Note from the Attorney General's Office:

1916 Op. Att'y Gen. No. 16-1462 was overruled by 2019 Op. Att'y Gen. No. 2019-005.

1916 Op. Att'y Gen. No. 16-1237 was clarified by 2004 Op. Att'y Gen. No. 2004-025.

OPINIONS OF THE ATTORNEY GENERAL FROM JANUARY 10, 1916, TO JANUARY 8, 1917.

1159.

MUNICIPAL CORPORATION—NEWSPAPER—PUBLICATION OF ORDINANCES AND RESOLUTIONS—WHEN OFFICER OF MUNICIPALITY IS INTERESTED IN NEWSPAPER WHICH PUBLISHES ORDINANCES—DOES NOT DISQUALIFY NEWSPAPER FROM MAKING SUCH PUBLICATION—OFFICER NOT LIABLE.

When but one newspaper is printed in a municipality in which said newspaper, under the provisions of section 4228, *G. C., as amended* 106 *O. L.,* 493, *the publication of ordinances and other matters therein specified is required to be made, the fact that an officer of the municipality is interested in said newspaper does not disqualify it from making said publication nor does said publication make said officer liable under sections* 3808 *and* 12912, *G. C.*

COLUMBUS, OHIO, January 10, 1916.

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

GENTLEMEN:—I have recently received several communications from you regarding the application of sections 3808 and 12912, G. C., considered in connection with the provisions of section 4228, et seq., of the General Code, as amended 106 O. L., 493, in the case of an official of a municipal corporation being interested in a newspaper which is required to print the ordinances of said corporation. The inquiries submitted to me may be stated thus:

1. "Do the provisions of section 4228, G. C., prevail over to the extent of nullifying the provisions of section 3808 or 12912, G. C.? In the case of an official of a village who is the owner of stock in a newspaper printed and of general circulation in the village when such newspaper as the only partisan paper of the political party to which it belongs is required to print the ordinances of said village in order to make the same legal under the requirements of said first named section.

2. "The editor and owner of the only newspaper printed, published and of general circulation in the village of ————, Ohio, has been elected mayor of said village and desires to know whether or not he may be paid for publishing the ordinances required by law to be published in his paper. Can the ordinances of said village be legally enacted without publication in his newspaper?"

Is it is expressly stated in connection with your foregoing inquiries that an opinion is requested for your future guidance we are, therefore, concerned only

with the law now in force, which is found in sections 4228, 4229, 4232, 4676 and 6255, G. C., as amended 106 O. L., 493, and also section 4233, G. C. Without attempting to quote these various sections in full it is sufficient to say that they provide a plan or scheme for the publication of all ordinances, resolutions, statements, orders, proclamations, notices, and reports required by law or ordinance to be published. The plan provided by said sections requires:

(1) That such publication shall be in two newspapers of opposite politics published and of general circulation in the municipality.

(2) If two such newspapers are not printed and of general circulation in said municipality, then said publication may be made in any newspaper printed and of general circulation in said municipality.

(3) If no newspaper is printed and of general circulation in said municipality, then said publication may be made in any newspaper of general circulation therein, or by posting.

It is further provided that newspapers to meet the requirements of being printed in a municipality shall have at least one side thereof printed in such municipality. It is provided also, that if no newspaper possessing the above requirements be printed in a municipality, or if the publisher thereof upon tender of the legal charge for printing, refuses to print said publication, then said publication may be made in any newspaper of general circulation at such place. If anything further was necessary to add to the mandatory character of the provisions above quoted it may be found in section 4233, G. C., which provides that it shall be deemed a sufficient defense to any suit or prosecution under an ordinance, to show that no such publication or posting as herein required was made. Admittedly, then, the method of publication provided for as heretofore noted is mandatory and any publication of any ordinance, resolution, statement, order, proclamation, notice or report not made in conformity with said requirements is void and the subject matter of said ordinance, proclamation, resolution, statement, order, notice or report is of no legal force and effect.

It must also be emphasized in this connection that the foregoing provisions of the law do not permit of any alternative method of publication except under the conditions prescribed in the law itself, which conditions are certain, definite and fixed. That is to say, the publication is required first to be made in two newspapers of opposite politics. If two newspapers of opposite politics are printed within the municipality in question no other method of publication may be legal. It is no answer to the requirement of the law in this behalf to say that because a municipal officer may have a pecuniary interest in one of said newspapers it follows that such newspaper is disqualified, because the fact remains that a newspaper of the description named in the law is published in said municipality and when so published no other method for the publication of ordinances, etc., is legal. Again, it is provided, as before noted, that if but one newspaper be published in said municipality such publication shall be made therein unless the owner thereof refuses to publish the same, whereupon a tender must be made of the legal charge for printing such publication before it may be made in any other manner or by any other means.

Let us assume in the latter case that the owner of said newspaper, being an officer of the corporation or the mayor, as suggested in your second inquiry, refuses to publish said notice. Upon that ground then, before publication can be made by any other method, some duly authorized officer of the corporation must tender to the owner of said paper the legal charge for printing said publication, and is therefore placed in the utterly absurd position of being compelled by law to solicit another officer of the corporation to commit a crime. It would seem that without further comment it is clear that the legislature intended no such abnormal situation

as this. However, the provisions of sections 3808 and 12912 are intended to prevent dishonest officials from profiting at the expense of the public. At common law a public officer was not prohibited from performing a purely ministerial duty for the reason that he may have some interest therein, but if his official act involved the exercise of judgment and discretion and he had a personal interest therein he was prohibited from acting unless the duty imposed upon him was one which could not be performed by any other official or in any other manner and the public good required that said duty be executed. Throop, Public Officers, section 607.

In the cases here presented the consideration to be paid for the publication required by the statutes under consideration is fixed by statutory law and no exercise of discretion or judgment is required of any official in determining what medium shall be selected for the publication of any ordinance because there is but one medium in each case through and in which said publication may be made.

It follows therefore, that the duty imposed by law upon a municipal officer to procure a publication in the newspaper named in your first and second inquiry is purely a ministerial duty because the law itself names such newspaper as the only medium through which such notices may be given to the public and fixes the maximum price which may be paid therefor.

In the case of Richardson v. Township Trustees, 6 O. N. P., (n. s. 505, the court in the syllabus states:

> "The fact that one of the township trustees is a stockholder and director in a bank situated within the township, which has submitted the highest bid for the usage of the township funds and to act as depository under the provisions of section 1513, does not under the provisions of section 6976 disqualify the bank from so acting."

The court in passing upon the facts in this case, which I think are analogous to the facts submitted in your inquiries, makes the following observation:

> "It can readily be seen that the application of the rigid principle urged by counsel for plaintiff in this case would thwart the very purpose of the law and work a great detriment to the public concerned. Carried to its last analysis, it would mean that no one who was in any way interested in the profits of a bank would be wise in assuming a public trust, such as a member of a school board or a board of township trustees. If they should assume those positions, and in many cases without pay, it would simply disqualify the banks in which they were interested from being depositories for the funds, and for that reason would make such persons practically ineligible for such positions, or in any event unwilling to hold them. Especially so, in view of the fact that the doing of the thing complained of in this case by the township trustee makes him, under the interpretation placed upon the statute by counsel for plaintiff, guilty of an offense of which he can be fined in a sum not exceeding one thousand dollars nor less than fifty dollars, or imprisoned not more than six months nor less than thirty days, or both, and for forfeiture of his office.
>
> "I cannot persuade myself to believe that section 6976 was ever intended for any such purpose. I am convinced that the township trustees of Sycamore township in doing the things complained of in the petition herein were acting strictly within the law and carrying out the duties imposed upon them."

The foregoing observations are in harmony with my conception of the situation presented by your inquiries. I am of the opinion that the interests of the public

would be far less vitally affected by permitting publications to be made under the circumstances named, in the newspapers mentioned, than to permit the provisions of sections 3808 and 12912, supra, to be so construed as to cover and therefore prohibit such publication. Indeed, if publication of ordinances may not be made in the newspapers of the municipalities named, I am wholly unable to conceive of any legal method whereby said ordinances may be published in said municipalities. To make publication in any other manner would be to invite attack upon every ordinance and notice, and in the case of the issuing of bonds in my judgment would prevent their sale entirely.

In reaching this conclusion I am not overlooking the remarks of the court in the case of McCormick v. Niles, 81 O. S., 246. This case, however, was determined upon the theory that a contract was necessary to fix the liability of the city. I think contracts are necessary in the cases presented here, but that does not in the least detract from the fact that by law the newspapers named are the only parties with whom such contracts may be legally made, nor from the further fact that under no circumstances may the consideration of such contracts be more than the amount fixed by statutory law. In view of these considerations there is no opportunity for fraud and no reason for the application of the provisions of sections 3808 and 12912, supra, whose sole and only purpose, as before observed, is to prevent dishonest officials from making fraudulent contracts at the expense of the municipality and for their own profit.

I am of the opinion therefore, under the facts stated in your inquiries, and these observations must be understood as applying only to the cases presented here, that publication of ordinances and other notices required by law to be published may be made in both newspapers in question without involving the officials mentioned by reason of the provisions of sections 3808 and 12912, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1160.

SECRETARY OF STATE—AMENDMENT TO ARTICLES OF INCORPORATION OF THE FARR BRICK COMPANY AUTHORIZED TO BE RECEIVED—LIMITED TO PARTICULAR CASE.

The secretary of state is advised to receive and record a certificate amending the Articles of Incorporation of The Farr Brick Company by changing (with the unanimous consent of all its stockholders) $1,000,000 *of its unissued common stock to preferred stock. This advice is based upon the particular facts in the case and not to be taken as a reversal of opinion dated October* 1, 1915.

COLUMBUS, OHIO, January 11, 1916.

HON. C. Q. HILDEBRANT, *Secretray of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of January 8, 1916, together with enclosures, in which you request my opinion as follows:

> "We are submitting for your approval certificate to the Articles of Incorporation of 'THE FARR BRICK COMPANY,' together with check for $5.00, and a ten cent internal revenue stamp.

"The proposed amendment changes $1,000,000 of their authorized common capital stock into $1,000,000 preferred stock. As a late opinion rendered by you holds that common stock cannot be changed into preferred stock by amendment, we refused to file same.

"We would appreciate an early opinion on the question raised as to whether or not a corporation can by amendment change their authorized common stock into preferred stock."

I am in receipt of a letter under the same date from Honorable R. E. Westfall, attorney for The Farr Brick Company, which I also quote as it contains a statement of the facts which are of importance in determining how I should advise you:

"With reference to the amendment of the Articles of Incorporation of The Farr Brick Company this day referred to you by the secretary of state, and confirming personal statements heretofore made to you by Mr. Benjamin A. Gage, of the firm of Gage, Day, Wilkin and Wachner, of Cleveland, as well as by myself, I beg to say that the Articles of Incorporation of the above company providing for a capital stock of $3,000,000, filed on or about March 14, 1914, were filed with the secretary of state after a full discussion with the secretary of state and a consideration of the opinion of Attorney-General Ellis under date of November 21, 1904.

"In this conference with the secretary of state the purpose of the incorporators to organize with a capital stock in the sum of $3,000,000 and by a subsequent amendment convert to preferred stock a substantial part of the authorized capitalization was fully disclosed to the secretary of state, who, relying upon the opinion of Attorney-General Ellis, above referred to, sanctioned and approved the Articles of Incorporation as filed and the plan of subsequently converting a part of the authorized capital stock into preferred stock.

"Relying upon the sanction and approval of the secretary of state, as above indicated, the Articles of Incorporation were filed, the company perfected its organization and by amendment to the Articles of Incorporation submitted to the secretary of state today, and by him referred to you the company seeks to carry out and effectuate its original plan and purpose."

The statements contained in the above letter of Mr. Westfall were also made to me by Messrs. Benjamin A. Gage and Luther Day, of Cleveland, Ohio, who are also attorneys for The Farr Brick Company, in several discussions concerning the question submitted in your letter.

From the certificate of amendment presented to you for filing by The Farr Brick Company and the letter of Mr. Westfall, above quoted, it seems that The Farr Brick Company was incorporated on March 14, 1914, with a capital stock of $3,000,000, all of which was common stock. The incorporators of The Farr Brick Company contemplated the organization of a corporation having both preferred and common stock, but at the time of filing the Articles of Incorporation they were undecided as to what portion should be preferred stock and what portion should be common stock. Upon the advice of counsel and at the suggestion of the secretary of state, and relying upon an opinion of Attorney-General Ellis rendered on November 21, 1904, it was decided that the corporation should be incorporated with a capital stock of $3,000,000 common stock, and that subsequently the corporation should by amendment change to preferred stock such portion of common stock as it should thereafter determine.

In this connection I believe that a review of the opinions or rulings of this

department will be helpful. Former Attorney-General Sheets, in the year 1903, rendered two opinions—one dated January 6, and the other August 15, in both of which opinions Mr. Sheets held that there was no statutory authority in Ohio to change common stock to preferred stock by amendment of the Articles of Incorporation. In both of these opinions, however, the author stated that he had no doubt that the stockholders of the corporation by unanimous consent might change the common stock to preferred stock and that the courts would respect and enforce such an agreement, his conclusion in this latter respect, however, being not upon authority of any statutory provision, but upon the ground that the rights of the state not being affected or involved the courts would doubtless enforce any legitimate or fair contract made among the stockholders themselves.

Under date of November 21, 1904, Attorney-General Ellis, in an opinion to the then secretary of state, held that a corporation by amendment under section 3238-a, Revised Statutes, (now section 8719 of the General Code) could change common stock to preferred stock. This opinion was followed by the secretary of state and certificates of amendment whereby common stock was changed to preferred stock were accepted and recorded by him until October 1, 1915, under which date I rendered to you the opinion referred to in your letter in which I held that there is no statutory authority in Ohio to change the common stock of a corporation to preferred stock by an amendment of its Articles of Incorporation.

I am by no means persuaded that the conclusion expressed in my opinion of October 1, 1915, just referred to, is erroneous, for I am still unable to find any statutory authority in Ohio to accomplish such change in the character of the capital stock of a corporation by amendment under section 8719 of the General Code.

However, in view of the facts revealed in the letter of Mr. Westfall and the statements made to me by Messrs. Gage and Day, which were entirely in harmony with Mr. Westfall's letter, I believe that in the present instance the proposed amendment should be accepted and recorded. I reach this conclusion because the company and its attorneys at the time of its incorporation had in mind the issuance of preferred and common stock but acting in harmony with the ruling of this office and in compliance with the suggestion of the secretary of state concluded at that time to provide that all of the company's stock should be common stock, and that the change should be made at a later date when the plans of the incorporators had been more maturely considered. It would, therefore, be manifestly unjust and unfair, in view of the further revealed facts that the proposed change is made with the unanimous consent of all the stockholders, to now refuse to accept and file the proposed amendment. The rights of the state will in no wise be affected, and since all the stockholders have agreed, I have no doubt, as was stated by Mr. Sheets, that the court would respect and carry out the agreement even though no statutory authority can be found to authorize the same.

Upon the specific facts revealed, I am therefore of the opinion that you should receive and record the certificate of amendment of The Farr Brick Company referred to and enclosed in your letter.

I am returning to you herewith the proposed certificate of amendment, the check for $5.00, letter addressed to you by Mr. Gage and the ten cent revenue stamp which were enclosed with your letter.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1161.

ROADS AND HIGHWAYS—COUNTY HIGHWAY SUPERINTENDENT—ACTUAL AND NECESSARY EXPENSES INCIDENT TO MAINTENANCE AND OPERATION OF AN AUTOMOBILE USED EXCLUSIVELY BY SUCH SUPERINTENDENT IN HIS OFFICIAL BUSINESS MAY BE ALLOWED BY COUNTY COMMISSIONERS—DISTINCTION BETWEEN EXPENSES FOR PUBLIC AND PRIVATE PURPOSES—HOW APPORTIONED.

If a county highway superintendent is the owner of an automobile and uses the same exclusively in his work, as such superintendent, the reasonable and necessary expense of maintaining the same may be paid to him. If the automobile is used both for public business and for private purposes, a division of the expense of maintaining the same should be made which division may be on a mileage basis, or an arrangement may be made involving the payment to the superintendent of a reasonable rate per mile covered by the automobile while used on public business, which rate must not include any item of compensation for the use of the automobile.

COLUMBUS, OHIO, January 11, 1916.

HON. JOHN E. BETTS, *Prosecuting Attorney, Findlay, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication of January 7, 1916, in which you call my attention to the provision of section 138 of the Cass highway law, section 7181, G. C., to the effect that the county highway superintendent and his assistants, when on official business, shall be paid out of the county treasury their actual necessary traveling expenses, including livery, board and lodging, and then inquire as to whether the county highway superintendent can use his own automobile in traveling about the county on official business and charge therefor upon a mileage or other basis.

It should first be observed that upon well established principles of public policy, a public official charged with the duty of making an expenditure on behalf of the public may not deal with himself. Any payment made to the county highway superintendent on account of the use by him of his own automobile, while traveling on the official business of the county, would, therefore, have to rest upon the principle of reimbursement to him for expenses actually incurred and could not include any item of compensation to him for the use of the automobile.

A question very similar to the one submitted by you was passed upon by me in opinion No. 618, rendered to The Bureau of Inspection and Supervision of Public Offices on July 17, 1915. One of the questions passed upon in that opinion was as follows:

> "A county superintendent of schools owns an automobile which he uses almost exclusively in traveling about the county in the performance of his official duties. Under the terms of section 4744-1, G. C., 104 O. L., 142, may he include the cost of gasoline, lubricating oil, repairs to tires and parts of his automobile as traveling expenses, under the provisions of this section?"

The pertinent provision of section 4744-1, G. C., relating to the traveling expenses of county superintendents of schools, reads as follows:

> "The county board may also allow the county superintendent a sum not to exceed $300.00 per annum for traveling expenses and clerical help,"

A comparison of the above quoted provision with the provision of section 7181, G. C., referred to by you, shows that both county superintendents of schools and county highway superintendents are entitled to be reimbursed for actual and necessary traveling expenses incurred while in the performance of their official duties. There is a limit upon the amount which can be paid to a county superintendent of schools on this account, and no statutory limit as to the amount which may be so paid to a county highway superintendent; otherwise the provisions are very similar and the same principles applicable in the case of a county superintendent of schools will govern in the case of a county highway superintendent.

In answering the question relating to the county superintendent of schools, the following language was used in the opinion referred to above:

> "The money thus allowed may undoubtedly be used to pay the expenses incurred by the county superintendent in providing himself with the necessary means of conveyance for the performance of his duties. The ownership of the vehicles would not preclude the payment of expenses necessarily incurred in the operation thereof. Just what expenses or what proportion of the expenses may be charged against public funds will depend upon the facts in each particular case. It is really more a matter of policy than of law. If the automobile were used exclusively in his work as county superintendent, the reasonable and necessary expense of maintaining the same might be allowed by the county board (subject, of course, to the maximum limitation). Where, however, the automobile is not so exclusively used, but is used as well for private purposes, there should be some definite arrangement entered into between the board and the superintendent. I would suggest that this arrangement be made upon a mileage basis. For instance, if the automobile were run 300 miles in a month, 200 in official business and 100 for private purposes, it would be fair and equitable for the board of education to allow two-thirds of the expenses of the upkeep for the month. If such an arrangement be not practical, the board might agree to allow the superintendent a reasonable rate per mile covered by the automobile in public business as traveling expenses of the superintendent. These, however, are mere suggestions."

Applying the principles set forth in the opinion from which the above is quoted to the facts of the case presented by you, I advise you that if a county highway superintendent is the owner of an automobile and uses the same exclusively in his work as highway superintendent, the reasonable and necessary expense of maintaining the same may, under the provision of section 7181, G. C., referred to by you, be paid to such county highway superintendent. If the automobile is not used exclusively for public business but is used as well for private purposes, a division of the expense of maintaining the same should be made, which division may properly be upon a mileage basis. If an arrangement for a division of the expense of maintaining the automobile is not practicable, an agreement may be made between the county commissioners and the county highway superintendent involving the payment to the superintendent of a reasonable rate per mile covered by the automobile while the same is being used on public business, which rate must not include any item of compensation for the use of the automobile. In other words, while the county commissioners or county highway superintendent may not, under the law, purchase an automobile for the use of the county highway superintendent, and pay for the same from public funds, and while the county highway superintendent, being charged with the duty of providing himself with transportation when engaged on official business, may not deal with himself and

include in his expense accounts compensation for the use of his own automobile, yet if the county highway superintendent is the owner of an automobile and uses the same in traveling about the county on official business, he may include in his expense accounts and the county commissioners may allow to him the actual and necessary expenses incident to the maintenance and operation of the automobile during the time the same is used in the public business of the county.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1162.

BOARD OF EDUCATION OF A RURAL SCHOOL DISTRICT CAN LEGALLY OWN REAL ESTATE IN LIMITS OF A VILLAGE SCHOOL DISTRICT LOCATED WITHIN SAID TOWNSHIP.

If the board of education of a township rural school district, in consolidating the schools of such district at two points within the township, finds that the most convenient location for one of the buildings is within the limits of a village school district located within said township, said board of education may, under authority of section 4749, G. C., own school property within the limits of said village school district for the purpose of operating one of its schools under said plan of consolidation.

COLUMBUS, OHIO, January 11, 1916.

HON. FRANK W. MILLER, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—In your letter under date of December 21 you request my opinion as follows:

> "Jefferson township rural school district in Madison county, Ohio, is contemplating the consolidation of its schools at two points. The most convenient location for one of these schools is in West Jefferson. West Jefferson is a village school district. Has the board of education of Jefferson township rural school district the legal right to own the building and grounds and operate its school within the territory of West Jefferson village school district?"

Section 4749, G. C., provides that the board of education of each school district shall, when properly organized, be a body politic and corporate and, as such, be capable of acquiring, holding, possessing and disposing of real and personal property, and of taking and holding in trust for the use and benefit of such school district any grant or devise of land and any donation or bequest of money or other personal property.

It will be observed that, under provision of said section 4749, G. C., the location of real property which the board of education of a school district may own and hold in trust for school purposes is not confined to such district by the terms of said statute.

While under provision of section 7690, G. C., the authority to manage and control the public schools in a school district is vested in the board of education of such district, the provisions of this statute relate to the schools of a district

established by the board of education thereof for the accommodation of all the youth of school age of such district, and are not applicable to a school established by the board of education of a township rural school district within the limits of a village school district located in such township, for the convenience and accommodation of a part or all the youth of school age residing in said township rural school district.

If, therefore, the board of education of Jefferson township rural school district, Madison county, in consolidating the schools of said district at two points within said township, finds that the most convenient location for one of the buildings is within the limits of the West Jefferson village school district located within said township, I am of the opinion in answer to your question that said board of education may, under authority of section 4749, G. C., own school property within the limits of said village school district for the purpose of operating one of its schools under the aforesaid plan of consolidation.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1163.

BOARD OF ADMINISTRATION—ADVERTISEMENT FOR FIVE NEW COTTAGES AT DIFFERENT INSTITUTIONS MAY BE MADE IN SAME LEGAL NOTICE—CONTRACT SHOULD BE AWARDED TO LOWEST BIDDER ON EACH OF SAID BUILDINGS.

COLUMBUS, OHIO, January 11, 1916.

Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—Under date of December 20, 1915, you submitted to me the following proposition:

> "We are enclosing herewith copy of letter received from Richards, McCarty & Bulford, the architects who have prepared plans for five new buildings for state institutions.
>
> "The plan of advertising these buildings in one advertisement instead of five seems to us to be all right and good business policy, but we desire to inquire if such procedure is legal in order that delays may be avoided when letting the contracts.
>
> "These five buildings will cost about $70,000 each, or $350,000 in all; and the architects feel certain that five per cent. or more can be saved by this plan, which would mean $1,500 or $2,000 to the state."

The letter which you enclosed is as follows:

> "Columbus, Ohio, December 17, 1915.
>
> "Dr. A. F. Shepherd, Ohio Board of Administration, Columbus, Ohio.
>
> "My Dear Dr. Shepherd:—I am anxious that all the money possible be saved in the manner of advertising and letting the contracts for the five buildings for which plans have been completed under design B-2 for the board of administration. We therefore ask, if you have not already secured such an opinion, that you secure an opinion from the attorney-general on the following point:

"First, in advertising the two buildings for Gallipolis, one building for the Columbus State Hospital, one building for the Custodial Farm, and one building for the Institution for Feeble-Minded at Columbus, if one advertisement cannot be made to cover all of these buildings; such advertisement to be inserted in the required number of papers in the state for general circulation and in the principal paper in the county in which each of these buildings is to be built; the cost of the advertisement to be prorated between the institutions, that is two-fifths to be paid by the Ohio Hospital for Epileptics at Gallipolis, two-fifths by the Institution for Feeble-Minded, and one-fifth by the Columbus State Hospital.

"Another object of this advertisement is to enable contractors who read these advertisements to know that there are five buildings of the same design, bids on which can be received all at the same time, and state in the advertisement that bids will be received on each building separately and that an alternate proposal will be received on each building in case the contractor is awarded the contract for all five buildings.

"It is my belief that if we can do this there will be a considerable percentage of the cost of the buildings saved if they can all be let to one contractor. The question in my mind is whether under the present law we could do this. If we can, it seems to me that it ought to be done.

"Yours respectfully,

"(Signed) C. E. Richards."

The sole question raised by your letter is relative to advertising for bids for the five buildings. The said buildings are to be erected under the building regulations—sections 2314, et seq., of the General Code.

Section 2314, G. C., provides that before entering into contract "for the erection, alteration or improvement of a state institution or building or addition thereto, excepting the penitentiary," accurate plans and specifications, bills of material and an accurate estimate of cost shall be made, which, under section 2315, G. C., shall receive the approval of the governor, auditor of state and secretary of state, and, if approved, a copy thereof filed in the office of the auditor of state.

Under section 2316, G. C., public notice of the time and place where sealed proposals will be received shall be given, and, under section 2317, the method of advertising such notice is provided for.

Under section 2318, G. C., it is provided that "on the day named in the notice, such officer, board or other authority shall open the proposals and award the contract to the lowest bidder."

It will be readily seen, therefore, that in so far as the provisions of law governing the building regulations are concerned, the legislature had in contemplation that each particular improvement is a separate and distinct entity.

I can see no legal objection to the procedure that is outlined in the letter of your architect: to advertise all of the buildings contemplated to be built in one advertisement, dividing the cost thereof between the separate appropriations, pro rata, and in such advertising stating that bids will be received on each building separately and an alternate proposal will be received on each building in case the contractor is awarded the contract for all five buildings.

However, it must be borne in mind, as before stated, that each improvement is a separate and distinct entity, and that the contract on each such improvement must be let to the lowest bidder. Therefore, in order to let contracts to one contractor for the five buildings in question it would be necessary that he be the lowest bidder on each of said buildings, unless under section 2319, G. C., the

written consent of the governor, auditor of state and secretary of state be obtained to accept on the various items a proposal other than the lowest.

I would also call your attention to the appropriations:

The appropriation to your board for the Ohio Hospital for Epileptics is for "two cottages to cost complete $140,000";

The appropriation to your board for the Columbus State Hospital, as amended by the veto of the governor, is for "one cottage to cost complete $70,000";

The appropriation to your board for the Institution for Feeble-Minded, Custodial Farm, is for "one cottage Custodial Farm to cost complete $70,000";

And the other appropriation for such Institution for Feeble-Minded, as amended by the veto of the governor, is for "one cottage to cost complete $70,000."

It therefore appears that so far as the legislature is concerned, it has considered the cottage for the Columbus State Hospital, the cottage for the Custodial Farm and the cottage for the Institution for Feeble-Minded as separate and distinct items, but it has considered as one item the two cottages for the Ohio Hospital for Epileptics.

From the letter of your architect, however, I assume that he has divided the above item for two cottages into two separate items. That being the case, therefore, each particular improvement is to be considered as separate and distinct from the other, and as to each, as before stated, the contract should be awarded to the lowest bidder, unless the provisions of section 2319, G. C., are complied with.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1164.

APPROVAL OF CERTAIN CANAL LAND LEASES.

COLUMBUS, OHIO, January 11, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of January 7, 1916, transmitting to me for examination the following leases of canal lands:

The Newburgh & South Shore Ry. Co., canal lands at Cleveland, valuation	$6,000.00
John W. McBroom, Logan, Ohio, portion of abandoned Hocking canal lands north of Logan, valuation	11,666.66
The Berea Pipe Line Company, St. Marys, lease granting the right to lay a gas main along the Ohio canal at Cleveland, valuation	5,750.00

I find these leases to be in regular form and am, therefore, returning the same with my approval endorsed upon the triplicate copies thereof.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1165.

CIVIL SERVICE—NON-COMPETITIVE OCCUPYING POSITIONS—PROPER CERTIFICATION OF ELIGIBLES FOR POSITIONS WHEN COMPETITIVE EXAMINATION HAS BEEN HELD—NON-COMPETITIVE WITH ELIGIBLE LIST MUST BE CERTIFIED—NO DISCRETION WITH COMMISSION.

The provisions of section 486-31, *G. C.* (106 *O. L.*, 418) *require the names of all persons holding positions in the classified service at the time said law became effective and who have not passed a regular competitive examination, or been in the service seven years as therein provided, to be certified, with the names of those qualifying by competitive examination, for permanent appointments to fill said positions.*

This certification must be made by the commission not only when an eligible list exists but when such list must be prepared later by the commission, and the duty to so certify in both instances is a ministerial duty, mandatory in its character and regarding which the commission may exercise no discretion.

COLUMBUS, OHIO, January 11, 1916.

The State Civil Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your letter of January 5, 1916, as follows:

"Several points have arisen in regard to the certification of eligibles to positions occupied by non-competitives under the provisions of the new civil service law, upon which we do not feel competent to pass judgment.

"Paragraph 2 of sections 486-31 of the new law, provides that:

"'The name of each officer, employe and subordinate holding a position in the classified service of the state, the counties, and city school districts thereof, at the time this act takes effect, who has not passed a regular competitive examination, and who has not been in the service seven years as herein provided, shall, within ten days after this act becomes effective, be reported by the appointing authority to the commission, and shall be certified to the appointing authority in addition to the three candidates for appointment to such position. If any such person is reappointed, he shall be deemed to have been appointed under the provisions of this act. If no eligible list exists, such person may be retained as a provisional employe until such time, consistent with reasonable diligence, as the commission can prepare eligible lists, when such position shall be filled as prescribed in this act.'

"Is it the intent of this section:

"1. That non-competitives in order to be qualified within the provisions of this act must be appointed after consideration with three names from an eligible list within the ten days after the taking effect of the law?

"2. If such certification has not been made because of the fact that the State Civil Service Commission had no appropriate list from which to certify persons eligible, are non-competitives who are retained as provisionals given the same status with regard to the civil service law as persons provisionally appointed under the provisions of sections 486-14, and in order to qualify must they compete to secure a position on an eligible list that will entitle them to be certified back?

"In other words, is it the intent of this law that non-competitives

retained provisionally when no eligible list existed, within the ten days shall be certified back to their positions as non-competitives along with three other names from an appropriate list when created?

"This further question has also arisen:

"The law provides that for certain reasons the State Civil Service Commission may refuse to receive applications from individuals, or refuse to certify individuals who have, by examination, secured a place on an eligible list. If it appeared that a non-competitive is not a satisfactory person by reason of his character or conduct in office, to occupy the position which he held under the former law, could the State Civil Service Commission refuse to certify his name for the same reasons that it has power to refuse to certify persons from an eligible list created by regular competitive examination?"

Before considering the provisions of said paragraph two, quoted in your letter, it is material that we refer to the plan or scheme of the law as it appears from the provisions of the preceding paragraph of said sections 486-31, as amended 106 O. L., 418. By this latter paragraph it is provided that all officers and employes holding positions under the civil service law by virtue of having taken a regular competitive examination as provided by law shall, when the provisions of the act of which said section is a part become effective, be deemed appointees within the provisions of said act. It is further provided, however, that no person holding a position in the classified service by virtue of having taken a non-competitive examination shall be deemed to have been appointed or to be an appointee in conformity with the provisions of said act. An exception, however, is made in the application of said last named provision by exempting therefrom all persons who have served continuously and satisfactorily the state or any political subdivision thereof for not less than seven years next preceding January 1, 1915. Persons who meet these qualifications are deemed appointees within the provisions of the act. From the foregoing provisions it appears that all persons holding positions by reason of non-competitive examination are not protected in said positions by the civil service law unless they come within the class last described.

Referring now to your first inquiry I am of the opinion that the ten days' limitation specified in said paragraph two, which you quote, refers to and applies only to the action of the appointing authority in reporting to the Civil Service Commission all persons who have not passed a regular competitive examination and who have not been in the service seven years as provided in paragraph one. That is to say, the clause "within ten days after this act becomes effective" modifies the verb "shall be reported" and does not qualify the verb "shall be certified." This being so, then the plain purpose of the law is to require the appointing authority to report to the commission within ten days the names of all persons who have not taken a competitive examination and who have not been in the service seven years as provided in paragraph one. It does not, however, require the commission to certify back to the appointing power an eligible list within ten days, or within any other specified period. All that is required, if an eligible list exists, is that such certification be made by the commission within a reasonable time and with reasonable diligence. If such eligible list exists, it therefore becomes the duty of the commission to certify from it the names of three persons together with the name of the "non-competitive," who is reported as holding the position by the appointing authority, within a reasonable time, when said position may be filled by the appointment of one of the four persons so certified to said appointing authority.

In answer to your first question, therefore, I am of the opinion that the cer-

tification required from the commission of the names of three persons from the eligible list together with the name of the "non-competitive" holding the position is not required to be made within ten days after the taking effecct of said law, but that such limitation of ten days applies only to the report to be made by the appointing authority to the commission of the non-competitives holding positions in the classified service.

In your second inquiry you desire to know what are the further rights of non-competitives who are retained as provisionals in the event no eligible list exists at the time the appointing authority makes the report hereinbefore referred to in answer to your first inquiry.

The non-competitives who are retained as provisional appointees hold their positions until an eligible list is prepared, which must be done by the commission with reasonable diligence. When this list is so prepared the statute provides that said position shall be filled as prescribed in said act. That is to say, the same certification shall then be made as in the first instance, which must include the name of the non-competitive in the list with three other names standing highest on the list of those who have taken a competitive examination. From this eligible list of four names the appointing power may then fill the position permanently.

Replying to your third question I must advise that the certification of non-competitives, as required by the provisions of law hereinbefore considered, is a mandatory duty imposed upon the commission, purely ministerial in its character and regarding which the commission may exercise no discretion. If there are any reasons, such as those noted in your inquiry, which should prevent the appointment of a non-competitive, they must be considered by the appointing power and not by the commission unless charges are filed as provided by law for the removal of said non-competitives from the positions which they hold. If such charges are not filed then it is the duty of the commission to certify the names of all non-competitives as hereinbefore noted.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1166.

BOARD OF AGRICULTURE—WITHOUT AUTHORITY TO APPOINT APPRAISERS TO DETERMINE VALUE OF CATTLE WHICH ARE REQUIRED TO BE KILLED UNDER SECTION 1114, G. C.

The board of agriculture is without authority to appoint persons whose duties shall be to visit various parts of the state and appraise all such animals as may be determined by the board, through its secretary, necessary to destroy under section 1114, *G. C.*, 106 *O. L.*, 150, *and to pay to persons so appointed salary or compensation for such services fixed by the board.*

COLUMBUS, OHIO, January 12, 1916.

The Board of Agriculture, Columbus, Ohio.

GENTLEMEN:—I am in receipt of a request for an opinion from Hon. R. W. Dunlap, secretary of the board of agriculture, under date of December 31, 1915, as follows:

"Section 1114 of the General Code, provides in part:

"'If, in order to prevent the spread of any dangerously contagious and infectious disease among the live stock of the state, the board of agriculture deems it necessary to destroy animals affected with or which have been exposed to dangerously contagious or infectious disease, it shall determine, through its secretary, what animals shall be killed and appraised or cause them to be appraised by disinterested citizens as provided by law.'

"Acting under this statute and in the face of an emergency, the board of agriculture on November 4, 1915, appointed a board of appraisers to determine the value of cattle which had been tested and condemned on account of being infected with tuberculosis.

"We have no specific appropriation available to pay the salaries and expenses of these appraisers. The board of agriculture had directed me to ask your opinion as to how the salaries and expenses of this board of appraisers can properly be paid."

From your inquiry and personal interview it is learned that it was contemplated by your board, in the appointment of what is by you termed a board of appraisers, consisting of four or more members, to have at least two members of such board of appraisers to visit the various sections of the state and to view and appraise all animals which the board of agriculture, through its secretary, may determine it to be necessary to kill in order to prevent the spread of any dangerously contagious or infectious disease among the live stock of the state, under the provision of section 1114, G. C., 106 O. L., 150. It is proposed by the board of agriculture to fix the compensation to be received by the said "board of appraisers" for the services by them rendered, and inquiry is made as to how such compensation may be lawfully paid.

I construe that part of section 1114, G. C., 106 O. L., 150, above quoted, to mean that when it shall have been determined by the board of agriculture, through its secretary, what animals shall be killed, it then becomes the duty of the board, either to appraise such animals or to cause the same to be appraised, by disinterested citizens, as provided by law. Unless it shall be deemed practicable and expedient to cause such animals to be appraised by disinterested citizens, that duty would then devolve upon the board of agriculture.

The appraisal of such animals will, in every case, involve the exercise of sound personal judgment and discretion of a peculiar character upon the part of persons authorized to make the same. It might be argued with force that the board could readily select persons with special qualifications and ability in the valuation of such animals, whose judgment would be more accurate in the opinion of its members than that of the board itself, yet the legislature has not seen fit to make specific provision for the appointment of persons so specially qualified for this service.

We are here concerned with the taking of private property for public benefit and while in the exercise of the police power of the state it was competent for the legislature to have authorized the destruction of such animals without any compensation therefor, since the legislature has determined upon the policy of compensation for animals so destroyed, there is by reason of the statutory declaration thereon, in every owner of such animals, the right to have his compensation for their restriction fixed in strict accordance with the method prescribed by statute. In other words, the authority conferred upon the board so involves the exercise of personal judgment and sound discretion and so nearly approaches a quasi judicial function, that it may not be delegated, notwithstanding the provision of section 1087, G. C., 106 O. L., 145, that "the board of agriculture shall

appoint heads of bureaus, experts, clerks, stenographers and other assistants and employes, and said board shall fix their compensation within the limits prescribed by law."

A permanent board of appraisers would not be such "disinterested citizens" as are within the contemplation of the statute. The legislature having chosen to define specifically those persons in whom authority to appraise cattle so destroyed shall be vested, I am inclined to the view that such appraisement may not be made by persons other than those upon whom such power is conferred.

An examination of house bill No. 701, 106 O. L., 660, discloses, as stated by you, that there is no appropriation therein available for the payment of the salary or compensation of appraisers such as are referred to by you, whether they be members of a permanent board such as suggested in your communication or "disinterested citizens." In the absence of such appropriation, by reason of the provision of section 22 of article 2 of the Constitution, that "no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law," it follows of necessity that no such compensation or salary is authorized to be paid.

I am therefore compelled to advise that the salary or compensation of appraisers appointed by the board of agriculture to appraise animals which said board, through its secretary, may determine necessary to kill, under the provisions of section 1114, G. C., supra, cannot lawfully be paid.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1167.

APPROVAL OF RESOLUTION FOR IMPROVEMENT OF CERTAIN ROAD IN DEFIANCE COUNTY.

COLUMBUS, OHIO, January 13, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of January 10, 1916, transmitting to me for examination final resolution relating to the improvement of the Hicksville-Defiance road, petition No. 574, I. C. H. No. 420, section "C," in Defiance county.

I find this resolution to be in regular form and am therefore returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1168.

BOND ISSUE OF VILLAGE OF BREWSTER, STARK COUNTY, OHIO, APPROVED.

COLUMBUS, OHIO, January 13, 1916.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—In re. bonds of the village of Brewster, Stark county, Ohio, in the sum of $10,000.00 being 20 bonds at $500.00 each, dated January 1, 1916, payable one each year beginning January 1, 1917, and bearing interest at 5½% per annum payable semi-annually.

I have examined the transcript of the proceedings of council and other officers of the village of Brewster, relative to the issuance of the above described bonds, also the bond and coupon form and certificates attached to said transcript, and am of the opinion that said proceedings have been regular and in conformity with law, and that said bonds, when properly executed and delivered, constitute valid and binding obligations of said village, and I hereby certify my approval thereof.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1169.

STEAM BOILERS—BOILERS OF LESS THAN FIFTEEN POUNDS PRESSURE EXEMPT FROM INSPECTION WHEN EQUIPPED WITH SAFETY DEVICES—RESOLUTION AUTHORIZING INSPECTION WHEN BOILERS NOT SO EQUIPPED, UNNECESSARY.

Steam boilers carrying a pressure of less than fifteen (15) pounds are expressly exempted from inspection by section 1058-7, *G. C., as amended* 103 *O. L.,* 649, *when equipped with safety devices as provided in boiler rules.*

No resolution is necessary to authorize the inspection of boilers not so equipped.

COLUMBUS, OHIO, January 13, 1916.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Permit me to reply to your request for an opinion relative to boiler inspection, which request is as follows:

"J. C. Callery, chief deputy of the boiler department of the Industrial commission, is having the rules of the boiler department printed at this time. He submitted to the Industrial Commission for its approval a resolution, which reads as follows:

RESOLUTION.

RESOLVED, That all boilers in the state of Ohio, carrying pressures of less than 15 lbs. per square inch, shall be inspected by a duly qualified inspector. After such inspection shall be made and boiler equipped with approved safety devices, and approved by the chief deputy inspector, and

upon the payment of regular inspection fee, including $1.00 for a certificate, that a certificate shall be issued, same to be exhibited under glass at location of boiler; and this boiler will hereinafter be exempt from further inspection, as long as it is used in present location and settings.

"The members of the Industrial Commission, upon consideration, concluded that inasmuch as your department might be called upon to prosecute violators of this resolution that it would be well to call upon you to either re-draft this resolution, embodying in it the essentials as contained in the original, or to approve the original as herein drawn by the boiler department.

"Our commission is accordingly referring to you this resolution for such action as may seem to you to be advisable."

Sections 1058-7, G. C., as amended 103 O. L., page 649, is as follows:

"All steam boilers and their appurtenances, except boilers of railroad locomotives subject to inspection under federal laws, portable boilers used in pumping, heating, steaming and drilling, in the open field, for water, gas and oil, and portable boilers used for agricultural purposes, and in construction of and repairs to public roads, railroads and bridges, boilers on automobiles, boilers of steam fire engines brought into the state for temporary use in times of emergency for the purpose of checking conflagrations, boilers carrying pressure of less than fifteen pounds per square inch, which are equipped with safety devices approved by the board of boiler rules, and boilers under the jurisdiction of the United States, shall be thoroughly inspected, internally and externally, and under operating conditions at intervals of not more than one year, and shall not be operated at pressures in excess of the safe working pressure stated in the certificate of inspection hereinafter mentioned. And shall be equipped with such appliances to insure safety of operation as shall be prescribed by the board of boiler rules."

It will be noted from a reading of the provisions of sections 1058-7, supra that steam boilers carrying a pressure of less than fifteen pounds per square inch, which are equipped with safety devices approved by the board of boiler rules, are expressly exempted from inspection, and the purpose of your letter would appear to be the extension of the inspection laws to such boilers, under the general powers granted to the Industrial Commission of Ohio, for the purpose of securing safety to employes.

In addition to the letter submitted, Mr. Callery, chief deputy of the boiler department of your commission, has just handed me a copy of section 4, part 1 of the boiler rules, which rules, according to his statement, were amended to comply with amended section 1058-7, supra, section 4 of which rules being as follows:

"THESE RULES AMENDED TO COMPLY WITH AMENDED 103 OHIO LAWS, P. 649. PART I. SECTION 4.

"BOILERS CARRYING PRESSURES LESS THAN FIFTEEN POUNDS PER SQUARE INCH are exempt from all other requirements, if provided with the following APPROVED SAFETY DEVICES:

"Each boiler must be provided with a SAFETY VALVE of the spring pop type which cannot be adjusted to a higher pressure than that specified in section 1058-7 of the law, (page 5, section 2, this book of

rules) i. e. (LESS THAN 15 POUNDS PER SQUARE INCH). Such valve to be stamped, lettered or tagged showing that it is adjusted to meet the requirements of the Industrial Commission of Ohio.

"Each boiler must also be provided with the necessary GAGE COCKS OR GLASS WATER GAGE for determining the water level in the boiler; the necessary CHECK and STOP VALVES in feed water pipes and in pipes returning condensation to the boiler; and the necessary STEAM GAGE and fusible plug.

"Owners should have the above equipment inspected by a qualified inspector after installation. If the equipment has been properly installed, the inspector shall then report to the department that the boiler is 'Exempt from further inspection.'

"If changes are to be made in the equipment, or it becomes necessary to increase the steam pressure above fifteen pounds, the department must be notified by the owner or user before such changes are made."

The questions raised by Mr. Callery verbally were as to the powers of the department, through its inspectors, to inspect boilers alleged by the owners to be equipped with safety devices, which safety devices, however, are not in accordance with section 4 of the rules quoted above.

The purpose of section 1058-7, G. C., as amended, supra, is to render unnecessary the inspection of certain classes of boilers therein mentioned, and with special reference to boilers carrying a pressure of less than fifteen pounds the requirement for the exemption from inspection is that the rules laid down by your commission, with reference to safety devices have been complied with; in other words, that the boilers have been equipped as provided in section 4 of the boiler rules, supra.

It is my opinion, therefore, that there is no authority vested in your department to inspect boilers carrying a pressure of less than fifteen pounds, when such boilers have been equipped with safety devices in accordance with the rules provided pursuant to section 1058-7, supra, and the general powers of the commission, with reference to its safety matters, are limited with respect to the boilers referred to specifically in section 1058-7, G. C., supra. I therefore cannot approve of the resolution as adopted, nor in fact do I see any necessity for the adoption of any resolution covering the point in question, as your commission has ample authority under its general provisions to inspect such boilers as are not specifically exempted by section 1058-7, G. C., as amended, supra.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1170.

OFFICES COMPATIBLE—TOWNSHIP CLERK—TOWNSHIP HIGHWAY SUPERINTENDENT.

The offices of township clerk and township highway superintendent are not incompatible and may be held by one person at the same time unless the volume of the township's business be such that it is physically impossible for one person to properly discharge the duties of both offices.

COLUMBUS, OHIO, January 13, 1916.

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

GENTLEMEN:—Under date of December 29, 1915, I have a communication from Mr. Winkeljohn, mayor of St. Henry, Ohio, in which he inquires as to whether the township trustees may appoint the township clerk as township highway superintendent, and I am addressing an opinion to you covering the matter referred to in Mr. Winkeljohn's letter.

It should first be observed that there is no statutory provision to the effect that one person may not hold the offices of township clerk and township highway superintendent at the same time. It therefore follows that both offices may be held by one person at the same time unless the offices are incompatible.

In determining whether the offices are incompatible, it becomes important to consider in the first instance whether one is subordinate to or in any way a check upon the other. An examination of the statutes relative to the appointment, compensation, expenses, powers and duties of township highway superintendents discloses that township highway superintendents are appointed by the township trustees, who fix their compensation, and that their compensation and all proper and necessary expenses, when approved by the township trustees, shall be paid by the township treasurer upon the warrant of the township clerk. Township highway superintendents are not authorized to certify any claims to the township clerk which the latter may pay without the approval and allowance of the trustees. In so far as claims for dragging roads are concerned, such claims are to be reported by the township highway superintendent to the trustees and these claims cannot be paid until allowed by the trustees.

The statutes relating especially to the duties of township highway superintendents, in connection with road repair work, do not provide the method of paying claims for such work, but inasmuch as this work, when performed by the township highway superintendent, is to be done under the direction of the trustees, it is apparent that claims for work or materials in connection with the repair of township roads are to be allowed by the trustees before payment.

From the above it seems clear that the township clerk is not in any way a check upon the office of township highway superintendent for the reason that the township clerk is not authorized to audit or allow any claims presented by the township highway superintendent, either in favor of himself or in favor of others, and is not authorized to draw any warrants in favor of the township highway superintendent or in favor of other persons for the payment of debts incurred by the township highway superintendent, until the claims covered by such warrants have been passed upon and approved by the township trustees.

It remains to consider the question of whether it is physically possible for one person to discharge the duties of both offices and this question is one that must be determined in each instance by reference to the volume and importance of the business of any particular township. It is my opinion, therefore, that the

offices of township clerk and township highway superintendent are not incompatible and may be held by one person at the same time unless the volume of the township's business be such that it is physically impossible for one person to properly discharge the duties of both offices.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1171.

OFFICES COMPATIBLE—TOWNSHIP TRUSTEE—INSPECTOR OF ROAD IMPROVEMENT WHEN ROAD IS CONSTRUCTED UNDER PROVISION OF SUB-DIVISION 3 OF SECTION 6919, G. C.

A trustee of a township may act as inspector for a county in the construction of a road through the township for which such inspector is trustee, where the road is constructed under the provisions of subdivision 3 of section 6919, G. C., unless the volume of the township's business requiring the attention of the trustee and the character of the inspector's duties be such that it is physically impossible for one person to properly discharge the duties of both positions.

COLUMBUS, OHIO, January 13, 1916.

HON. OTHO W. KENNEDY, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—I have your communication of December 29, 1915, which reads as follows:

> "I desire your opinion on this question: Can a trustee of a township act as inspector for the county, in the construction of a road through the township for which said inspector is trustee, said road improvement being made under subdivision 3 of section 98, of the Cass road law?
>
> "As I understand it, an inspector would come under the civil service law and of course would have to take an examination and all of that, but the question is as to whether or not there is any incompatibility between the positions of inspector and township trustees on a road improvement being made under subdivision 3 of section 98, of the Cass road law.
>
> "The sole question probably would be this: That the township would be called upon to pay a certain portion of this expense, thereby giving the township certain rights in respect to the construction of the road. As for instance, say that the contractor would not construct said road according to his contract, possibly the trustees would have a right to raise some question in respect thereto, and if one of the trustees were an inspector upon the road, it is very evident that he would not be in a very good position to make any complaint or raise any objection whatever, as trustee."

Subdivision 3 of section 98, of the Cass highway law, section 6919, G. C., reads as follows:

> "The county commissioners may assess all or such part of the costs and expenses, as they deem equitable, on the real estate abutting upon

said improvement, according to the benefits thereto, and the balance thereof, if any, shall be paid by the county and the township or townships in which such road may be in whole or in part situated in such proportions as may be agreed upon between the county commissioners and trustees of such township or townships."

Section 98 of the Cass highway law, section 6919, G. C., is a part of the chapter of that act relating to road construction and improvement by county commissioners. The section in question provides that the board of county commissioners shall, at the time a county road improvement is granted, whether upon a petition or by unanimous vote of the board without a petition, determine by resolution the method of paying the compensation, damages, costs and expenses thereof, and such compensation, damages, costs and expenses shall be apportioned and paid in the manner specified in the petition, when the board is acting upon a petition, which shall be in one of eight methods enumerated in the section. Subdivision 3 of the section referred to by you and quoted above sets forth the third of the eight enumerated methods. Under subdivision 3 all of the cost of an improvement may be assessed on the real estate abutting thereon or a part may be assessed against such real estate and the balance paid by the county and the township or townships in which the road may be, in whole or in part, situated, in such proportions as may be agreed upon between the county commissioners and township trustees.

From the argument contained in your communication, I assume that in the case referred to by you only a part of the cost is to be assessed and that the balance is to be divided between the county and township according to the terms of the agreement between the commissioners and trustees. Inasmuch as the commissioners must determine the method of payment at the time the improvement is granted, it is manifest that the agreement between the commissioners and trustees as to the division of expenses must be made prior to the granting of the improvement. When the township trustees have entered into an agreement with the county commissioners as to the division of that part of the cost and expense of the improvement not assessed against the real estate abutting thereon, the township trustees are *functi officio*. All subsequent proceedings are to be carried forward by the county commissioners and the township trustees are thereafter absolutely without any authority whatever in the premises.

Under section 6911, G. C., the commissioners are to determine the route and termini of the road and the kind and extent of the improvement and are vested with authority to order the county surveyor to make such surveys, plats, profiles, cross sections, estimates and specifications as may be required for the improvement and the profile and grade are subject to the approval of the commissioners. All notices to be given in connection with subsequent proceedings are to be given by the county commissioners who, under section 6915, G. C., are authorized to allow compensation for land or property taken and such damages as will in their judgment accrue from the construction of the improvement.

Under sections 6917 and 6918, G. C., the final determination of the question of whether the improvement is to be constructed, taking into consideration the questions of public convenience and welfare and cost and expense, rests with the county commissioners; under section 6922, G. C., estimated assessments are made by the county surveyor and are subject to the approval of the county commissioners; under section 6927, G. C., the levy made for the purpose of providing a fund for the payment of that part of the cost to be paid by the township is to be made by the county commissioners; under section 6945, G. C., the contract for the work is let by the county commissioners, and other sections of the act provide that

the work shall be done under the supervision of the county highway superintendent and all estimates are to be paid to the contractor only when approved by such county highway superintendent.

From the above it appears that when, prior to the granting of the improvement, a board of township trustees enters into the agreement contemplated by subdivision 3 of section 6919, G. C., such board has completely exhausted its authority in the premises, has no control of the subsequent proceedings and does not even levy the tax to pay the proportion of the cost and expense which the board has agreed to assume on behalf of the township. Inasmuch as the township trustees have no official functions to perform after entering into an agreement with the county commissioners, which agreement must precede the granting of the improvement, I am unable to say that the township trustees have any check upon any officials who may be concerned in the carrying out of the work subsequent to the time the agreement is entered into between the trustees and commissioners.

I therefore conclude that the office of township trustee is not incompatible with the position of inspector upon road work being carried forward under the provisions of subdivision 3 of section 6919, G. C., unless it is physically impossible for one person to discharge the duties of both positions.

I advise you, therefore, in answer to your specific inquiry, that the trustee of a township may act as inspector for a county in the construction of a road through the township, for which such inspector is trustee, where the road is constructed under the provisions of subdivision 3 of section 6919, G. C., unless the volume of the township's business requiring the attention of the trustee and the character of the inspector's duties be such that it is physically impossible for one person to properly discharge the duties of both positions. This latter question is one that must be determined in each instance by reference to the particular facts of the case under consideration. Such inspector is an assistant to the county highway superintendent appointed under authority of section 138 of the Cass highway law, section 7181, G. C., but your inquiry does not involve any discussion of the application of the civil service law of the state. Respectfully,

EDWARD C. TURNER,
Attorney-General.

1172.

STATE HIGHWAY COMMISSIONER—EMPLOYMENT OF AN INVESTIGATION OFFICER FOR HIGHWAY DEPARTMENT—NO AUTHORITY TO COMPENSATE SUCH AN EMPLOYE FROM "MAINTENANCE AND REPAIR" FUND.

The state highway commissioner is without authority to compensate an employe from the "maintenance and repair" fund, so-called, and require him to devote any considerable or substantial part of his time to the investigation of accounts, payrolls, bills, quantities of materials furnished, the financial status of contractors and similar matters, or to require such employe to devote any substantial or considerable portion of his time to the performance of any duties the compensation for which is to be properly regarded as a part of the overhead expense of the state highway department.

COLUMBUS, OHIO, January 13, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of January 10, 1916, which communication reads as follows:

"I respectfully direct your attention to the provisions of section 6309, General Code, which reads as follows:

"'The revenues derived by registration fees provided for in this chapter shall be paid by the secretary of state weekly into the state treasury. Any surplus of such revenues which may remain after the payment of the expenses incident to carrying out and enforcing the provisions of this chapter shall be used for the repair, maintenance, protection, policing and patroling of the public roads and highways of this state, under the direction, supervision and control of the state highway department.'

"I respectfully request an opinion from you as to whether or not this department may legally employ, under the above mentioned section, a man to protect, police and patrol the inter-county highways and main market roads of this state, and include as a substantial portion of his duties as making for 'protection' the following:

"The investigation of accounts, payrolls, bills, quantities of materials furnished, financial status of contractors,—in short the making of investigations generally into matters wherein the state highway department might possibly be defrauded or where greater economy could be exercised in its various operations by its various agents.

"If you find that this department has such authority, I respectfully request you to advise me if such an employe should be secured from the classified lists of the State Civil Service Commission."

A proper answer to your inquiry involves, in the first instance, a reference to opinion No. 1149 of this department, rendered to you on January 5, 1916. It was pointed out in that opinion that from a consideration of the Cass highway law, in connection with house bill No. 701 (106 O. L., 666), and being the current appropriation measure, it was apparent that the item of $750,000.00 carried by section 2 of said house bill No. 701, for repairing, maintaining, protecting, policing and patroling public highways, as provided in section 6309 of the General Code, and all sections supplementary or amendatory thereof, was available for the payment of the compensation of employes of your department under certain conditions.

The illustration used in that opinion had reference to the appropriation of $562,500.00 carried by section 2 of house bill No. 701, for the construction, improvement, maintenance and repair of main market roads, but the same principle is applicable to the so-called "maintenance and repair" appropriation.

The conclusion expressed in that opinion was that compensation is payable from the three items of $1,533,400.00 for inter-county highways, $562,500.00 for main market roads, and $750,000.00 for repairing, maintaining, protecting, policing and patroling public highways, carried by section 2 of said act, only when such compensation is a part of the cost of constructing, improving, maintaining, repairing, protecting, policing or patroling some specific section of highway or the highways of some particular county under state control, and that in so far as employes of your department whose services cannot be regarded as a charge against any particular county or any particular road improvement are concerned, you are limited as to the number, character and compensation of such employes by the appropriations for your department under the head of "Personal Service."

The same conclusion was expressed in other language by observing that those salaries which are to be regarded strictly as overhead expense, and which are not paid out on account of any particular road improvement or on account of the state's road activities in any particular county, are provided for under the head

of "Personal Service" and the appropriations under that head constitute a limitation which you are not authorized to disregard.

In view of the foregoing I advised you in the opinion above referred to that there is no appropriation available for the payment of the salary of an employe of your department whose duties would be to investigate accounts, payrolls, bills, quantities of materials furnished and the financial status of contractors,—in short, to make investigations generally into matters wherein the state highway department might possibly be defrauded or where greater economy could be exercised in its various operations by its various agents. It was intended to base this conclusion principally upon the proposition that in order to warrant the employment by you of any person having certain specific duties, and whose compensation must be regarded as strictly in the nature of overhead expense, an appropriation for such employe must be found in the current appropriation measure under the head of "Personal Service."

Coming now to consider section 6309, G. C., (104 O. L., 6), which section is quoted by you in your communication to me, it is provided in this section that surplus automobile revenues shall be used for the repair, maintenance, protection, policing and patroling of the public roads and highways of this state.

The appropriation of such surplus automobile revenues carried by section 2 of house bill No. 701, is to repair, maintain, protect, police and patrol public highways. In other words, the language of section 6309, G. C., is incorporated in that item of the appropriation bill carrying surplus automobile registration fees. That no part of the moneys appropriated for the repair, maintenance, protection, policing and patroling of the public highways may be used to meet the overhead expenses of the state highway department, and that as to such expenses, insofar as they consist of the compensation of employes, the appropriations for "Personal Service" constitute a limitation which may not be exceeded, is further indicated by the provision of subdivision 1 of section 214, of the Cass highway law—section 1221, G. C., to the effect that seventy-five per cent. of the *state highway improvement fund* shall be used for the construction, etc., of inter-county highways and *for the maintenance of the state highway department, including the state's portion of the salaries of the county highway superintendents.*

By the enactment of subdivision 1 of section 1221, G. C., in its present form the legislature clearly intended that all of the overhead expense incident to the operation of the state highway department should be paid from the three-fourths part of the state highway improvement fund referred to in that subdivision, and the terms of the current appropriation measure serve to strengthen and support this conclusion.

Referring to the terms "repair," "maintenance," "protection," "policing" and "patroling," these terms must be given a meaning which will make the section in which they are found consistent with the general provisions of the Cass highway law.

I am of the opinion that by the use of the word "protection" the legislature intended physical protection, and that the expenditure which may be made from surplus automobile registration fees on account of protecting the public highways of the state is an expenditure for such materials and labor as are designed to protect the surface of a roadway or its embankments from the wear of traffic or the operation of the elements. If the state highway commissioner should have reason to believe that the statutes of the state framed for the protection of the state highways and designed to prevent their improper use were being violated as to a certain specific road or roads, then, under the authority to make expenditures for policing public highways, he would have a right to employ, if he deemed it proper, such person or persons as might be necessary to police the highway or

highways in question and see that the several statutes designed to prevent the improper use of the highways were observed. Under an appropriation for patroling the public highways of the state, the state highway commissioner would be authorized to employ such person or persons as might be necessary to actually go upon state highways and patrol the same, either for the purpose of preventing their abuse by the traveling public or for the purpose of detecting slight defects arising from use and repairing the same or reporting the same for repair.

But any expenditure from the appropriation for repairing, maintaining, protecting, policing and patroling the public roads and highways of this state, if in the nature of compensation, must be paid to some person actually engaged in repairing, maintaining, affording physical protection, policing or patroling a certain specific road or roads, and no part of this appropriation can be used to pay the compensation of an employe whose time is employed in the supervisory work of the department and whose compensation must be properly regarded as overhead expense.

The overhead expense of your department must be met entirely from the three-fourths part of the state highway improvement fund referred to in the first paragraph of section 214 of the Cass highway law—section 1221, G. C., and insofar as that overhead expense consists of the compensation of assistants and employes, other than county highway superintendents or engineers appointed under section 7185, G. C., where county highway superintendents are removed from their control of state work, such compensation must be paid from the appropriation made for your department under the head of "Personal Service."

The compensation of persons actually employed in repairing or maintaining or in affording physical protection to a state road, or in policing the same for the purpose of preventing and punishing violations of the laws relating to the use of such roads, or patroling the same in order to detect and repair slight defects, and whose service would be in the nature of patrol maintenance, may be paid by you from the so-called "maintenance and repair" fund.

The compensation of a person to investigate accounts, payrolls, bills, quantities of materials furnished and the financial status of contractors, being in the nature of overhead expense, may not be paid from the so-called "maintenance and repair" fund, and, as pointed out in opinion No. 1149 of this department, there is no appropriation available for your department for the compensation of such an employe.

Your question therefore resolves itself into the proposition of whether you may employ a man for one purpose, for which purpose an appropriation is available for his compensation, and then require him to devote a substantial amount of his time to the performance of duties incident to another and different position, for which position no appropriation is available.

I am compelled to answer this inquiry in the negative, and to advise you that you have no authority to compensate an employe from the "maintenance and repair" fund, so-called, and require him to devote any considerable or substantial part of his time to the investigation of accounts, payrolls, bills, quantities of materials furnished, the financial status of contractors and similar matters, or indeed to require him to devote any substantial or considerable portion of his time to the performance of any duties the compensation for which is to be properly regarded as a part of the overhead expense of your department. To reach any different conclusion would do violence to the statutes and defeat the manifest intention of the legislature, which was to require the payment of all the overhead expenses of your department from the three-fourths portion of the state highway improvement fund referred to in paragraph 1 of section 214 of the Cass highway law—section 1221, G. C., and to limit the compensation of employes engaged in

a supervisory capacity, with the exception of county highway superintendents or engineers appointed under section 7185, G. C., to the appropriations for "Personal Service" carried by the current appropriation measure.

The conclusion which I have reached as to the first branch of your inquiry renders it unnecessary for me to discuss the second branch thereof.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1173.

INTERPRETATION OF PARRETT-WHITTEMORE LAW PROVIDING FOR LISTING AND VALUATION OF PROPERTY FOR PURPOSES OF TAXATION—ANNUAL APPRAISEMENT OF REAL ESTATE NOT REQUIRED UNLESS ORDERED BY TAX COMMISSION—RE-ASSESSMENT OF REAL PROPERTY ORDERED BY TAX COMMISSION—AUTHORITY VESTED IN COUNTY AUDITOR TO DETERMINE WHO SHALL PERFORM SUCH DUTY—COUNTY AUDITOR WITHOUT AUTHORITY TO ORIGINATE OR CHANGE ANY ASSESSMENT OF REAL PROPERTY—ASSESSORS BEGIN APPRAISING REAL PROPERTY ON SECOND MONDAY IN APRIL—"UNIT OR TENTATIVE" VALUES OF REAL PROPERTY NOT PERMITTED—POWERS AND DUTIES OF COUNTY BOARDS OF REVISION AT ITS JUNE AND AUGUST SESSIONS—POWERS CONFERRED UPON COUNTY AUDITOR BY SECTION 5401, G. C., MAY BE EXERCISED BEFORE OR AFTER COMPLETION OF TAX LIST.

Under the provisions of the act of the general assembly known as the Parrett-Whittemore law, as found in 106 *O. L.*, 246-272, *the appraisement or assessment of real property is limited to the control of the tax commission of Ohio, the county auditor and such officers and boards as are mentioned in section* 55 *of the act, section* 5548, *G. C., and an annual appraisement of real estate is not required unless so ordered by said tax commission. If the tax commission of Ohio orders an assessment of real property, the same should be made in all counties of the state at the same time, i. e., in the same year.*

The term "subdivision" as used in sections 77, 79 *and* 80 *of the act, sections* 5614, 5624-4 *and* 5624-5, *G. C., refers to the parts of an assessment district in the case where the county auditor, under authority of section* 18 *of the act, assigns a part of said assessment district to an assistant assessor for the return of personal property and the assessment of such real property as may be required under section* 55 *of the act, and said term applies to the parts of said assessment district as subdivided. Said term also refers to the "part" of an assessment district as mentioned in the provision of the first part of section* 55 *of the act.*

Where a re-assessment of real property is ordered by the tax commission of Ohio, under authority of section 79 *of the act, section* 5624-4 *G. C., the discretion to determine whether said assessment shall be made by the assessor of the district in which said property is located or by an assistant assessor or assistant assessors appointed by the county auditor, under authority of section* 18 *of the act, is vested in said county auditor as the chief supervising assessing officer of said county, and the said tax commission may not interfere with the exercise of this discretion.*

County auditors are without authority to originate or change any assessment of

real property, either under any provision of the so-called Parrett-Whittemore law or under any provision of any other section of the General Code now in force. Under the provisions of sections 5399, 5400 *and* 5401, *G. C., which apply only to personal property, a county auditor may exercise such authority under the conditions named and provided in said sections.*

The regularly elected and qualified assessors may not begin the work of appraising real property for the year 1916 *before the second Monday in April of said year.*

The county auditor is without authority to direct the assessors to fix "unit or tentative" values of real property, and he may not himself or through his deputies or assistants fix such values.

The county board of revision, in the performance of its duties, under section 51 *of the act, section* 5605, *G. C., at its June session in any year, is limited in its consideration of valuations of real property to the statements and returns of such year, as placed before it by the county auditor in compliance with said section, and said board may not increase or decrease valuations of real estate which has not been appraised during said year.*

The county board of revision may increase or decrease any valuations or correct any assessment of real property complained of, regardless of whether an appraisement of all such property has been made for the current year under provision of section 55 *of the act.*

The powers of the county board of revision, under provision of section 45 *of the act, section* 5598, *G. C., may only be exercised by said board in the performance of its duties under section* 44 *of the act. In increasing or decreasing the valuations of real property, the county board of revision, in the exercise of the powers conferred upon it by the provisions of section* 43 *of the act, section* 5596, *G. C., is limited to the investigations which it may make under section* 51 *of the act. Said powers may be exercised by said board in connection with the discharge of its duties under that part of section* 51 *of the act which relates to the examination and correction of statements and returns of personal property. Said powers may also be exercised by said board in the performance of its duties under the provisions of sections* 44 *and* 52 *of the act, sections* 5597 *and* 5609, *G. C.*

The only notice of changes in valuation made by said county board of revision, acting as a board of equalization at its June session, required to be given, is that provided for in sections 58 *and* 59 *of the act, sections* 5606 *and* 5607, *G. C.*

Before said county board of revision, in the exercise of the powers conferred upon it by sections 44 *and* 52, *in connection with the exercise of the powers conferred upon it and the discharge of the duties placed upon it by the provision of section* 44 *of the act, can increase any valuation complained of, notice must be given as required by the provision of section* 46 *of the act, section* 5599, *G. C.*

The powers of the county board of revision at its August session are confined to the hearing of complaints only.

The powers conferred upon the county auditor by provision of section 5401, *G. C., may be exercised before the completion of the tax list, as well as thereafter, and the only notice required to be given in connection with the exercise of such powers is that provided for in said section.*

Section 70 *of the act, section* 5623, *G. C., makes it the duty of the tax commission of Ohio to decide all questions that may arise with reference to the construction of any statute affecting the assessment, levy or collection of taxes, in accordance with the advice and opinion of the attorney-general, and such opinion and the rules, regulations, orders and instructions of the commission prescribed and issued in conformity therewith shall be binding upon all officers, who shall observe such rules and regulations and obey such orders and instructions unless*

and until the same are reversed, annulled or modified by a court of competent jurisdiction. The tax commission of Ohio should formally decide the questions considered in conformity with this opinion of the attorney-general.

COLUMBUS, OHIO, January 14, 1916.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter requesting my opinion upon a number of questions involving an interpretation of various provisions of the so-called Parrett-Whittemore law as found in 106 O. L., 246-272, and entitled "An act to provide for the listing and valuation of property for purposes of taxation and to repeal certain sections of the General Code, relating thereto."

Section 104 of said act provides:

> "This act shall take effect and be in force from and after January 1, 1916, except sections 17 to 24, both inclusive, which shall take effect and be in force from and after the earliest period allowed by law."

Sections 17 to 24, both inclusive, of the act relate principally to the election and qualification of assessors, the appointment and qualification of assistant assessors, and to the general powers and duties of such assessors and assistants. Being excepted from the above provision of section 104 of the act, said sections became effective August 10, 1915.

Sections 31, 32 and 39 of the act were amended by an act of the general assembly found in 106 O. L., 433. Reference will hereafter be made to the provisions of said sections as amended.

It should be observed at the outset that, by provision of section 1 of the act, the offices of district assessors, district boards of assessors and district boards of complaints, created by the act of the general assembly passed April 18, 1913, 103 O. L., 786, and known as the Warnes law, are abolished and the terms of office of all persons appointed to said offices shall, upon the taking effect of the so-called Parrett-Whittemore law, cease and terminate.

Said section further provides that:

> "District assessors and district boards of assessors shall turn over to the county auditor of the counties constituting their respective assessment districts, and district boards of complaints shall turn over to the county boards of revision, created by this act, of the counties constituting their respective districts, all the books, papers, files, records and furniture of their said offices. Any unfinished business of a district assessor or a board of assessors shall be completed by such county auditor and any unfinished business of a district board of complaints shall be completed by such county board of revision."

Section 2 of the act, being section 5579 of the General Code, provides that in addition to all other powers and duties vested in or imposed upon it by law, the tax commission of Ohio shall direct and supervise the assessment for taxation of all real and personal property in the state, and further provides that:

> "County auditors shall, under the direction and supervision of the tax commission of Ohio, be the chief supervising, assessing officers of their

respective counties, and, with the local assessors selected in the manner provided in this act, shall list and value real and personal property for taxation, within and for their respective counties, except as may be otherwise provided by law. There shall also be in each county, a board to hear complaints and revise assessments of real, and personal property for taxation, which shall be known as the county board of revision."

Section 24 of the act (Sec. 3354, G. C.) provides that:

"Assessors, within their respective districts, and assistant assessors within such territory as may be assigned to them respectively, shall, under the direction of the county auditor, list and value for taxation the property subject to taxation therein, except as otherwise provided by law, and in the performance of such duties shall have and perform under his direction all the powers and duties of the county auditor in respect thereto."

Said section further provides that:

"Wherever in the General Code, or in this act, the words 'assessor,' 'district assessor,' 'township assessor,' 'ward assessor,' 'precinct assessor,' 'assessor of real estate' or 'assessor of real property,' are used, the same shall be deemed to mean the county auditor or the assessor, as the case may be. The county auditor or the assessor shall, unless otherwise provided by law, perform, or cause to be performed, all the duties, exercise all the powers and be subject to all the liabilities and penalties devolved, conferred or imposed by law upon such officers."

It will be observed that, under the above provisions of the statutes, the power and authority to direct and supervise the assessment for taxation of all real and personal property in the state is still vested in the state tax commission, while the county auditor, generally speaking, takes the place of the district assessor or district board of assessors, as the chief supervising, assessing officer of the county, the assessors and assistant assessors selected in the manner provided in the act take the place of the deputy district assessors heretofore appointed under provision of said Warnes law, and the county board of revision succeeds the district board of complaints as a board to hear complaints and revise assessments of real and personal property for taxation.

Your questions will be considered in the order in which you have submitted them, the first question being as follows:

"Is an annual appraisement of real property required, or is the same only to be made when directed by the tax commission, or considered advisable by the county auditor?"

I have experienced much difficulty in coming to a satisfactory conclusion as to the proper answer to this question. Arguments difficult to meet may be advanced for or against either the annual appraisement or the appraisement only when ordered by the state tax commission.

The policy of the state in the past, together with the attendant question of unnecessary expenditure of money, as well as what appears to be the general understanding of those who had to do with the bill, have led me to take the position that annual appraisement is not required.

The question is a very important one and its determination now different from

that of a court hereafter might cause serious complications were it not for the provisions of section 70 of the act (G. C. 5623) to the spirit of which at least I believe the courts will give due consideration. This section provides:

> "The tax commission of Ohio shall decide all questions that may arise with reference to the construction of any statute affecting the assessment, levy or collection of taxes, in accordance with the advice and opinion of the attorney general. Such opinion and the rules, regulations, orders, and instructions of the commission prescribed and issued in conformity therewith shall be binding upon all officers, who shall observe such rules and regulations and obey such orders and instructions unless and until the same are reversed, annulled or modified by a court of competent jurisdiction."

A somewhat similar provision to section 70 was upheld by the court in the case of State v. Halliday, 61 O. S., 352.

In many counties of the state it takes the greater part of a year to make the real estate appraisement and in the larger counties costs approximately from $100,000 in Franklin to $300,000 in Cuyahoga county.

Real estate values do not fluctuate rapidly enough to justify such an annual expenditure and I can see nothing to be gained by it. While the Warnes law provided for annual appraisement of real estate as a matter of fact it was omitted, the assessors merely adopting the assessment of the year before.

The argument herein will therefore be directed to support the proposition that annual appraisement of real property is not required. In connection with this question, however, I desire to call your attention to what is a very important matter not raised specifically by your inquiry. That is, the question as to whether the tax commission may order an assessment of real estate in one county and not in another. This, too, is a question not free from doubt. The constitution provides that all property shall be taxed by a uniform rule according to its true value in money. If there was an original assessment of real property in one county one year while in the adjoining county there had been no original assessment for several years, it might well be argued that the real estate in the two counties was not being taxed by a uniform rule. The only safe course therefore for the tax commission to pursue will be to order an assessment of real property in all counties of the state at the same time, i. e., in the same year. This interpretation, however, will not prevent reassessments in any one or more districts.

Recurring then to the question as asked: This question involves a consideration of section 55 of the act (section 5548, G. C., 106 O. L., 260) which provides in part as follows:

> "Each county auditor shall, annually, when so directed by the tax commission of Ohio, or when in his opinion it is advisable to reassess the real property, or any class thereof, in any district or part thereof, within his county, make and deliver to the assessor of such district an abstract from the books of his office, containing such description of such real property therein, together with such plat books and such lists of transfers of title to land made therein during the next preceding year as may be deemed necessary to enable the assessor to perform the duties imposed upon him by law in listing and valuing such property for taxation. Such abstracts, plat books and lists of transfers of title to land shall be in such form and detail as the tax commission of Ohio may prescribe. The board of county commissioners of the county, the board of township trustees of a township, the board of education of a school district, the

council of a municipal corporation, or twenty-five tax payers, owners of real property, in a district, may file with the county auditor a petition asking for a reassessment of the real property or a class thereof, in any township, school district or municipal corporation or part thereof. * * *"

It will be noted that the first sentence of this section does not specifically require assessment or reassessment of real property. The force of this provision is, however, to require the auditor to make and deliver to assessors abstracts, lists of transfers and plat books necessary to enable the assessor to perform the duties imposed upon him by law.

Since, however, the abstracts, lists of transfers and plat books referred to in the section last above quoted are in every case indispensable to an assessment of real property, it follows of necessity that such assessment of real property can be said to be required only when it is provided that the abstracts, lists and books will be delivered to those officers upon whom is imposed the duty of making such assessments. That is to say, an assessment of real property cannot be said to be required except at such time as the auditor is required to make and deliver the abstracts, lists of transfers and plat books necessary therefor.

It will be observed that the phrase "or when in his opinion it is advisable to reassess the real property or any class thereof, in any district or part thereof, within his county," and all that part of section 5548, G. C., supra, following the first sentence thereof, has reference only to a reassessment of real property and can be construed to require the delivery of such abstracts, lists, books and maps only when such reassessment is authorized to be made. In so far then as said section has application to original assessment, it reads as follows:

"Each county auditor shall, annually, when so directed by the tax commission of Ohio, * * * make and deliver to the assessor of such district an abstract from the books of his office, containing such description of such real property therein, together with such plat books, and such lists of transfers of title to land made therein during the next preceding year as may be deemed necessary to enable the assessor to perform the duties imposed upon him by law in listing and valuing such property for taxation."

There is little room for doubt that without the term "annually" this provision would require the auditor to make and deliver plat books, etc., *only* when so directed by the tax commission or when in his opinion it was advisable to reassess real property, or when the county commissioners, township trustees, board of education, council or 25 taxpayers, owners of real property, petitioned for a reassessment of real property. What then was the effect of the insertion of the word "annually?"

If this provision read "each auditor shall, annually, make and deliver to the assessor," etc., then no doubt could arise that it was the legislative intent that the auditor should make and deliver the plat books, etc., to the assessors every year, and if such had been the legislative intent, no more apt or concise language could have been adopted. The failure of the legislature to adopt such plain and specific language is, to my mind, conclusive that it was not contemplated to impose the duty upon the auditor every year, and since such plats, lists and abstracts are in every case indispensable to an assessment or reassessment of real property, it therefore follows that an annual appraisement of real property was not contemplated or intended to be required by the enactment of section 5548, G. C., supra.

It might be argued with reason that the effect of the insertion of the word "annually" was to restrict rather than to extend the imposition of the duties of the auditor as well as the authority of the tax commission to order an assessment and to thus limit the exercise of that authority to once each year. Although we give to the term "annually" that construction most favorable to any contention, that section 5548, G. C., supra, requires an annual appraisement of real property, we may yet not overlook that provision immediately following this term which, if given any operative force at all, must attach as a condition precedent to the statutory mandate that "the auditor shall annually" make, etc. That is to say, no such construction of the term "annually" may be adopted as to render nugatory the plain terms of its accompanying provision, "when so directed by the tax commission of Ohio." As stated above, the maps, abstracts and lists here referred to being indispensable to an assessment or reassessment of real property on the order of the state tax commission, under section 5624-4, G. C., 106 O. L., 267, or the determination of the county auditor of the advisability of reassessing any real property, being a condition precedent to the furnishing of the same and, therefore, a condition precedent to such assessment or reassessment, it follows that no authority or requirement of such assessment or reassessment, except the same be in every case subject to the action of the tax commission or auditor, or the filing of a petition therefor, can be found in section 5548, G. C., supra. On the contrary, I am of the opinion that when the tax commission so orders, under section 5624-4, G. C., 106 O. L., 267, or the auditor deems it advisable, the provisions of this section require that a reassessment of real property be made as well as when the same is petitioned for and ordered under the succeeding provisions of the same section. In addition thereto, or, more correctly stating it, precedent to any such reassessment, there is authorized and required an original assessment of real property *only* when the same is so directed by the tax commission of Ohio, which may not be oftener than once each year.

Section 4 of the act (section 5366-1, G. C., 106 O. L., 247) provides in part as follows:

> "The listing of all property, moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, except the stock in trade of transient persons, shall be made between the second Monday of April and the first Monday of June, annually. The listing and valuation of all such property for taxation shall be made as of the day preceding the second Monday of April, annually, and all personal property, moneys, credits and investments except as otherwise provided in this act shall be listed and valued with respect to the ownership thereof on said date and in the place where then taxable. Wherever any property is by any existing provision of law required to be listed or returned for taxation as of a day other than the day preceding the second Monday of April, such provision shall be deemed to mean the day preceding the second Monday of April, and whenever the liability of any person or of any property to taxation is, by any existing provision of law, to be determined by reference to a day other than the day preceding the second Monday of April, said liability shall be determined by reference to the day preceding the second Monday of April. * * *"

The use of the term "all property" in the first sentence of the above section, if standing alone, would lead us to the conclusion that this section within itself requires an annual appraisement of every kind, including both real and personal property. The phrase "such property" in the second sentence, manifestly refers

to all that property to which the first sentence applies. It then follows that the scope of the operation of the second sentence is dependent upon the meaning to be given to the term "all property" in the first sentence, and if the broadest meaning to which these terms are susceptible is to be adopted without reference to the further provisions of the act, an annual appraisement might be said to be required.

We may, however, in determining what meaning should be given to the phrase "all property" take into consideration, together with the provisions of the other sections of the act, the purpose of the section under consideration. It will be noted that the only purpose of this section is to fix a time as of which and the period within which the liability for taxes attaches and the valuation thereof is to be made, and it is not believed that the legislature here intended to determine the frequency with which real property should be valued for taxation.

The language of the first sentence of sections 5366-1, G. C., supra, was manifestly adopted upon consideration of section 2 of article XII of the constitution, which provides in part as follows:

> "Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property according to its true value in money," etc.

While the terms of section 5366-1, G. C., are susceptible of a construction which would require an annual appraisement of real property, this section must be read in the light of its manifest purpose and construed together with and held, subject, in so far as applicable to the assessment of real property, to such limitations thereof as are effected by the provisions of section 5548, G. C., supra. That is to say, the purpose of sections 5366-1, G. C., is solely to fix the time as of which and the period within which all property which is required to be assessed within each year, shall be valued and it was not the purpose thereby to determine the frequency with which real property shall be assessed.

I am therefore of opinion that under the Parrett-Whittemore bill the appraisement or assessment of real property is limited to the control of the state tax commission and the reassessment thereof to the control of the tax commission, the county auditor and such officers and boards as are mentioned in section 5548, G. C., and that an annual appraisement of real estate is not in any wise required unless so ordered by the tax commission of Ohio. In conformity with section 70 of the act (G. C. 5623) above quoted, the tax commission should decide this question according to the above opinion of the attorney-general.

Your second and third questions read as follows:

> 2. "If a reassessment is ordered, can the tax commissioner control whether or not the reassessment shall be made by the assessor of such district, or by an assistant appointed by the county auditor?"
>
> 3. "What is meant by 'subdivision' of an assessment district, as set forth in section 79 of said law?"

Inasmuch as I am informed that in your second question you have in mind a reassessment of real or personal property ordered by your commission, under authority of section 79 of the act, as distinguished from a "reassessment" of real property directed by the county auditor under authority of section 55 of the act as above quoted, and under the conditions prescribed in said section, I deem

it advisable, before answering your second question, to determine the proper meaning to be given to the term "subdivision" as used in said section 79, as well as in sections 77 and 80 of the act. Your third question will therefore be considered first.

Section 79 of the act (Sec. 5624-4, G. C.) provides:

> "The tax commission of Ohio may order a reassessment of the real or personal property, or any class of either, in any district or *subdivision* thereof, when in its opinion, such property has been unequally or improperly assessed, to the end that all classes of property in such district shall be assessed in compliance with the law."

Section 80 of the act (Sec. 5624-5, G. C.) provides:

> "When a reassessment is ordered in any district or subdivision thereof, the assessor of such district, or an assistant assessor to be appointed by the auditor, shall proceed to make such reassessment in the manner provided by law for making original assessments. Provided, however, that if the tax commission of Ohio so orders, the county auditor shall, in the case of personal property, make such reassessment by revising and correcting the statements and returns on file in his office without taking new statements or returns from the persons required by law to list or return personal property for taxation."

Upon a careful examination of all the sections of the act under consideration, I find that the term "subdivision" as used in the above provisions of sections 79 and 80, as well as in the provision of section 77 of the act, is no where defined. I think, however, that the proper meaning of said term may be determined by reference to the provision of section 18 that "the county auditor shall assign to each assistant assessor such portion of the work of the assessor as he thinks proper" taken in connection with the provision of said section that "an assistant assessor shall possess all the qualifications of an elected assessor and, after giving bond and taking an oath of office as prescribed by law, shall, in the work assigned to him, perform all the duties and be subject to all the liabilities and penalties enjoined upon elected assessors by the provisions of law," and the provision of section 55 that "each county auditor shall, annually, when so directed by the tax commission of Ohio, or when in his opinion it is advisable to reassess the real property, or any class thereof, in any district *or part thereof*, within his county, make and deliver to the assessor of such district an abstract from the books of his office, etc."

I am of the opinion therefore, in answer to your third question, that the term "subdivision," as above used, refers to the parts of an assessment district in the case where the county auditor, under authority of section 18 of the act, assigns a part of said assessment district to an assistant assessor for the return of personal property and the assessment of such real property as may be required under section 55 of the act, and said term applies to the parts of said assessment district as subdivided. Said term also refers to the "part" of an assessment district as mentioned in the above provision of section 55 of the act.

Coming now to a consideration of your second question it will be observed that under provision of section 2 of the act, as above set forth, the county auditor under the direction and supervision of the state tax commission is the chief supervising, assessing officer of the county, and with the local assessors selected in the

manner provided by section 17 of the act, and the assistant assessors appointed by him under authority of section 18 of the act, is required to list and value real and personal property for taxation.

Section 17 of the act (Sec. 3349, G. C.) provides:

"At the regular election to be held in November, 1915, and biennially thereafter, assessors shall be elected in the manner provided by law for the election of ward, district, city, village and township officers, as follows: In municipal corporations divided into wards, one assessor shall be elected in each ward; in villages one assessor shall be elected; in cities not divided into wards, the board of deputy state supervisors of elections or the board of deputy state supervisors and inspectors of elections, as the case may be, shall, acting in conjunction with the county auditor, within ten days after this act shall become effective, divide such cities or such part or parts thereof as may be located in their county, into such number of assessment districts as in the judgment of the county auditor may be necessary in order to provide for the assessment of all the property therein; a division so fixed shall remain in effect for a period of four years, at the expiration of which and quadrennially thereafter a like division shall be made in the same manner and by the same authority. One assessor shall, at the time specified in this section, be elected in each assessment district so created; provided, however, that nothing therein shall be so construed as to require a division of any municipal corporation or part thereof into assessment districts when, in the judgment of the county auditor, such division is not necessary, in which event one assessor shall be elected in the entire municipal corporation or in that part thereof which may be located in one county as the case may be; in townships not having a municipal corporation therein, one assessor shall be elected in such township; in townships composed in part of a municipal corporation, one assessor shall be elected in the territory outside such municipal corporation. An assessor shall be a citizen possessing the qualifications of an elector of such ward, district, city, village or township. Such assessor shall take and hold his office for the term of two years, from and after the first day of January following his election. Upon the election and qualification of such assessor, the right of the deputy assessor, theretofore appointed under any provision of law to exercise any powers or perform any duties as such deputy assessor shall cease and determine, and he shall turn over to the person so elected and qualified, all the books, records, papers and furniture of said office. Such elected assessor shall be the successor of said appointed officer, with full power to take up, carry on and complete any and all of the unfinished business thereof, and he shall perform all the duties, exercise all the powers and be subject to all the liabilities and penalties devolved, conferred or imposed by law upon the deputy assessor so appointed."

Sestion 18 of the act (Sec. 3350, G. C.) provides:

"A county auditor, who deems it necessary to enable an assessor to complete his work within the time prescribed, may appoint one or more assistant assessors for such ward, district, city, village or township. The county auditor shall assign to each assistant assessor such portion of the work of the assessor as he thinks proper. An assistant assessor shall

possess all the qualifications of an elected assesssor and, after giving bond and taking an oath of office as prescribed by law, shall, in the work assigned to him, perform all the duties and be subject to all the liabilities and penalties enjoined upon elected assessors by the provisions of law. Such assistant assessors shall not be subject to the provisions of any civil service law or regulation."

Section 71 of the act (Sec. 5624, G. C.) provides:

"The tax commission of Ohio shall, from time to time, prescribe such general and uniform rules and regulations and issue such orders and instructions, not inconsistent with any provision of law, as it may deem necessary, respecting the manner of the exercise of the powers and discharge of the duties of any and all officers, relating to the assessment of property and the levy and collection of taxes. It shall cause the rules and regulations prescribed by it to be observed, the orders and instructions issued by it to be obeyed and the forms prescribed by it to be observed and used."

Under the above provisions of the statutes, it is clear that the county auditor, as the chief assessing officer of his county, can always direct and if necessary order the reassessment of real property under the conditions prescribed in section 55 of the act, as above quoted, and that the assessor, elected under authority of section 17, and the assistant assessor appointed by said county auditor under authority of section 18, are at all times under the direction and subject to the orders of said officer. All rules and regulations prescribed by the state tax commission and orders made by said commission under authority of section 71 of the act, as above quoted, in connection with the listing of personal property and the reassessment of real property must be directed to the county auditor of the county in which such property is located and through him to the local assessors and assistant assessors in the various assessment districts of such county.

It seems equally clear that if a reassessment of real property in any assessment district or subdivision thereof is ordered by your commission, under authority of section 79 of the act, such reassessment must be made by the assessor of such district or by an assistant assessor or assistant assessors appointed by the county auditor under authority of section 18 of the act, and that the assessor of such district or the assistant assessor or assistant assessors, as the case may be, in the performance of their duty, are at all times subject to the direction and orders of said county auditor.

I am of the opinion therefore, in answer to your second question, that, where a reassessment of real property is ordered by your commission, under authority of said section 79 of the act, the discretion to determine whether said assessment shall be made by the assessor of the district in which said property is located or by an assistant assessor or assistant assessors, appointed by the county auditor under authority of section 18 of the act, is vested in said county auditor, as the chief supervising, assessing officer of said county, and that the state tax commission may not interfere with the exercise of this discretion.

Your fourth question is as follows:

"Is the county auditor an original assessing officer? Can he change valuations listed and returned to him by local assessors? Is his authority in this respect identical with the authority of the present district assessors

under the Warnes law, particularly that contained in section 4 and section 9 of said law?"

The original assessing officers as to real and personal property are the elected assessors and their assistants, except when a reassessment is ordered by the tax commission as to a class of personal property, when, under section 80 above quoted, the reassessment may be made by the county auditor himself as an original assessing officer. While the district assessor under the Warnes law had authority to make original assessments of real property, I do not think such power is vested in the county auditor, as the chief supervising, assessing officer of the county, by any provision of the act under consideration. This power is vested in the elected assessor, and in the event no assessor is elected it is the mandatory duty of the auditor to fill the vacancy. It is likewise true in the event the assessor is not able to discharge his duties in the time limit in accordance with law that an assistant assessor must be appointed. It seems clear that in no event can the county auditor make the original appraisement.

I take it from the form in which the latter part of your foregoing inquiry is phrased that you desire to know to what extent section 3 of the act, being section 5366, G. C., confers upon the county auditor the authority formerly vested in district assessors by the Warnes law. Said section provides as follows:

> "Whenever any person, company, firm, partnership, association or corporation was by any existing provision of any law repealed by this act required to return property to the district assessor for taxation, the same shall be returned to the county auditor; and whenever the district assessor was by any provision of any such law charged with any duty or vested with any powers in making up the original tax list, or in listing and valuing any property which has been omitted from the tax list, or in correcting any returns or statements of property for taxation, either with respect to its valuation or amount, such duty shall devolve upon and be performed by the county auditor and such power shall vest in him and be exercised by him."

I am compelled to conclude that the foregoing section is without any operative force and is null and void because in contravention of the provisions of section 16 of article II of the constitution of this state. Said section 16 provides, among other things, that:

> "No bill shall contain more than one subject * * * and no law shall be revived or amended unless the new act contains the entire act revived, or the section or sections amended, and the section or sections so amended shall be repealed."

The provisions of the Warnes law, to which reference is made in section 3 aforesaid of said act, are repealed by section 103 thereof. It follows therefore that said provisions thus repealed, so far as they may be considered a part of the present law, are the same as if "they are not and never were." In other words, the duty and power conferred upon the county auditor by the terms of said section 3 may be determined only by reference to the powers and duties of district assessors under laws which are now repealed and whose provisions have not been carried into and made a part of the new law. This is an attempt to revive and continue in force a repealed law without carrying into the new act its provision as required by the constitution. Section 3, therefore, is not intelligible

without reference to the provisions of the repealed Warnes law and under the constitutional inhibition above quoted we are not permitted to refer to a repealed law to supply the operative terms of the new law.

In the case of Lehman v. McBride, 15 O. S., 603, Judge Scott in commenting upon this constitutional provision, said:

> "The constitutional provision to which, it is said, this act does not conform, was intended, mainly, to prevent improvident legislation; and with that view, as well as for the purpose of making all acts, when amended, intelligible without an examination of the statute as it stood prior to the amendment, it requires every section which is intended to supersede a former one to be fully set out. No amendments are to be made by directing specified words or clauses to be stricken from, or inserted in, a section of a prior statute which may be referred to; but the new act must contain the section as amended."

For the foregoing reasons, therefore, I am compelled to hold that section 3 aforesaid is inoperative and no duty or power conferred upon district assessors by the repealed Warnes law may now be exercised by county auditors under favor of said section. With this section thus eliminated, I am of the opinion that county auditors are without authority to originate or change any assessments of real property either under any provision of the act under consideration or under any provision of any other section of the General Code now in force. However, under the provisions of sections 5399, 5400 and 5401 of the General Code, which apply only to personal property, a county auditor may exercise such authority under the conditions named and provided in said sections.

Your fifth, sixth, seventh and eighth questions will be considered together. Said questions read as follows:

> 5. "When are assessors qualified with the authority—under the direction and supervision of the county auditor—to begin the work of appraising real estate for the duplicate of 1916? May such appraisement begin before the second Monday of April?
>
> 6. "Has the county auditor authority to direct the assessors to fix 'unit' or other tentative valuations between the first Monday of January and the second Monday of April and then subsequently, formally and officially, list and value them at their taxable value so fixed as of the latter date?
>
> 7. "Can the county auditor himself, or through his deputies and assistants, fix tentative values of real estate between such dates?
>
> 8. "What may be done by county auditors in the matter of appraising real estate prior to the second Monday of April, 1916?"

I have already held in answer to your first question that the purpose and effect of section 4 of the act (Sec. 5366-1, G. C.) is to fix the time as of which and the period within which all property which is required to be assessed within each year shall be valued. The time so fixed by the provisions of said section is between the second Monday in April and the first Monday in June.

In view of this conclusion, I am of the opinion in answer to your fifth question, that the regularly elected and qualified assessors may not begin the work of appraising real property for the year 1916, before the second Monday in April of said year.

Inasmuch as section 5554, G. C., provides that the assessor in all cases *from*

actual view, and from the best sources of information within his reach, shall determine as near as practicable the true value of each separate tract and lot of real property within his district, according to the rules prescribed by law for valuing real property, I am of the opinion in answer to your sixth and seventh questions that the county auditor is without authority to direct the assessors to fix "unit" or "tentative" values of real property and that he may not himself or through his deputies or assistants fix such values.

Your eighth question has been answered in determining the answer to your fifth question.

Your ninth inquiry is as follows:

> "May the board of revision increase or decrease real estate if no reappraisement has been made? May the board consider complaints as to real property if no reappraisement of real estate has been made?"

Sections 31, 32 and 39 of the act, being sections 5580, 5581 and 5592 respectively, of the General Code, as amended in 106 O. L., 433, relate to the appointment and organization of the county board of revision.

Section 31 provides:

> "The county treasurer, prosecuting attorney, probate judge, and the president of the board of county commissioners of each county shall constitute a county board for the appointment of three members of county boards of revision. All appointments made by such county appointing board must be approved by the tax commission of Ohio before the same shall become effective. In case the county board fails to make any appointment as provided in this act, or such appointment is not approved by the tax commission of Ohio within ten days after such appointment is made, the tax commission of Ohio shall make such appointment."

Section 32 provides in part:

> "On or before January 10, 1916, on or before April 10, 1917, and on or before April 10 of each year thereafter the county board provided for in the next preceding section shall appoint three competent persons who shall constitute the county board of revision for the county. Such persons shall serve until the completion of the work as provided in section 40 of this act."

Section 39 provides that:

> "Each county board of revision shall organize annually, on the second Monday in June, or at such time as may be directed by the tax commission of Ohio, by the election of a chairman for the ensuing year."

and further provides that the county auditor shall be the secretary of the board of revision.

Section 40 of the act (Sec. 5593, G. C.) provides:

> "County boards of revision shall hold sessions beginning on the second Monday of June, and the first Monday of August respectively and con-

vene at such other times as the tax commission of Ohio may order. Such boards may adjourn from day to day and shall complete their work within such times as may be fixed by the tax commission of Ohio for the completion thereof."

Under provision of section 45 of the act (Sec. 5598, G. C.) said county board of revision shall have power to investigate *all assessments on the tax list,* with respect to the amount of property listed as well as with respect to the valuation at which the same is listed. Said section further provides that:

"The power of the board shall extend to all cases in which real or personal property has been assessed for taxation *for the current year,* but not to assessments, additions or corrections hereafter made by the tax commission of Ohio."

Sections 51 and 52 of the act (sections 5605 and 5609, G. C.) relate to the examination, revision and correction of all property statements and returns and to the filing of complaints, and provide as follows:

Section 51. "On the second Monday of June, 1916, and annually, thereafter, the county auditor shall lay before the county board of revision the statements and returns of property received by him for the current year, and such board shall forthwith proceed to examine and revise the statements and returns of all property, both real and personal, to see that the valuations thereof are equal and uniform throughout the county, and that all property, and each and every class, kind or description thereof, is valued for taxation throughout the county at its full and true value in money. If the board finds any statement or return of personal property to be erroneous, either in the amount of property, moneys, credits, investments in bonds, stock, joint stock companies or otherwise, listed in the name of any person, company, firm, partnership, association or corporation, or in the valuation of any item or items thereof, it shall correct such statement or return, by listing thereon any omitted property and giving to it, as well as to any property that has been listed therein but which has been incorrectly valued, the true value in money thereof, and by omitting therefrom property improperly listed thereon. The county auditor shall add to any such statement or return, any dog omitted therefrom. If the board finds that any tract, lot or parcel of land or any buildings, structures or improvements thereon, or any minerals therein or rights thereto have been improperly listed either in the name of the owner, the description or quantity thereof, or have been incorrectly valued, or have been omitted and not valued, it shall make the necessary corrections and shall give to each such tract, lot or parcel of land, or any buildings, structures or improvements thereon or any minerals therein or rights thereto, incorrectly valued or omitted, the true value in money thereof. The board of revision shall not undertake the hearing of complaints or the exercise of any other power at its June session, until its powers and duties under this section have been exercised and discharged. The county auditor shall not make up his tax list and duplicate, as provided in section 56 of this act, nor advertise, as provided in section 58 of this act, until the board of revision has completed its work under this section and has returned to the auditor all the statements and returns laid before it with the revisions and corrections thereof, as made by it."

Section 52. "Complaints against any valuation or assessment on the tax list for the current year may be filed with the county auditor before the meeting of the county board of revision on the first Monday of August or within thirty days thereafter if the board remains in session so long. Any taxpayer may file such complaint as to the valuation or assessment of his own or other's property, and the county commissioners, the prosecuting attorney, county treasurer or any board of township trustees, any board of education, mayor or council of any municipal corporation in the county shall have the right to file such complaint. The county auditor shall lay before the county board of revision all complaints filed with him."

Section 46 of the act (Sec. 5599, G. C.) provides that:

"The county board of revision shall not increase any valuation complained of, nor increase the listed amount of any taxable property complained of without giving reasonable notice to the person in whose name the property affected thereby is listed, and affording him an opportunity to be heard."

Under provision of section 47 of the act the county board of revision may not decrease any valuation complained of nor reduce the listed amount of any taxable property complained of, unless the party affected thereby, or his agent, makes and files with the board a written application therefor, verified by oath, showing the facts upon which it is claimed such decrease should be made, and not without affording the county auditor an opportunity to be heard thereon.

Under provision of section 43 of the act (Sec. 5596, G. C.) the county board of revision has the authority to call persons before it and examine them under oath as to their own or other's property, moneys, credits and investments to be placed on the tax list and duplicate for taxation, or the value thereof, and said board may compel the attendance of said persons in the manner provided in said section.

Section 44 of the act (Sec. 5597, G. C.) makes it the duty of the board of revision to hear complaints relating to the assessment of both real and personal property laid before it by the county auditor and to investigate all such complaints, and authorizes said board to increase or decrease any valuation or correct any assessment complained of, or it may order a reassessment by the original assessing officer.

I observe that your ninth question is divisible into two parts; the first part of said question relates to the function of the county board of revision at its June session to equalize valuations of property, and the second part of said question relates to the function of said board at its August session to revise valuations of property on complaint.

Under provision of section 51, which provides for the equalization of property, the county auditor is required to lay before the county board of revision "the statements and returns of property received by him for the current year," and the county board of revision is required to proceed "to examine and revise the statements and returns of all property, both real and personal."

It seems clear that under the provisions of said section 51 of the act the county board of revision at its June session is limited to the values listed on the returns filed with said board by the county auditor, especially in view of the last sentence of the section which states that the county auditor shall not make up his tax list and duplicate "until the board of revision has completed its work

* * * and has returned to the auditor all the statements and returns laid before it with the revisions and corrections *thereof*, as made by it."

While section 45 of the act provides that the county board of revision shall have power to investigate all assessments on the tax list with respect to the amount of property listed as well as with respect to the valuation at which the same is listed, by the further provision of said section the power of the board referred to in the first part of said section only extends to "cases in which real or personal property has been assessed for taxation for the *current year*."

It is evident that the authority of the county board of revision conferred by the provisions of section 45 of the act may only be exercised by said board in the performance of its duties under section 44 of the act for the reason that under provision of the latter part of section 51, the tax list for the current year is not made up by the county auditor until after the county board of revision has completed its work under said section and has returned to the auditor the statements and returns laid before it with the revisions and corrections thereof as made by it.

I am compelled to conclude therefore in answer to the first part of your ninth question that the county board of revision, in the performance of its duties under section 51 of the act, at its June session in any year is limited in its consideration of valuations of real property to the statements and returns for such year as placed before it by the county auditor in compliance with section 51 of the act, and that said board may not increase or decrease valuations of real estate which has not been appraised during said year.

Under provision of section 52 of the act complaints may be filed with the county auditor as secretary of the county board of revision, against any valuation or assessment on the tax list as placed before said board of revision by the county auditor, at the August session of said board, and section 44 of the act makes it the duty of said board to hear said complaints and investigate the same, and it may increase or decrease any valuation or correct any assessment complained of, or it may order a reassessment by the original assessing officer.

It will be observed that the jurisdiction of said county board of revision at its August session is determined by the filing of a complaint, and the complaint may be made as to any assessment on the tax list.

Section 56 of the act (Sec. 2583, G. C.) provides that:

> "On or before the first Monday of July, annually, the county auditor shall compile and make up, in tabular form and alphabetical order, separate lists of the names of the several persons, companies, firms, partnerships, associations and corporations in whose names real or personal property has been listed in each township, city, village, special district or separate school district in his county, placing separately, in appropriate columns opposite each name, the description of each tract, lot or parcel of real estate, the value of each tract, lot or parcel and the value of the improvements thereon, if any, and in a separate list the aggregate value of the personal property as listed therein and revised by him, or the county board of revision, as the case may be, and the number of dogs and the value, if given by the owner."

Said section further provides that:

> "If the name of the owner of any tract, lot or parcel of real estate or of any item of personal property is unknown, the word 'unknown'

shall be entered in the column of names opposite said tract, lot, parcel, or item. Such lists shall be prepared in duplicate. On or before the first Monday of September in each year, the county auditor shall correct such lists in accordance with the additions and deductions ordered by the tax commission of Ohio and by the county board of revision, and shall certify and on the first day of October deliver one copy thereof to the county treasurer. The copies prepared by the county auditor *shall constitute the auditor's tax list* and treasurer's duplicate of real and personal property for the current year. In making up such tax lists, the county auditor may place each town lot in its numerical order, and each separate parcel of land in each township according to the numerical order of the section."

Under the above provisions of section 56 of the act, the old appraisement must necessarily become the tax list assessment for all real property which has not been assessed under section 55 of the act, or which has not been reassessed under provision of said section 55 of the act or by direction of the tax commission under provisions of sections 79 and 80 of the act, and said valuations, being on the tax list for the current year, become the subject of complaint under provision of section 52 of the act.

I am of the opinion therefore in answer to the second part of your ninth question that the county board of revision may increase or decrease any valuation or correct any assessment complained of regardless of whether an appraisement of all such property has been made for the current year under provision of section 55 of the act.

Your tenth inquiry is as follows:

"Does the power of the board conferred by sections 43 and 45, extend to the increase or decrease of the valuation of real or personal property, and also to the listing of any such property omitted? If so, may this be done without notice to the parties?"

I have already held in answer to the first part of your ninth question that the powers of the county board of revision under provision of section 45 of the act may only be exercised by said board in the performance of its duties under section 44 of the act, and that the county board of revision, acting as a board of equalization, at its June session, is limited in its consideration of valuations of real property to the statements and returns for the current year as placed before it by the county auditor in compliance with the requirements of section 51 of the act, and may not at said session increase or decrease valuations of real estate which has not been appraised in said year.

It follows therefore that in increasing or decreasing the valuations of real property, said board, in the exercise of the powers conferred upon it by the provisions of said section 43 of the act is limited to the investigations which it may make under said section 51 of the act.

I am of the opinion, however, that said powers may be exercised by said board in connection with the discharge of its duties under that part of said section 51 which provides that:

"If the board finds any statement or return of personal property to be erroneous, either in the amount of property, moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, listed in the name of

any person, company, firm, partnership, association or corporation, or in the valuation of any item or items thereof, it shall correct such statement or return, by listing thereon any omitted property and giving to it, as well as to any property that has been listed therein but which has been incorrectly valued, the true value in money thereof, and by omitting therefrom property improperly listed thereon."

Said powers may also be exercised by said board in the performance of its duties under provisions of sections 44 and 52 of the act.

The only notice of changes in valuations, made by said county board of revision acting as a board of equalization at its June session, required to be given is that provided for in sections 58 and 59 of the act (sections 5606 and 5607, G. C.)

Section 58 provides:

"When the board of revision has completed its work of equalization and has transmitted the statements and returns to him, the county auditor shall give notice, by advertisement in two newspapers, of opposite politics, published in and of general circulation throughout the county, that the tax statements and returns for the current year have been revised and the valuations completed and are open for public inspection in his office, and that complaints against any valuation or assessment, except the valuations fixed and assessments made by the tax commission of Ohio, will be heard by the county board of revision, stating in the notice the time and place of the meeting of such board. Such advertisements shall be inserted in a conspicuous place in each such newspaper and be published daily for ten days unless there be no daily newspaper published in and of general circulation throughout such county, in which event such advertisement shall be so published once each week for two weeks. The county auditor shall, upon request, furnish to any person a certificate setting forth the assessment and valuation of any tract, lot or parcel of real estate or any specific personal property, and mail the same, when requested to do so, upon receipt of sufficient postage."

Section 59 provides:

"On or before the 15th day of July, annually, the county auditor shall cause to be printed a list showing all changes made in the assessment of any tract, lot or parcel of real estate or improvement thereon or minerals or mineral rights therein, and shall cause a copy of such list to be mailed to each owner whose assessment has been changed, if known, and if not, then to his agent, if known."

Before said county board of revision in the exercise of the powers conferred upon it by sections 43 and 45 of the act, in connection with the exercise of the powers conferred upon it and the discharge of the duty placed upon it by provision of section 44 of the act, can increase any valuation complained of, notice must be given as required by provision of section 46 of the act, as above quoted.

Valuations complained of may be decreased only upon written application under oath of the party affected thereby, or his agent, as provided in section 47 of the act, as above set forth.

Your eleventh question is as follows:

"Are the powers of the board at its August session confined to the hearing of complaints only?"

In view of the provisions of section 51 of the act and especially the provision of the latter part of said section, taken in connection with the provisions of section 52 of the act, it seems clear that while section 51 gives the county board of revision power to correct the amounts of valuations of any of the listings for the current year, and also gives it power to make any investigation in regard to said listings, it does not give to said board any authority to hear any complaints of said listings until after they have been revised and corrected by said board and have been returned to the county auditor to be thereafter reviewed upon complaint. It seems equally clear that at the August session the work of the county board of revision is confined to a review upon complaint of any valuation or assessment on the tax list for the current year, as returned to the county auditor by said county board of revision after its work of equalization has been completed at its June session. I am of the opinion, therefore, that your eleventh question must be answered in the affirmative.

Your twelfth question is as follows:

"May the power vested in the board by sections 43 and 45 be exercised at the June session, or at the August session of the board, or both?"

This question has been answered in determining the answer to your ninth and tenth questions.

Your thirteenth inquiry is as follows:

"Has the county auditor the same power, and if so, may it be exercised before the completion of the tax list as well as thereafter, and without notice?"

Inasmuch as I have already held in answer to your fourth question that no provision of the act under consideration vests in the county auditor, as the chief supervising, assessing officer of the county, any authority to originate or to change valuations of real estate listed and returned to him by the local assessors or assistant assessors, as the case may be, and that the only authority in said county auditor to originate or to change the valuations of personal property is found in the provisions of sections 5388, 5400 and 5401, G. C., it follows that the authority of said county auditor, referred to in section 56 of the act (Sec. 2583, G. C.), to revise lists of personal property, must be determined by reference to said sections of the General Code.

Section 5401, G. C., provides in part as follows:

"The county auditor, if he shall have reason to believe, or is informed that a person has in the year ninteen hundred and eleven or in any year thereafter, given to the assessor a false statement of the personal property, moneys, or credits, investments in bonds, stocks, joint stock companies, or otherwise, that the assessor has not returned the full amount required to be listed in his ward or township, or has omitted or made an erroneous return of property, moneys, or credits, investments in bonds, stocks, joint stock companies, or otherwise, which are by law subject to taxation,

shall proceed, in said year nineteen hundred and eleven or in any year thereafter at any time before the final settlement with the county treasurer to correct the return of the assessor, and charge such persons on the duplicate with the proper amount of taxes. To enable him so to do, he may issue compulsory process, and require the attendance of any persons whom he thinks have knowledge of the articles, or value of the personal property, money or credits, investment in bonds, stocks, joint stock companies, or otherwise, and examine such persons, on oath, in relation to such statement or return. The auditor, in all such cases, shall notify every such person, before making the entry on the tax list and duplicate, that he may have an opportunity of showing that his statement or the return of the assessor was correct."

It will be observed that the powers conferred by this section upon the county auditor are practically the same as those conferred upon the county board of revision by section 43 of the act.

Replying to your thirteenth question I am of the opinion that the powers conferred upon the county auditor by provision of section 5401, G. C., may be exercised before the completion of the tax list as well as thereafter, and that the only notice required to be given in connection with the exercise of such powers is that provided for in said section.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

P. S. The tax commission of Ohio should *formally* decide the questions considered in conformity with this opinion of the attorney-general.

1174.

FINES IMPOSED BY COMMON PLEAS AND PROBATE COURTS FOR VIOLATIONS OF ANY LOCAL OPTION LAWS SHOULD BE PAID INTO COUNTY TREASURY—WHEN PART OF SUCH FINES ARE TO BE TURNED OVER TO LAW LIBRARY ASSOCIATIONS.

Fines imposed by common pleas and probate courts of any county for violations of local option laws and which under section 13247, *G. C., are to be paid into the county treasury, are subject to the provisions of section* 3056, *G. C., and such fines, or such part thereof as may be necessary to bring the payments to the law library association for any year up to* $500 *should be turned over to said association.*

COLUMBUS, OHIO, January 15, 1916.

HON. G. O. MCGONAGLE, *Prosecuting Attorney, McConnelsville, Ohio.*

DEAR SIR:—Your letter of January 1, 1916, requesting my opinion, received, and is as follows:

"Our clerk of courts has collected and now has in his hands, a fine of $200.00 assessed against a defendant by our common pleas court, under an indictment for a violation of the Beal municipal local option law in force here.

"We have a law library association organized under G. C. 3054, et seq., that is claiming this fine under provision in G. C., 3056, latter part of section, the association not having received funds reaching the $500 limit.

"G. C., 13247, directs this fine to the county treasury.

"The question, therefore, arises as to which section shall control."

Your question involves a consideration of sections 12378, 13247 and 3056, G. C. Section 12378, G. C., is a general statute regulating the disposition of fines and provides as follows:

"Unless otherwise required by law, an officer who collects a fine, shall pay it into the treasury of the county in which such fine was assessed. to the credit of the county general fund within twenty days after the receipt thereof, take the treasurer's duplicate receipts therefor and forthwith deposit one of them with the county auditor."

This is an old statute and has been in force in its present form since the revision of 1880. This general provision is subject to exceptions contained in a number of special statutes on the same subject, among them being the following provision of the Beal municipal local option law, 95 O. L., page 90:

"Money received from fines and forfeited bonds collected under the provisions of this act shall be paid into the treasury of the municipal corporation wherein said fine was imposed or bond forfeited, and shall be applied to such fund or funds as the council of the said corporation may direct."

A similar provision was contained in the Jones district local opinion law, 98 O. L., page 68.

In the case of Mt. Vernon v. Mochwart, 75 O. S., 529, the court had under consideration the question of the disposition of fines imposed by a common pleas court under the Beal municipal local option law. The court held that by reason of the fact that it was impossible to determine to what municipality such fines should be paid the provision of the Beal law above quoted did not apply to such fines and that they should be paid into the county treasury under the provisions of section 6802, R. S., now section 12378, G. C., supra.

Following this decision, and in all probability as a result thereof, the legislature in 99 O. L., page 475, apparently attempted to provide that fines imposed by common pleas and probate courts for a violation of any local option law should be turned into the county treasury. Whether the act in question was effective for the purpose or not is immaterial for this result was undoubtedly accomplished by the codification of 1910 when section 13247 assumed its present form. This section provides as follows:

"Fines and forfeited bonds collected under this subdivision of this chapter, except as provided in section thirteen thousand two hundred and thirty-one, if enforced in the county court, small be paid into the county treasury, and, if enforced in municipal courts, shall be paid into the treasury of the municipal corporation in which the cause was tried. Such funds paid into the treasury of the municipal corporation shall be applied as the council thereof may direct."

At the very latest this section was effective February 5, 1910, when the General Code was adopted by the general assembly.

It should be noted that the purpose of section 13247, supra, was merely to remove the special provision theretofore existing with reference to local option fines insofar as common pleas and probate courts were concerned and permit them to be covered into the county treasury in the same manner as other fines under the provisions of section 12378, G. C., supra, so that section 13247, G. C., supra, while it may be said to be a special statute directing the disposition of fines in local option cases imposed by municipal courts, is not a special statute with reference to fines imposed by common pleas and probate courts, the effect of it being merely to remove the special direction theretofore existing and provide that such fines should be paid into the county treasury as other fines.

With this in view we come to a consideration of section 3056, G. C., and its effect upon the foregoing statutes. Section 3056, G. C., provides as follows:

> "All fines and penalties assessed and collected by the police court for offenses and misdemeanors prosecuted in the name of the state, except a portion thereof equal to the compensation allowed by the county commissioners to the judges, clerk and prosecuting attorney of such court in state cases shall be retained by the clerk and be paid by him quarterly to the trustees of such law library associations, but the sum so retained and paid by the clerk of said police court to the trustees of such law library association shall in no quarter be less than 15 per cent of the fines and penalties collected in that quarter without deducting the amount of the allowances of the county commissioners to said judges, clerk and prosecutor. In all counties the fines and penalties assessed and collected by the common pleas court and probate court for offenses and misdemeanors prosecuted in the name of the state, shall be retained and paid quarterly by the clerk of such courts to the trustees of such library association, but the sum so paid from the fines and penalties assessed and collected by the common pleas and probate courts shall not exceed five hundred per annum. The moneys so paid shall be expended in the purchase of law books and the maintenance of such association."

This section had been in existence for many years as to fines imposed by police courts, but the provision thereof as to fines imposed by common pleas and probate courts was placed therein by amendment in 94 O. L., 295, which act became effective May 18, 1910, subsequent to both of the sections heretofore quoted. This is a general provision and modifies section 12378, G. C., supra, to the extent that fines which, under its terms were to be covered into the county treasury, must now be turned over to the law library association until the same amount in any year to five hundred dollars. This general provision, however, would not operate to modify any special provisions as to the disposition of any designated class of fines. Section 13247, G. C., supra, in so far as it applies to fines imposed by police courts in local option cases, is such a special provision and is therefore not modified by section 3056, G. C. The portion of section 13247, G. C., however, which applies to fines imposed by common pleas and probate courts is not, as has been shown above, a special provision and that portion of the section is modified by section 3056, G. C., supra, to the same extent as section 12378, G. C.

I am therefore of the opinion that the fine imposed by your common pleas court under an indictment for a violation of the Beal municipal local option law is subject to the provisions of section 3056, G. C., and the same, or such part thereof as is necessary to bring the payments to the library association up to five hundred dollars, should be turned over to said association.

In reaching the foregoing conclusion I have read and considered the opinions

of former Attorney-General U. G. Denman, found in the annual report of the attorney-general for the year 1910, part II, page 784, with which I agree, and former Attorney-General Timothy S. Hogan, found in the annual report of the attorney-general for the year 1913, part II, page 1103, with which I am unable to agree.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1175.

PROSECUTING ATTORNEY—"FURTHERANCE OF JUSTICE FUND"—BIDS FOR DEPOSIT OF FUND NOT REQUIRED—PROSECUTOR'S BOND IS COUNTY'S SECURITY.

The county's security for any money drawn, as well as for any money expended by the prosecuting attorney, is the bond specially required by section 3004, G. C. Security for deposit of any of this fund when drawn out of the treasury and placed in a bank is a matter personal to the prosecuting attorney alone.

COLUMBUS, OHIO, January 15, 1916.

HON. JOHN V. CAMPBELL, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—I am in receipt of your request for an opinion under date of January 10, 1916, reading as follows:

> "During my incumbency and during that of my predecessor the county prosecutor's fund has been deposited in a Cincinnati bank which pays us 3 per cent interest on our average balances, which interest was of course credited to the fund. It was my memory that the last legislature passed an act providing that any funds in the hands of a public officer might be deposited as the funds in the hands of the county treasurer may be. The only act I find on the subject is an amendment to Sec. 744-12, General Code, 105-106 O. L., page 505. I wish you would advise whether, in your opinion, the county prosecutor's fund is within the intendment of this act and whether bids should be received and security taken for the deposit. The prosecutors of this county have not exacted security for the deposits made by them and were, of course, personally liable for any default on the part of the bank."

I am clearly of the opinion that section 744-12, G. C., as amended (106 O. L., page 505), has no application to the "furtherance of justice fund" drawn from the county treasuries by prosecuting attorneys under section 3004.

Section 3004, G. C., does not require or contemplate that the full amount of the allowance be drawn from the public treasury at one time by the prosecuting attorney. Neither does said section prevent the prosecuting attorney from leaving all of the funds in the county treasury and paying them out upon voucher to the county auditor for warrant upon the county treasury as the expenses are incurred.

The county's security for any money drawn, as well as for any money expended by the prosecuting attorney, is the bond specially required by section 3004. The question of whether or not the prosecuting attorney shall take security for

the deposit of any of this fund when he draws it out of the treasury and places it in a bank is a matter personal to the prosecuting attorney alone. If the prosecuting attorney is allowed interest upon the deposit by a bank, the course you have pursued in crediting the interest to the fund is proper.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1176.

CASS HIGHWAY LAW—ROADS AND HIGHWAYS—NO AUTHORITY TO ASSESS AGAINST ABUTTING PROPERTY OWNERS ANY PORTION OF COST IN EXCESS OF TEN PER CENT, EXCLUSIVE OF BRIDGES AND CULVERTS—SEE OPINION NO. 1148, JANUARY 5, 1916, OPINIONS OF ATTORNEY GENERAL FOR 1915.

Where a highway is constructed, reconstructed or improved and the work is carried on by the state highway department, there is no authority to assess against the abutting property owners any portion of the cost in excess of ten per cent thereof, exclusive of bridges and culverts.

COLUMBUS, OHIO, January 17, 1916.

HON. C. H. CURTISS, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR:—I have your communication of January 12, 1916, in which you inquire as follows:

> "Under the Cass law what is your ruling under state aid construction on the question as to whether abutting property owners can be assessed in excess of ten per cent of the cost of the improvement exclusive of bridges and culverts?"

The exact question submitted by you has not been passed upon by this department, but the general subject of assessments on work carried forward by the state highway department was dealt with in opinion No. 1148, rendered by me to Hon. Clinton Cowen, state highway commissioner, on January 5, 1916, a copy of which opinion I enclose for your consideration.

It was held in that opinion that as to any work in the nature of construction, reconstruction or improvement carried on by the state highway department, ten per cent of the cost thereof must be assessed against the owners of the abutting property, but that so long as work carried on by the state highway department may be properly classified as a maintenance or repair operation, there is no authority to assess any part of the cost thereof against the owners of the abutting property. In the opinion referred to above you will find a reference to all of the sections of the Cass highway law referring to the matter of assessments where the work is carried on by the state highway department. All of these sections which relate to the amount of the assessment provide for an assessment of ten per cent of the cost, and I do not find that any authority has been conferred upon the state highway department, the county commissioners or the township trustees to either increase or diminish the amount of this assessment.

I advise you, therefore, in answer to your inquiry, that where a highway is constructed, reconstructed or improved and the work is carried on by the state

highway department, there is no authority to assess against the abutting property owners any portion of the cost in excess of ten per cent thereof, exclusive of bridges and culverts.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1177.

BROTHERHOOD OF ALL RAILWAY EMPLOYES, FOREIGN FRATERNAL BENEFIT ASSOCIATION, CANNOT BE LICENSED TO DO BUSINESS IN OHIO—ITS CHARTER AUTHORIZES PAYMENT OF DEATH BENEFITS ONLY IN EVENT OF DEATH RESULTING FROM *ACCIDENTS*—SUCH PROVISION DOES NOT MEET REQUIREMENTS OF GENERAL CODE OF OHIO.

Brotherhood of all railway employes, a foreign fraternal benefit association incorporated under the laws of the state of Illinois, which is authorized by its charter to pay death benefits only in event of death from accidental causes and which cannot therefore meet the requirements of the Ohio fraternal benefit act relative to annually reporting a valuation of its death certificates equal to or higher than the national fraternal congress table of mortality of 1899, cannot be licensed by the superintendent of insurance to do business in Ohio under the Ohio fraternal benefit act.

COLUMBUS, OHIO, January 17, 1916.

HON. FRANK TAGGART, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—I have your letter of December 29, 1915, in which you request my opinion as follows:

> "The brotherhood of all railway employes is a fraternal benefit association duly incorporated under the laws of the state of Illinois, and duly licensed. By its articles of incorporation, it is empowered 'to provide and maintain by means of dues and assessments, or either of them, from its members, a benefit fund from which shall be paid to its members in the event of bodily injury, disablement or *death resulting from accident,* to his then designated beneficiary or beneficiaries who shall be of the relationship provided by the laws of this state, and is now or that may hereafter be provided in and by the constitution and laws.'
>
> "This association, by its application and certificates of membership, provides for the payment of *death benefits resulting from accidental death.* This association has filed its application for admission to write this class of insurance in the state of Ohio, and had complied, or offered to comply, with all the provisions of section 9477, paragraph 16, of the General Code of Ohio, in that it has filed with the superintendent of insurance a duly certified copy of its charter, or articles of association, a copy of its constitution and laws certified by the secretary or corresponding officer, a power of attorney to the superintendent as provided in this law, a statement of its business under oath of its president and secretary, or corresponding officer, in the form required by the superintendent of insurance, a certificate from the proper officials of the state of Illinois that the society is legally organized, and copies of its contracts which show that

benefits are provided for by periodical, or other payments, by persons holding its contracts.

"Its charter, however, and its constitution and by-laws, simply provide for *death benefits resulting from accident,* and do not provide for the payment of *death benefits generally.* Section 9477 provides that any foreign society desiring admission to this state 'shall have the qualifications required of domestic societies organized under this act, and have its assets invested as required by the laws of the state, territory, district, country or province where it is organized.'

"Section 9466 provides that 'every society transacting business under this act, shall provide for the *payment of death benefits.*'

"Section 9484 of the General Code requires a valuation of the certificates of associations of this kind, the legal minimum standard valuation of which shall be the national fraternal congress table of mortality as adopted by the national fraternal congress April 23, 1899, or, at the option of the society, any higher table. As this table of mortality is only adapted to the valuation of certificates providing for death benefits generally, and not for death by accident, I am desirous of knowing whether I am entitled to admit this association to transact business in this state unless it shall by its constitution and by-laws provide for the payment of death benefits generally and not limit to death benefits from accidental causes.

"Your instruction and advice in this regard are respectfully requested."

Upon an examination of certificate-of-membership forms A and B, which you have since submitted to me, I find that in addition to paying benefits to its members in event of bodily injury, disablement or death resulting from accident, as recited in your letter, the brotherhood of all railway employes also contracts to pay benefits to its members in case of disability resulting from illness. It does not, however, offer to pay death benefits in event of death from sickness or from any cause other than accident.

Section 9466 of the General Code, referred to in your letter, and which is a part of the fraternal benefit act, provides, in part, as follows:

> "Every society, transacting business under this act *shall provide for the payment of death benefits,* and *may* provide for the payment of benefits in case of temporary or permanent physical disability, either as a result of disease, accident or old age; provided, etc. * * *"

If the above quoted language stood alone, unqualified and unrestricted by the provisions of other sections of the act, I would have little difficulty in concluding that the brotherhood of all railway employes should be licensed and admitted to do business in Ohio because it does in its certificate "provide for the payment of death benefits," although within a limited scope only.

There are other provisions and requirements of the act, however, which indicate a general legislative purpose and intent to require all fraternal benefit societies to provide for the payment of death benefits generally, and not to permit such societies to issue certificates calling for the payment of death benefits only in case death should result from limited causes. In other words, it is apparent from an examination of the entire act that the powers and privileges created and conferred by the act were intended to apply to and govern only such societies as issue certificates providing for the payment of death claims generally, i. e., claims arising from death caused by both sickness and accident.

Section 9477 of the General Code, relative to licensing of foreign fraternal societies provides, in part, as follows:

"* * * any foreign society desiring admission to this state shall have the qualifications required of domestic societies organized under this act and have its assets invested as required by the laws of the state, territory, district, country or province where it is organized. For each such license or renewal the society shall pay the superintendent twenty-five dollars. When the superintendent refuses to license any society or revokes its authority to do business in this state he shall reduce his ruling, order or decision to writing and file the same in his office, and shall furnish a copy thereof, together with a statement of his reasons, to the officers of the society, upon request, and the act of the superintendent shall be reviewable by proper proceedings in any court of competent jurisdiction within the state * * *"

From the above quoted provisions it follows that every foreign society admitted to do business in this state must have the same qualifications as required of domestic societies organized under the Ohio act. Section 9470 of the General Code, in part, is as follows:

"* * * The funds from which benefits shall be paid and the funds from which the expenses of the society shall be defrayed, shall be derived from periodical or other payments by the members of the society and accretions of such funds; provided, that no society, domestic or foreign, shall hereafter be incorporated or admitted to transact business in this state, which does not provide for stated periodical contributions sufficient to provide for meeting the mortuary obligations contracted, when valued upon the basis of the national fraternal congress table of mortality as adopted by the national fraternal congress, August 23, 1899, or any higher standard, with interest assumption not more than four per cent per annum, nor write or accept members for temporary or permanent disability benefits except upon tables based upon reliable experience, with an interest assumption not higher than four per cent per annum."

Section 9473 of the General Code, relative to the incorporation of domestic fraternal benefit associations and prescribing certain other qualifications, contains the following language (quoting from paragraph 6):

"* * * * but no such society shall incur any liability other than for such advance payments nor issue any benefit certificate nor pay nor allow or promise to pay or allow, to any person any death or disability benefits until * * * there has been submitted to the superintendent of insurance under oath of the president and secretary or corresponding officers of such society, a list of such applicants, giving their names, addresses, date examined, date approved, date initiated, name and number of the subordinate branch of which each applicant is a member, amount of benefits to be granted, rate of stated periodical contributions, which shall be sufficient to provide for meeting the mortuary obligation, contracted, when valued for death benefits upon the basis of the national fraternal congress table of mortality, as adopted by the national fraternal congress August 23, 1899, or any higher standard at the option of the society, and for disability benefits by tables based upon reliable experience and for combined death and permanent total disability benefits by tables based upon reliable experience, with an interest assumption not higher than four per cent per annum. * * *"

Section 9484 of the General Code provides, in part as follows (quoting from paragraph 2):

> "* * * In addition to the annual report herein required, each society shall annually report to the superintendent a valuation of its certificates in force on December 31, last preceding; * * *
>
> "Such valuation shall be certified by a competent accountant or actuary, or, at the request and expense of the society, verified by the actuary of the department of insurance of the home state of the society, and shall be filed with the superintendent within ninety days after the submission of the last preceding annual report. The legal minimum standard of valuation for all certificates, except for disability benefits, shall be the national fraternal congress table of mortality, as adopted by the national fraternal congress April 23, 1899, or, at the option of the society, any higher table; or, at its option, it may use a table based upon the society's own experience of at least twenty years and covering not less than one hundred thousand lives with interest assumption not more than four per centum per annum * * *"

From the language above quoted from the several sections of the Ohio act it is clear that foreign as well as domestic corporations, excepting such as come within the exempting language of the fourth paragraph of section 9491, G. C., must annually report to the superintendent of insurance a valuation of its certificates in force on December 31, preceding such report, with certain enumerated exceptions.

The brotherhood of all railway employes cannot avoid the necessity of reporting a valuation of its policies under the provisions of said paragraph four of section 9491, G. C., referred to, because the exception therein in that respect is specifically limited to "any fraternal benefit society heretofore organized and incorporated and operating * * *" Section 9491, G. C., is a part of the fraternal benefit act passed May 31, 1911, 102 O. L., 533, whereas the brotherhood of all railway employes was not organized, incorporated or in operation until subsequent to that date.

The General Code adopts as the standard of valuation for all such certificates required to be valued the table of mortality as adopted by the national fraternal congress of August 23, 1899, or, at the option of the society making the valuation, any higher table, or it may use a table based upon the society's own experience of at least twenty years and covering not less than one hundred thousand lives with interest assumption of not less than four per centum per annum.

From the facts stated in your letter and other documents submitted, it appears that the brotherhood of all railway employes has not been in existence for twenty years. Therefore, it cannot avail itself of the latter of the three enumerated methods of valuation. It must necessarily then use the table of mortality as adopted by the national fraternal congress of August 23, 1899, or any higher table.

I am informed that the table of mortality of the national fraternal congress referred to was based and computed upon statistics of deaths resulting from sickness as well as from accident, and that there was no table adopted by this congress computed upon statistics of death resulting from accidents only. It follows, therefore, that it would be practically impossible for the brotherhood of all railway employes to remain in competitive business and value its certificates in accordance with the method and standard required by the Code. Since all death certificates must be valued and the standard of valuation adopted and required by the legislature deals solely with general death certificates, it must be concluded

that the legislative intent was to make the act applicable only to societies issuing general death certificates.

I am, therefore, of the opinion that the brotherhood of all railway employes cannot be licensed to do business in Ohio under the provisions of the fraternal benefit act.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1178.

MUNICIPAL COURT OF COLUMBUS, OHIO—PERSONS CONVICTED IN SAID COURT FOR VIOLATION OF SECTION 12758, G. C., SHOULD BE REQUIRED TO PAY ALL NECESSARY COSTS OF ANALYSIS AND INSPECTION AS PROVIDED IN SECTION 12759, G. C.

Persons convicted in the municipal court of Columbus, Ohio, of a violation of section 12758, G. C., should be required to pay all necessary costs of anaylsis and inspection, as provided in section 12759, G. C.

COLUMBUS, OHIO, January 17, 1916.

Board of Agriculture, Dairy and Food Division, Columbus, Ohio.

GENTLEMEN:—Your letter of January 14, 1916, asking my opinion as to whether in prosecutions in the municipal court of Columbus, Ohio, for violations of section 12758, G. C., the defendant is required to pay the cost and expense of inspection and analysis, received.

Section 12758, G. C., provides as follows:

"Whoever manufacturers for sale, offers for sale or sells a drug, article of food, or flavoring extract which is adulterated or misbranded as the terms 'drugs,' 'food,' 'flavoring extract,' 'adulterated' and 'misbranded' are defined and described by law, or manufacturers, offers or exposes for sale or delivers a drug or article of food and fails, upon demand and tender of its value, to furnish a sample thereof for analysis, shall be fined not less than twenty-five dollars nor more than one hundred dollars, and, for each subsequent offense, shall be fined not less than one hundred dollars nor more than two hundred dollars or imprisoned in the county jail not less than thirty days nor more than one hundred days, or both."

Section 12759, G. C., provides as follows:

"A person found guilty of manufacturing, offering for sale or selling an adulterated article of food or drug, as described in the next preceding section, shall pay all necessary costs and expenses incurred in inspecting and analyzing such adulterated article."

Section 13423, G. C., 103 O. L., 539, provides in part as follows:

"Justices of the peace, police judges and mayors of cities and villages shall have jurisdiction, within their respective counties, in all cases of violation of any law relating to:

"1. The adulteration or deception in the sale of dairy products and other food, drink, drugs and medicines."

Section 1558-54, G. C., 106 O. L., page 367 (part of the Columbus municipal court act), provides in part as follows:

"The municipal court shall have and exercise all jurisdiction now conferred by law or which may hereafter be given to police courts."

The municipal court of Columbus having been given jurisdiction in prosecutions for violations of section 12758, G. C., supra, the provisions of section 12759, G. C., supra, apply to convictions in such cases in said court in the same manner as to other courts.

I am, therefore, of the opinion that a person found guilty in the municipal court of Columbus of manufacturing, offering for sale or selling adulterated articles of food or drink, should be required to pay all necessary costs and expenses incurred in inspecting and analyzing such adulterated article.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1179.

BANKS AND BANKING—DEPOSITORY OF COUNTY FUNDS—MAY DESIGNATE ANOTHER BANK OR TRUST COMPANY AS ITS AGENT—ORIGINAL DEPOSITORY AND ITS SURETY STILL RESPONSIBLE FOR SAFE KEEPING OF SUCH FUNDS.

A lawfully designated depository of county funds may, with the consent of its surety, designate another bank or trust company as its duly authorized agent to receive the deposit of such funds from time to time as the same may be made by the treasurer of such county, if at the same time it authorizes the commissioners of said county to direct said county treasurer to deposit funds of said county, according to the terms of its contract, with said bank or trust company as its duly authorized agent, and said depository and its surety will still be responsible for the safe keeping and repayment of the funds so deposited by said county treasurer, it being understood that said arrangement will be made with the consent of said surety company.

COLUMBUS, OHIO, January 17, 1916.

HON. CHARLES F. ADAMS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—In your letter under date of December 24th, you request my opinion as follows:

"We desire your opinion on the matter of depositories of county funds as it concerns one of the local banks which was designated as one of the county depositories. Bids were asked and received for the county funds in the usual manner, one of the bidders being the Lorain County Banking Company. Recently The Lorain County Savings & Trust Company was incorporated under the laws of this state and purchased, or took over, the assets of the Lorain County Banking Company. In effect the stockholders of the Lorain County Banking Company intend simply to acquire addi-

tional authority which that company did not possess, but the two corporations are still in existence. The charter of the Lorain County Banking Company will, we understand, not be surrendered for some time owing to matters which cannot be settled at once.

"The new company acquired the lease, furniture, deposits, etc., and proceeded with, we believe, the same or practically the same board of directors and officers. When the Lorain Banking Company's bid was accepted and its bond approved, the bond provided for the safe keeping, re-payment, etc., of the funds to be deposited by the county treasurer with that company and not with its successors or assigns. No occasion arose for the question as to the deposit under this bid and bond until the new company took over the business of the old company. No new bond has been given to guarantee the deposits which might be made with the new company, nor has the new company been named as an emergency depository under the statutes.

"We have advised the county treasurer that if deposits were made with The Lorain County Savings & Trust Company we had no bond securing such deposits, nor in fact did he have any authority to so deposit under the bid and bond of the Lorain County Banking Company. The query which confronts us under the foregoing circumstances is do we have to deposit with the old company whose bid was accepted and who gave the bond required by law, and which corporation still exists, or do the circumstances above related require the commissioners to treat this condition as nullifying the further contract to deposit and re-advertise for bids under the statute?"

The commissioners of Lorain county, acting under authority and in compliance with the requirements of the statutes governing the designation of depositories for the funds of said county, having designated the Lorain County Banking Company as one of the depositories for said funds, and having accepted the bond offered by said company in compliance with the requirements of sections 2722 et seq., of the General Code, it follows that under provision of section 2729, G. C., said the Lorain County Banking Company became a depository for such part of said funds as was awarded to said company by said county commissioners for a term of three years from the date of the acceptance of said undertaking.

By the aforesaid designation of the Lorain County Banking Company, the giving of the bond by said company and the acceptance of the same by the commissioners of Lorain county, a contract was effected between said county commissioners and said the Lorain County Banking Company for a term of three years from the date of the acceptance of said bond and the county treasurer, by virtue of the terms of said contract and of the written notice from said county commissioners, issued to him in compliance with the requirements of section 2736, G. C., as amended in 103 O. L., 562, advising him of the selection of said the Lorain County Banking Company as an active or as an inactive depository of a part of the funds of Lorain county, has the right to deposit funds of said county in said depository as provided in said section 2736, G. C., and in a sum not to exceed the amount awarded to said depository by said county commissioners for the aforesaid term of three years, or until the undertaking of its successor, designated in the manner provided by law, has been accepted by said county commissioners.

The rights of said county commissioners under the aforesaid contract are in no way affected by the taking over of the assets and place of business of the Lorain county Banking Company by The Lorain County Savings and Trust Com-

pany, and the Lorain County Banking Company and its surety will be responsible for the safe keeping and re-payment of the money deposited with said company by the treasurer of said county, according to the terms of said contract. The county treasurer has no authority under said contract to deposit money with The Lorain County Savings and Trust Company, and any deposit made with said company would be in violation of the statutes governing the deposit of county funds.

While the aforesaid contract has many of the characteristics of an ordinary contract, and it may be argued that the Lorain County Banking Company has the right to assign said contract to The Lorain County Savings and Trust Company, in view of the peculiar relation existing between your county commissioners and the Lorain County Banking Company as a depository of county funds, by virtue of the designation of said company as said depository by said county commissioners in compliance with all the requirements of the statutes governing such designation, I am of the opinion that the contract effected by said designation and by the acceptance by said county commissioners of the undertaking of said the Lorain County Banking Company, may not be assigned by said company to The Lorain County Savings and Trust Company.

Inasmuch, however, as it is the desire of the Lorain County Banking Company that The Lorain County Savings and Trust Company shall take over its place of business and its assets including the deposit of the public funds, I can see no objection to the Lorain County Banking Company with the consent of its surety designating The Lorain County Savings and Trust Company as its duly authorized agent to receive the deposits of county funds from time to time as the same shall be made by the county treasurer, and at the same time authorizing the commissioners of Lorain county to direct the county treasurer to deposit funds according to the terms of the aforesaid contract with said The Lorain County Savings and Trust Company, as the duly authorized agent of said the Lorain County Banking company. Such an arrangement would not violate any of the terms of said contract and the Lorain County Banking Company and its surety would still be responsible for the safe keeping and re-payment of the funds so deposited by the county treasurer, it being understood that said arrangement will be made with the consent of said surety company.

I am of the opinion, therefore, that such an arrangement may be effected and in this way the deposit of the county funds may be made according to the terms of said contract for the remainder of the three-year term.

This plan, of course, necessitates the continuing of the corporate existence of the Lorain County Banking Company until the expiration of said three-year term.

If, on the other hand, such an arrangement is not effected and the Lorain County Banking Company fails to provide for the receipt and safekeeping of that part of the county funds awarded to it according to the terms of its contract, then I am of the opinion that your county commissioners should at once provide for the deposit of said part of said funds in the manner prescribed by the statutes governing the designation of depositories for county funds.

If your county commissioners are compelled to provide a new depository because of the failure of the Lorain County Banking Company to perform its contract, said company and its surety will be responsible to said county commissioners for the safe keeping and re-payment of any funds deposited with it according to the terms of said contract until such time as the same shall be withdrawn by the county treasurer under the direction of said county commissioners, and will be liable for any loss occasioned by its default.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1180.

APPROVAL OF LEASE OF CERTAIN CANAL LANDS IN CITY OF AKRON TO MARTIN D. KUHLKE.

COLUMBUS, OHIO, January 17, 1916.

HON. FRANK R. FAUVER, *Superintend of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of January 4, 1916, transmitting to me for examination a lease of certain canal lands in the city of Akron to one Martin D. Kuhlke, the valuation of said lands being $11,000.00.

I find this lease to be in regular form and am, therefore, returning the same with my approval endorsed thereon. Respectfully,

EDWARD C. TURNER,
Attorney-General.

1181.

ARTICLES OF INCORPORATION OF THE ECONOMY MUTUAL CASUALTY COMPANY OF DAYTON, OHIO, APPROVED.

COLUMBUS, OHIO, January 18, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I herewith return the articles of incorporation of The Economy Mutual Casualty Company, of Dayton,Ohio, with my approval attached thereto.

I have some doubt as to the necessity of securing the approval of the attorney-general to articles of incorporation of a company organized under said section 9445 of the General Code, but to make sure of compliance with the statute I have done so.

Section 9341 of the General Code, requires the approval of the attorney-general to articles of incorporation of legal reserve life insurance companies. The company in question is, however, not a legal reserve life insurance company.

Section 9512 of the General Code, requires the approval of the attorney-general to articles of incorporation of a company formed for the purpose of insurance, other than life insurance. The broad language used in this section would indicate that it was the legislative intent to require the approval of the attorney-general to articles of incorporation of all insurance companies.

This same section, however, viz. 9512, provides further that,

> * * * "if such articles of incorporation be found by him to be in accordance with the provisions of this chapter, and not inconsistent with the constitution and laws of this state, and of the United States, he shall certify and deliver them back to the secretary."

This would seem to indicate that the section was only intended to apply to corporations organized under the chapter of which section 9512 is a part, and which is chapter 1, division III, subdivision II, title IX. Section 9445 of the General Code, however, under which this company is organized, is a part of chapter 3, division III, subdivision I, title IX, and it would obviously be impossible for the attorney-general to find that its articles of incorporation are in accordance with the provisions of chapter 1, division III, subdivision II, title IX.

Respectfully,

EDWARD C. TURNER,
Attorney-General.

1182.

ANSWERS TO SIXTEEN QUESTIONS IN REGARD TO OFFICERS AND MEMBERS OF THE GENERAL ASSEMBLY—ATTENDANCE AND MILEAGE OF MEMBERS—SALARIES OF CLERKS—PURCHASE OF ARTICLES FOR USE OF GENERAL ASSEMBLY— WHAT VOUCHERS SHOULD BE APPROVED BY CLERK OF HOUSE OF REPRESENTATIVES AND PRESIDENT OF SENATE—PORTRAIT OF LIEUTENANT GOVERNOR—NO PROHIBITION AGAINST A MEMBER BEING INTERESTED IN CONTRACTS LET BY STATE—TELEPHONE AND TELEGRAPH SERVICE OF MEMBERS, PRIVATE AND PUBLIC—POSTAGE —AUDITOR OF STATE CAN PRESCRIBE SYSTEM OF ACCOUNTING FOR GENERAL ASSEMBLY.

1. *In the absence of fraud or gross neglect of duty the president of the senate or speaker of the house of representatives would not be personally liable for a mistake in the certification of the number of days' attendance of members of such houses, as provided in section* 54, *G. C.*

2. *The mileage provided for in section* 50, *G. C., is a part of the fixed compensation of members of the general assembly and the members are entitled to same each week, whether they actually travel to and from their homes or not. Payment of such mileage is not a violation of section* 31 *of article* II *of the constitution of Ohio.*

3. *The vouchers for salaries of the clerks of the house of representatives or the senate after adjournment in "making indexes to the recorded and printed journals and reading proof sheets of the printed journals" should be approved by the commissioners of public printing.*

4. *The salaries of the clerks of the senate and house of representatives are limited to five dollars per day by section* 51 *of the General Code, and it would not be competent for one branch of the general assembly to authorize, by resolution or in any other manner, the payment of more than such stipulated compensation to said officers.*

5. *The salaries of the clerks of the senate and house of representatives for the time employed after the adjournment of the general assembly in making indexes to the recorded and printed journals and reading the proof sheets of the printed journals may be changed and such clerks may be retained for other services, provided the general assembly has made an appropriation therefor, the expenditure of which for such purposes has been duly authorized by resolution of the branch of the general assembly to which the appropriation is made.*

6. *Purchases of stationery, books, blank books and articles of the same general character for the use of the general assembly must, in the absence of joint resolution, be purchased by the secretary of state, as provided in sections* 171 *and* 172 *of the General Code. Purchases of articles for the use of the general assembly for either branch thereof which do not come within the foregoing class, may be purchased by anyone duly authorized so to do.*

7. *Vouchers drawn against the funds appropriated to the house of representatives, except those for attendance and mileage, should be approved by the clerk of the house of representatives, pursuant to house resolution No.* 8, *passed January* 4, 1915. *Vouchers drawn against the funds appropriated to the senate should be approved by the president of the senate.*

8. *Vouchers drawn pursuant to a resolution of the senate for the painting of a picture of the lieutenant governor and the taking of a picture of the members*

of the senate is sufficient to warrant such payments, providing funds have been appropriated by the general assembly for said purposes.

9. *Neither section* 15, *G. C., as amended* 106 *O. L.,* 306, *nor as it stood immediately prior to such amendment, nor section* 19 *of article II of the constitution, generally speaking prohibit a member of the general assembly from being interested in contracts let by the state, either with or without competitive bids. This rule, however, is subject to modification by specific facts.*

10. *Whether a member of the general assembly comes within the provisions of sections* 12910 *and* 12911 *of the General Code, depends entirely upon the facts in each particular case. Generally speaking, section* 12910 *would not apply to a member of the general assembly but it is possible that a state of facts might arise which would come within the provisions of said sections.*

11. *Members of the general assembly are not entitled to be furnished with telephone, telegraph and other means of communication for private purposes but an appropriation by the general assembly to furnish telephone, telegraph and other services of like character to members of the general assembly necessary to the proper discharge of their duties would not constitute an allowance such as is prohibited by section* 31 *of article II of the constitution.*

12. *The furnishing of postage by the state to carry out the provisions of section* 768, *G. C., is not a violation of section* 31 *of article II of the constitution of Ohio.*

13. *Under sections* 274, *et seq., G. C., the auditor of state, as chief inspector and supervisor of public offices, can prescribe and require in the offices of the clerk of the house of representatives and the clerk of the senate the installation of a system of accounting and reporting for the disbursement of public money appropriated to the respective branches of the general assembly, so far as said clerks may handle such funds or vouchers. This authority of the auditor of state does not extend to records of the general assembly such as journals, etc., the method of keeping which is provided for in the constitution and the general code.*

COLUMBUS, OHIO, January 18, 1916.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Your letter of September 21, 1915, asking for a written opinion upon a number of questions, was received in this office on October 5, 1915. The questions are so numerous that each question will be stated in the order in which the same is answered.

> *First question:* "Under section 54, G. C., can the president of the senate and the speaker of the house be held personally responsible if the 'number of days' attendance' is not correctly certified?"

Section 54, G. C., provides:

> "The president of the senate, and speaker of the house of representatives, shall ascertain the number of days' attendance of each member and officer of the respective houses, during the session, the number of miles travel of each member to and from the seat of government and certify such attendance and mileage, and the amount due therefor, to the auditor of state."

In the absence of fraud or gross neglect of duty, the president of the senate

or speaker of the house of representatives would not be liable personally if a mistake were made in the number of days' attendance certified to.

Second question: "Can the mileage provided for in section 50, G. C., be regarded as fixed compensation' under Art. II, Sec. 31, constitution of Ohio?"

The answer to this question is necessarily involved in the answer to your third question and I will, therefore, at this point merely answer your second question in the affirmative and refer you to the answer to your third question for the reasons therefor.

Third question: "Are members entitled to mileage once a week as provided in section 50, G. C., whether they go home or not?"

Section 50, G. C., provides as follows:

"Every member of the general assembly shall receive as compensation a salary of one thousand dollars a year during his term of office. Such salary for such term shall be paid in the following manner: Two hundred dollars in monthly installments during the first session of such term and the balance of such salary for such term at the end of such session.

"Each member shall receive two cents per mile each way for mileage once a week during the session from and to his place of residence, by the most direct route of public travel to and from the seat of government, to be paid at the end of each regular or special session. If a member is absent without leave, or is not excused on his return, there shall be deducted from his compensation the sum of ten dollars for each day's absence."

The answer to your third question depends upon whether the purpose of the provision of section 50, G. C., supra, in reference to the payment of two cents per mile is to fix a basis for the computation of compensation of members of the general assembly, or to provide the basis upon which such members are to be reimbursed for expenses incurred in such travel. A careful reading of said section indicates that the first proposition above stated is the correct interpretation. That is to say, this section has no reference to expense whatever, but is purely a statute fixing the *compensation* of members of the general assembly. The section provides: "Every member of the general assembly shall receive as compensation" —what? "A salary of one thousand dollars a year" and "two cents per mile each way for mileage once a week during the session from and to his place of residence."

The statute also fixes the time at which the portion of the compensation designated as "salary" shall be paid, and the time at which the portion of the compensation designated as "mileage" shall be paid. It is significant that the word "expense" does not appear in section 50 anywhere, and it is also significant that section 54 of the general code, in its present form and as originally enacted by the legislature (see 60 O. L., page 5), in providing for the ascertainment of the attendance and mileage of the members of the general assembly, uses the following language: "The number of miles *travel* of each member to and from the seat of government." This language does not provide for the ascertainment of the number of miles actually traveled by members of the general assembly, but

the number of miles which it is necessary to travel in going to and from the seat of government to the residence of the member, by the most direct route. No provision is made for the making of a statement by members or anyone else as to the number of times they go back and forth during the session, and there is no record from which these facts can be ascertained by the officers of the general assembly.

While the foregoing is apparently the only logical and practical interpretation of the statute, yet it cannot be said to be absolutely free from doubt and we are, therefore, justified in looking at matters extrinsic of the statute to arrive at the proper interpretation thereof. The cardinal principle in the interpretation of statutes is, of course, to ascertain the intention of the legislature and in determining such intention we are aided materially by the fact that in this connection the legislature itself is on record as to the interpretation of the same. For many years it has been the custom of the legislature to provide by resolution for the appointment of mileage committees to ascertain and report the mileage due to members. Reports of such committees may be found on page 279 of the printed House Journal of the session of 1911, page 55 of the Senate Journal of the same year; page 304 of the House Journal of the session of 1913, page 62 of the Senate Journal of the same year; page 150 of the House Journal of the session of 1914, page 75 of the Senate Journal of the same year; page 7 of the House Journal of February 17, 1915, page 3 of the Senate Journal of January 21, 1915.

All of the foregoing reports of committees are in substantially the same form and it is necessary to quote only one of them. The report of the committee found at page 150 of the House Journal of the session of 1914, is as follows:

> "We, the undersigned, a select committee of three appointed pursuant to house resolution No. 11, to ascertain and report the mileage due members of the house of representatives, beg leave to submit the following:
>
> | "Name | County | Mileage | Amount due each week. |
> |---|---|---|---|
> | "* * * | * * * | * * * | * * *" |

Under the appropriate heads of the report then appears names, counties, number of miles and amount due each week to each member of the general assembly and the computation is made in accordance with the foregoing interpretation of section 50, G. C., to-wit: That each member is entitled to two cents a mile each week, regardless of whether he actually travels back and forth to and from his home each week.

No mention is made in the reports of these committees, nor in the resolution providing for their appointment, of any reduction from mileage because of the failure of any member to go back and forth to and from his home each week during the legislative session. The reports of these committees were adopted by vote of the respective branches, thus giving the above interpretation of the statute sanction of the entire body and not merely that of one or more of its members.

There remains another and probably stronger reason for the foregoing interpretation than any of those above stated. Courts will always endeavor to give to a statute a construction which will make it constitutional, if possible, in preference to an interpretation which would render the statute unconstitutional and inoperative. Applying this principle, I call your attention to section 31 of article II of the constitution of Ohio, which provides as follows:

> "The members and officers of the general assembly shall receive a fixed compensation, to be prescribed by law, and no other allowances or

perquisites, either in the payment of postage or otherwise; and no change in their compensation shall take effect during their term of office."

With this provision of the constitution in mind, it becomes clear that both the salary and mileage provided for in section 50, supra, were intended to be and are a part of and constitute the compensation of members of the general assembly. If the portion of the compensation heretofore designated as salary is the entire compensation of the members of the general assembly, then the provision for payment of mileage would be an additional allowance or perquisite, and the provision for the payment of same would be unconstitutional and void.

Under the foregoing interpretation section 50 is in harmony with said section 31 of article II of the constitution, for the reason that the salary fixed therein is definite and the allowance for mileage is definite under the rule that that is certain which may be made certain, and the aggregate of both constitutes the "fixed compensation" of members of the general assembly as required by the constitution.

Fourth question: "If the preceding question is answered in the negative, can the speaker of the house and the president of the senate be held personally liable if the 'number of miles travel of each member' (Sec. 54) is not correctly certified?"

The preceding question having been answered in the affirmative, it is, of course, unnecessary to discuss this question.

Fifth question: "Under section 53, G. C., must the salaries of the employes of the general assembly *after adjournment* be approved by the printing commision?"

Your question refers to the salaries of the *employes* of the general assembly after adjournment, but inasmuch as you have specifically directed your question to section 53, G. C., the answer to the same is limited to the employes of the general assembly mentioned in said section, to wit: The clerks of the senate and house of representatives:

Section 53, of the General Code, provides as follows:

"The clerks of the senate and house of representatives shall be paid five dollars per day, each, for the time employed after the adjournment of the general assembly in making indexes to the recorded and printed journals, and reading the proof sheets of the printed journals. . The bills therefor must be approved by the commissioners of public printing or a majority of them. Such clerks shall have no other allowance or compensation for services after the adjournment of the general assembly, except as provided by law or resolution."

The primary purpose of this section is to fix the rate of compensation to be paid to the clerks of the senate and house of representatives for certain specifically enumerated services, and it is provided that the bills of these clerks for the performance of services so designated must be approved by the commissioners of public printing. It is clear, however, that the requirement of approval by the commissioners of public printing, or a majority of them, has application only to those services so specifically mentioned in the next preceding sentence, viz: "Making

indexes to the recorded and printed journals and reading proof sheets of the printed journals."

While the concluding sentence of said section 53, G. C., supra, is restrictive in its character, it is so only with reference to the disbursing officers of the state, and it not only does not apply to the general assembly, but clearly recognizes the power of that body, or either branch thereof, to require of its clerks other and additional services after adjourning than those enumerated and to fix their compensation therefor by law or resolution. In other words, the power of the general assembly to appropriate money for the use of one of the branches thereof and the power of said branch to direct the expenditure thereof for the purpose of paying its clerks for services other than those specifically mentioned in section 53, G. C., supra, at a rate to be determined by it, is in no way restricted by the provisions of section 53.

Specifically answering your fifth question, therefore, you are advised that the bills of the clerks of the senate and house of representatives for the time employed after the adjournment of the general assembly, in making indexes to recorded and printed journals and reading the proof sheets of the printed journals, must be approved by the commissioners of public printing, and that such approval is not required by section 53, G. C., supra, on bills for services of the clerks of the senate and house of representatives for the performance of other duties which may be placed upon them by the general assembly, or either branch thereof, by law or resolution.

> *Sixth question:* "Under sections 51 and 53, G. C., are the clerks of the house and the clerk of the senate limited to a salary of five dollars per day? If they are can money paid them in excess of five dollars per day be recovered under section 270?"
>
> *Seventh question:* "Under section 53, G. C., can clerks be retained after the work mentioned is finished? If they can, in what form?"

These two questions are considered together for the reason that the answer to the seventh question is involved in the answer to the sixth.

Section 51 of the General Code, prior to its amendment in 106 O. L., page 14, provided as follows:

> "The clerks and sergeant-at-arms of the senate and house of representatives, and their assistants, shall each be paid five dollars for each day's attendance during the session. For services rendered at the organization of the general assembly, each of the officers named in section thirty-three, unless re-elected to his position, shall be paid five dollars for each day, for not exceeding ten days."

The amendment of this section did not become effective until after the adjournment of the last general assembly and does not affect your question. It will be noted that this section provides for the compensation of the clerks and sergeants-as-arms of the senate and house of representatives during the session and for the compensation of the officers mentioned in section 33, G. C., to wit: The chief clerk, journal clerk, message clerk, sergeant-at-arms and the second assistant sergeant-at-arms of each house in the organization of the general assembly in case such officers are not re-elected to their positions, and section 53 provides for the compensation of the clerks of the senate and house of representatives for the time employed after the adjournment of the general assembly, in making indexes to the recorded and printed journals and reading the proof sheets of the printed

journals. Section 53, however, as pointed out heretofore in the answer to your fifth question, recognizes the right of the general assembly, or either branch thereof, to retain the clerks for the performance of services other than those specifically mentioned in said section 53, and to fix their compensation for such services, either by law or resolution. But section 51, G. C., supra, contains no such provision. It would not be competent, therefore, for one branch of the general assembly to authorize, by resolution or in any other manner, the payment of more than the stipulated compensation to the officers mentioned in section 51, supra, during the session or during the organization thereof, nor for the services specifically mentioned in section 53, G. C., supra, and any payment in excess of such stipulated compensation, if paid by the treasurer upon the warrant of the auditor, could be collected and returned to the state treasury under section 270, G. C.

Specifically answering your seventh question, you are advised that the clerks of the house and senate may be retained after the work mentioned in section 53, supra, is completed, provided such retention is authorized by law or resolution, and may be paid for such services if there is money appropriated for the purpose.

Eighth question: "Under the provisions of sections 171 and 172, G. C., can any purchases be made other than from the secretary of state except by joint resolution?"

The form of your question indicates that it is directed solely to purchases for the use of the general assembly, and it is upon this assumption that the question is considered and answered.

Section 171, of the General Code, provides as follows:

"On or before the first day of November of each year the secretary of state shall purchase and cause to be delivered at his office, so much and such kinds of stationery and other articles as may be necessary for the use of the general assembly and state officers. No person other than the secretary of state shall purchase any article for the use of the general assembly, or either house thereof, unless directed so to do by joint resolution. The amount that may be necessary for the purchase of such stationery and other articles shall be drawn upon the order of the secretary of state."

Section 172, G. C., provides as follows:

"The secretary of state, when he delivers stationery, books, blank books or other articles to the sergeant-at-arms of either house of the general assembly or other officer entitled by law thereto, shall take a receipt therefor, stating the amount and value thereof, and in his annual report shall give a statement of each class of stationery, blank-books, and other articles so delivered, the amount and value thereof, and to whom delivered. The statement shall also contain an inventory of the amount of stationery, blank-books and other articles on hand in his office on the fifteenth day of November, and the amount and value of each class thereof, received by him in the preceding year, together with a list of the names of the persons from whom received."

These two sections apply to the same subject matter and should be read together in determining what purchases should be made for the use of the general

assembly by the secretary of state. These sections speak for themselves and never having been repealed by the legislature are in full force and effect. Not all purchases which may be made by the general assembly, however, are covered by these sections. It will be noted that section 171 contains the language: "stationery and other articles," and section 172 contains the language "stationery, books, blank-books or other articles." Under the familiar rule of construction that where specific words in a statute are followed by general language, such general language is to be construed to cover only things of the same general character unless a contrary intention clearly appears, these two sections can only be held to cover such purchases as stationery, books, blank-books and supplies of that character, intended for the use of the general assembly. It would be impractical to attempt here to specify what articles may or may not be purchased other than by the secretary of state, but the above rule must be applied to each particular case.

The foregoing discussion has been limited to an interpretation of sections 171 and 172, G. C. It should be borne in mind, however, that the provisions of said sections may be modified or changed not only by joint resolution, as provided in section 171, supra, but also by subsequent act of the general assembly inconsistent therewith. If, therefore, the general assembly has appropriated or should appropriate money to someone other than the secretary of state, for the purchase of the articles above described, such appropriation would operate, during the life of the bill in which it appears, as a modification of said sections.

With these limitations in mind, the answer to your eighth question is that in the absence of a joint resolution, or other modification of said sections 171 and 172, G. C., by sebsequent act of the general assembly, no one has authority to purchase the articles above described for the general assembly except through the secretary of state.

> *Ninth question:* "Upon the adjournment of the general assembly it transpires that many bills are being presented against the funds appropriated for the general assembly, and no provision of law has been made for lodging in any officer of the general assembly the power of determining or approving the validity and correctness of such bills. Should the auditor of state pay such bills upon presentation, and, if so, are there any prerequisite acts on the part of myself or any other officer required by law before such payments are made?"

At the outset it should be stated that there was no appropriation made to the general assembly, as such, and it is assumed that you refer to appropriations made to the senate and to the house of representatives.

The form of your question suggests that the difficulty arises from the provisions of section 4 of H. B. 314—106 O. L., page 100—or of section 6 of H. B. 701—106 O. L., 826. These sections are similar so far as their effect on your question.

Section 6, of H. B. 701, provides in part as follows:

> "The moneys appropriated in sections 2 and 3 of this act shall be drawn upon a requisition or voucher presented to the auditor, approved by the head of the department or by the trustees of an institution or by the members of a board or commission, or by an officer or employe of such department, institution, board or commission, specially designated by resolution or order to approve and present such requisition or voucher, a copy of which resolution or order shall be filed with the auditor of state."

I call your attention to house resolution No. 8, passed January 4, 1915, which is as follows:

> "*Resolved,* That except in cases in which the signature or approval of the speaker is required by law, the clerk of this house is hereby directed and empowered to sign all vouchers to be presented to the auditor of state for the payment of any claim or claims against the house for services rendered or supplies furnished or for any other matter whatsoever."

This resolution authorizes the clerk of the house to sign all vouchers on its behalf except those required by law to be signed by the speaker. The only voucher so required to be signed by the speaker is the certification of attendance and mileage, provided for in section 54, G. C., which is quoted in the early part of this opinion.

So far as the house of representatives is concerned, there is, therefore, ample authority for approval of vouchers and when so approved the same should be paid as other vouchers.

The senate, not having adopted a resolution authorizing any particular officer or employe to sign or approve vouchers, the same should (for the protection of the auditor) be approved by the president of the senate, and when so approved should be paid as other vouchers.

> *Tenth question:* "Is a resolution passed by the senate and not approved by the house authorizing the painting of a picture of the lieutenant governor and of the taking of a picture of the members of the senate sufficient to warrant this payment?"

Section 22 of article II of the constitution, provides as follows:

> "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law."

Under this provision the payments mentioned in your question cannot be made unless an appropriation has been made therefor and such appropriation would, of course, have to be approved by both branches of the general assembly. Assuming that such an appropriation has been made, such payments can be made upon a resolution adopted by one branch of the general assembly. This was the holding of the supreme court of this state in the case of State ex rel v. Oglevee, 36 O. S., 324. At page 326 of the opinion the court said:

> "Where a fund is provided by law for the contingent expenses of either branch of the general assembly the disbursement of the fund for such purpose is subject to the control of such branch."

If, therefore, an appropriation has been made for the general assembly and is available for the purposes mentioned in your question, a resolution adopted by the branch of the general assembly for which the appropriation was made is sufficient authority for the auditor to issue a warrant for the amount of same if he finds it to be otherwise a legal and proper claim.

Your 11th and 12th questions are as follows:

> *11th question:* "Can a member of the general assembly be interested in contracts let by the state at competitive bids?"

12*th question:* "Can a member of the general assembly be interested in contracts let by the state where competitive bids are not required by law?"

It is impossible to answer these questions intelligently in the absence of specific facts relating to each one of them. If it is your purpose to ascertain whether or not such acts are inhibited by section 15 as amended 106 O. L., 306, or as it stood immediately prior to such amendment, the answer is "No." If it is the purpose of your inquiry to find whether or not such action is in conflict with section 19 of article II of the constitution of Ohio, the answer is again "No." However, the specific facts in each case might cause the answer to be in the affirmative rather than in the negative.

Your 13th question is as follows:

13*th question:* "Does a member of the general assembly come under the provisions of sections 12910 and 12911 of the General Code?"

Section 12910, G. C., provides as follows:

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

In the absence of specific facts I would say generally, and I am inclined to say universally, that a member of the general assembly would not come under the foregoing section.

Section 12911, G. C., provides as follows:

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

It would depend entirely upon the facts in the particular case as to whether or not a member of the general assembly would come within the inhibition of this section.

14*th question:* "Under Art. II, Sec. 31, are members entitled to telephone, telegraph, and other means of communication, whether personal or official?"

Article II, section 31 of the constitution, has already been referred to and set out in the earlier part of this opinion. It provides that members of the general

assembly shall receive a fixed compensation "and no other allowance or perquisites, either in the payment of postage or otherwise." You have designated the telephone, telegraph and other communications as "personal" and "official." It is assumed that by this you mean communications for purely private purposes and having no connection with the discharge of the duties of the members as distinguished from such communications as may be necessary to the proper discharge of such duties. With this distinction in mind, payment by the state for telephone, telegraph and other services of like character rendered to members of the general assembly in "personal" matters would be such an allowance as is prohibited by said section 31 of article II, but it would be entirely competent for the general assembly to appropriate money to pay the expense of furnishing to members of the general assembly means of communication in "official" matters and such payment would not constitute an allowance such as is prohibited by said section 31 of article II; such expense would be no more an allowance to the members of the general assembly than the furnishing of heat, light, desks and other conveniences intended for the more prompt and efficient discharge of their duties. Such payments are more properly characterized as expenses of the general assembly itself than of the individual members.

15*th question:* "In carrying out the provisions of section 768, G. C., is the state required to furnish the postage? If so, is this a violation of Art. II, Sec. 31, constitution of Ohio, and unconstitutional?"

Section 768 of the General Code, provides as follows:

"Each day one copy of such pamphlet shall be placed on the desk of each member of the senate and house of representatives, one copy shall be sent to each state department, two hundred copies shall be distributed by the members of the senate, under the direction of the clerk thereof and six hundred copies shall be distributed by the members of the house of representatives under the direction of the clerk of the house of representatives. The proper number of sheets for the permanent copies of such journals shall be printed, retained and bound with the indexes therefor, as provided by law."

The effect of this section is to place upon the clerks of the house of representatives and senate the duty of distributing copies of the daily journals of those bodies and it will undoubtedly be conceded that it is entirely proper for the general assembly to make provision and appropriate money for the purpose of advising the people of the state of Ohio as to what has taken place in the general assembly from day to day. The legislature is the best and only judge of how this should be accomplished and the fact that they have provided that the members of the general assembly shall be permitted to designate to whom certain of the copies shall be sent, does not render the statute unconstitutional, as a violation of section 31 of article II of the constitution.

I am, therefore, of the opinion that it is competent for the general assembly to appropriate money to pay postage required to distribute the copies of the journal of the house of representatives and senate, as provided in section 768 of the General Code, and that the section is not in contravention of section 31 of article II of the constitution.

16*th question:* "Can the auditor of state, under the provisions of sections 274, 277, 278, 279, or other sections, prescribe forms for keeping the accounts and records of the general assembly of Ohio?"

Section 274 of the General Code (106 O. L., 26) provides as follows:

"There shall be a bureau of inspection and supervision of public offices in the department of auditor of state which shall have power as hereinafter provided in sections two hundred seventy-five to two hundred eighty-nine, inclusive, to inspect and supervise the accounts and reports of all state offices, including every state educational, benevolent, penal and reformatory institution, public institution and the offices of each taxing district or public institution in the state of Ohio. Said bureau shall have the power to examine the accounts of every private institution, association, board or corporation receiving public money for its use and purpose, and may require of them annual reports in such form as it may prescribe. The expense of such examination shall be borne by the taxing district providing such public money. By virtue of his office the auditor of state shall be chief inspector and supervisor of public offices, and as such appoint not exceeding two deputy inspectors and supervisors, and a clerk. No more than one deputy inspector and supervisor shall belong to the same political party."

Section 277 of the General Code provides as follows:

"The auditor of state, as chief inspector and supervisor, shall prescribe and require the installation of a system of accounting and reporting for the public offices, named in section two hundred seventy-four. Such system shall be uniform in its application to offices of the same grade and accounts of the same class, and shall prescribe the form of receipt, vouchers and documents, required to separate and verify each transaction, and forms of reports and statements required for the administration of such offices or for the information of the public."

Other sections of the General Code contain detailed provisions for the purpose of the carrying out of the general provisions of section 277, supra.

The offices of the clerk of the house of representatives and the clerk of the senate are "state offices" and are covered by the provisions of sections 274 and 277, supra.

I am therefore of the opinion that the auditor of state, as chief inspector and supervisor, can prescribe and require in these offices the installation of a system of accounting and reporting for their disbursement of public money appropriated to the respective branch of the general assembly, so far as these officers may handle such funds or vouchers.

Your question refers to "keeping the accounts and records of the general assembly." It must be borne in mind that specific provision is made in the constitution and the General Code for the keeping of certain records of the general assembly, such as the journals and records of that character, which are clearly not contemplated as coming under the supervision of the bureau of inspection and supervision of public offices.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1183.

COMBINED NORMAL AND INDUSTRIAL DEPARTMENT OF WILBERFORCE UNIVERSITY—CONTRACTS AND BONDS FOR IMPROVEMENT OF WATER SUPPLY SYSTEM APPROVED.

COLUMBUS, OHIO, January 18, 1916.

Board of Trustees of the Combined Normal and Industrial Department of Wilberforce University, Wilberforce, Ohio.

GENTLEMEN:—I have examined the five contracts presented to me for the furnishing of materials for and constructing the improvement to the water supply system at the combined normal and industrial department at Wilberforce University, and the bonds attached thereto, and have this day approved the same as being in compliance with law, and have filed same in the office of the auditor of state.

The said contracts are as follows:

1. Contract with The Pittsburgh-Des Moines Steel Company, of Pittsburgh, Pa., for an 80,000 gallon steel tank and tower.
2. Contract with Samuel H. Barnes, Dayton, Ohio, for an 8-inch well complete, 60 feet deep.
3. Contract with The Weimman Pump Manufacturing Company of Columbus, Ohio, for the furnishing of two steam pumps.
4. Contract with The Shartle Machine Company of Columbus, Ohio, for furnishing one hot water storage heater.
5. Contract with The Shartle Machine Company of Columbus, Ohio, for water softening plant; plumbing, steam fitting, water mains, miscellaneous.

I have returned the rest of the papers to The Richards Engineering Company of Columbus, Ohio, your engineer.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1184.

CASS HIGHWAY LAW—COUNTY HIGHWAY SUPERINTENDENT—EXPENSES OF SUCH OFFICER TO BE PAID FROM GENERAL COUNTY FUND WHEN SAME ARE INCURRED IN PERFORMANCE OF HIS DUTIES WITH RESPECT TO ROADS AND BRIDGES.

The expenses of the county highway superintendent incurred in the performance of his duties with respect to roads and bridges under the Cass highway law are to be paid from the general county fund.

COLUMBUS, OHIO, January 19, 1916.

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

GENTLEMEN:—I have your communication of December 20, 1915, in which you request my opinion upon a question set forth in certain correspondence from Mr. Frank R. Smith, county auditor of Sandusky county, which correspondence was attached to your communication.

It appears that there has been filed in the office of the county auditor of Sandusky county a statement of the expenses of the county highway superintendent of that county. The expense account of the county highway superintendent, consisting for the most part of expenses incurred for livery, is so itemized as to indicate the particular road or bridge improvement in connection with which each item of expense was incurred. The question upon which my opinion is desired is whether this expense account should be paid out of the general county fund or whether the different items should be paid from the different road and bridge funds as specified in the items. The question assumes that a specific fund has been created and is in existence for the construction, improvement, maintenance or repair of each road or bridge in question. This assumption may be correct as to the situation confronting the county officials of Sandusky county, but the question will have to be answered with reference to any situation which might arise.

The pertinent provision of the Cass highway law is found in section 138 of that act, section 7181, G. C., and is to the effect that in addition to his salary the county highway superintendent, when on official business, shall be paid out of the county treasury his actual necessary traveling expenses, including livery, board and lodging. This provision is silent as to the particular fund from which the payment of expenses is to be made, the provision being merely that payment shall be made out of the county treasury.

An examination of the scheme of road improvement by county commissioners, as set forth in chapter VI of the Cass highway law, discloses that in some instances at least, expenses will be incurred by the county highway superintendent in connection with the improvement of a specific section of road before any particular fund has or can be created for the improvement of such road. It is not until the completion of the survey for an improvement and the final determination of all questions of compensation and damages that the board of county commissioners finally determines and orders that the improvement shall be constructed, and where a bond issue is necessary, certainly no authority to issue bonds and create a special fund for the construction of the improvement in advance of the time when it is finally determined to build the improvement can be gathered from the sections of the law. It therefore follows that the county highway superintendent, under the scheme of road improvement provided for county commissioners, will often be called upon to perform services and incur expenses where no special fund has been created, and inasmuch as he is entitled to receive his expenses so incurred out of the county treasury, it follows in such cases at least that such expenses must be paid to him out of the general county fund. There is not found in the Cass highway law any authority in such cases to pay the expenses in the first instance out of the general county fund and thereafter reimburse such county fund from a special fund created for a specific improvement.

Considering the question in the light of the fact that under a number of the methods of paying the costs and expenses of a county road improvement, either all or a part thereof are to be assessed, it is apparent that an inequality might arise if the expenses of the county highway superintendent are to be paid out of the special fund, in case such fund existed at the time the expenses were incurred.

In view of the holding in the cases of Longworth v. Cincinnati, 34 O. S., 101, and Spangler v. Cleveland, 35 O. S., 496, to the effect that the value of surveying and engineering which is done by the salaried officers of a municipal corporation and paid out of the general fund may not be included in assessments, and in view of the further fact that there is no authority in the act for paying the expenses of the county highway superintendent out of the general county fund and thereafter reimbursing such fund from a special fund created after the expenses are incurred, it follows that in cases where the special fund was created

before any expenses were incurred, all the expenses of the county highway superintendent would be paid from such special fund and in cases where the special fund was not created until after the survey had been made, only a part of the expenses would be paid from the special fund. This, as previously indicated, would result in an inequality, the special fund which would furnish the basis of assessment having to bear all of the expenses of the county highway superintendent in one case and only a part of such expenses in the other.

In view of the foregoing considerations and of the fact that the statute itself merely provides that the expenses of the county highway superintendent shall be paid out of the county treasury without stipulating the fund out of which they are to be paid, I advise you that such expenses should be paid from the general county fund and that no effort should be made to pay the same out of special funds where the same exist or to reimburse the general county fund where payment is originally made from the general county fund and a special fund is thereafter created for the improvement in question.

This opinion is limited to the facts presented and it is only intended to hold herein that the expenses of the *county highway superintendent* incurred in the performance of his duties with respect to *roads and bridges* under the Cass highway law are to be paid from the general county fund.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1185.

TOWNSHIP CLERK—MANDATORY DUTY OF SUCH OFFICER TO CANVASS RETURNS OF ELECTIONS OF TOWNSHIP OFFICERS AND ISSUE CERTIFICATES OF ELECTION—CANNOT QUESTION REGULARITY OF SUCH ELECTION—TOWNSHIP CLERK CONTINUES TO HOLD OFFICE UNTIL DULY ELECTED SUCCESSOR QUALIFIES —TOWNSHIP TRUSTEES OR CLERK NOT AUTHORIZED TO DETERMINE WHO IS ENTITLED TO OFFICE OF TOWNSHIP CLERK.

It is the mandatory duty of township clerks to canvass the returns of elections of township officers and to issue certificates of election to those persons shown by the returns to have been elected. He may not pass upon any question of the regularity of such election.

A township clerk whose term expired December 31, 1915, *may continue to hold that office and discharge the duties thereof until his successor is elected and qualified, and the failure of a successor duly elected to qualify according to law does not create a vacancy which the township trustees may fill by appointment.*

Neither the township trustees nor the clerk are authorized to determine disputed questions of title to the office of township clerk.

COLUMBUS, OHIO, January 19, 1916.

HON. DEAN E. STANLEY, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—Yours under date of January 1, 1916, is as follows:

"At the recent election in Union township, in this county, a dispute has arisen over the clerkship. Union township has two voting precincts.

The ballots in one of these precincts were erroneous, in that the name of one of the candidates for clerk was printed as candidate for trustee and not for clerk, as a result of which quite a number of voters marked his name as a candidate for trustee. On the face of the returns he was defeated by a small vote and claims that had the ballots been correct and the true intention of the voters been expressed, he would have been elected.

"Section 5112 of the General Code, provides that the returns of the township elections shall be delivered to the clerk who shall canvass the vote, announce the result and issue certificates to the officers elected. The candidate to whom I refer above, whose name was erroneously printed on the ticket, was the old clerk, and in view of his contention that he was elected at the last election, I am informed that he has not canvassed the vote and has issued no certificate of election. Thereupon the old clerk, claiming to have been re-elected, tendered a bond to the trustees for approval and at about the same time, the other candidate who, on the face of the returns, has received the majority of the votes for clerk, tendered his bond to the trustees for approval. The trustees found each bond to be correct in form and sufficient as to surety, but declined to approve either of them for the reason that no certificate of election was presented by either candidate. The old clerk claims the right to hold office under his former election until a successor is elected and qualified.

"I desire to inquire what course the trustees should follow in the matter, whether by authority of section 3261 they have power to treat the office of clerk as vacant and appoint a clerk for the next two years. Second, whether they have power to appoint a clerk temporarily until a certificate of election is issued to one of the contestants. And third, whether or not their action in finding the bonds of each of the candidates to be sufficient in form and as to sureties and declining to approve either of them for lack of certificate is correct.

"I very much regret to trouble you with these questions, but it was the opinion of the trustees, until within the last few days, that the candidates, by some legal proceeding, would determine which of them was elected, but they have failed to do this and inasmuch as the new clerk should have taken office today, the trustees are confronted with the question as to who shall keep their records and whether or not the acts of such trustees would be legal until there is a clerk duly qualified.

"From the information I have received, I am of the opinion that there can be little question but that there was a mistake in the ballots in one of the two precincts of Union township, which might have tended to prejudice the chances of the old clerk at the election, and inasmuch as he was defeated by a small majority, it might, it seems to me, be successfully contended that there had been no legal election."

Your first and second questions may be considered together and are, in effect, whether under the facts stated there is a vacancy in the office of township clerk which may be filled by appointment by the township trustees.

Section 3261, G. C., to which you refer, provides as follows:

"If by reason of non-acceptance, death, or removal of a person chosen to an office in any township, except trustees, at the regular election, or upon the removal of the assessor from the precinct or township for which he was elected, or there is a vacancy from any other cause, the trustees

shall appoint a person having the qualifications of an elector to fill such vacancy for the unexpired term."

From the provisions of this section, it will be observed that it is only when there is a vacancy in a township office, other than trustee, that there is authority to appoint. A vacancy cannot exist in an office so long as there is a qualified person in possession of and authorized to discharge the duties of the same.

Section 8, G. C., provides as follows:

"A person holding an office of public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws."

By force of this section it will be noted that until the successor of the clerk, whose term of office expired December 31, 1915, has been elected and duly qualified, such clerk will continue to be lawfully entitled to hold the office and discharge the duties thereof. This, I think, fully disposes of the question as to the authority of the trustees to make an appointment and, as well, the further question suggested as to the legality of the official acts of the clerk who is in possession of the office. There is little if any doubt that, under the facts stated by you, the clerk in possession of the office is at least a de facto officer, and a de jure officer if no successor has been duly elected and qualified (State ex rel. v. Howe, 25 O. S., 595), whose official acts are valid in so far as the public or other persons may be affected or concerned.

Your third question, however, is involved in some difficulty. Section 5112, to which you refer, provides as follows:

"The returns of township elections shall be made by the judges and clerks in the several precincts to the proper township clerk within one day after the election. Such clerk shall canvass the vote, declare the result and issue and deliver certificates to the officers so elected."

It is therefore the mandatory duty of the clerk of the township, within a reasonable time after the receipt of the returns of a township election, to canvass the vote as shown by such returns, to declare the result of such election and to issue to those persons shown by such returns to have been elected a proper certificate of their election. This plain duty imposed by law is, when neglected or refused to be performed by the township clerk, enforceable by an action in mandamus.

There is no authority for the canvassing officer to go behind the returns made to him in determining the result of an election. Irregularities of various character may have occurred which would render the election subject to contest, but the question of such irregularities is not within the authority of the canvassing officers to consider. Though the question under consideration was not identical, the principle here involved was applied in the case of State ex rel. v. Pattison, 73 O. S., 305, the fourth branch of the syllabus of which is as follows:

"In certifying the election of an officer the power of the deputy supervisors of elections is limited to certifying that the successful candidate has been elected, and they have no power to decide upon a disputed term of office."

Section 3300, G. C., provides as follows:

> "Before entering upon the discharge of his duties, the township clerk shall give bond payable to the trustees with sureties approved by them, in such sum as they determine, conditioned for the faithful performance of his duties as clerk. Such bond shall be recorded by the clerk, filed with the township treasurer and carefully preserved."

It was incumbent, therefore, upon the person who was elected township clerk at the November election in 1915, to present to the trustees a proper bond for their approval and by necessary implication it was the plain duty of the trustees to approve the same if in all respects in conformity with the requirements of the law. Yet, there is no authority in the trustees to determine or consider questions as to who has been duly elected to the office of clerk, nor may they take what is termed "judicial notice" of the result of the election. The only method by which the election of a clerk may be brought to the official knowledge of the trustees is by the presentation of a proper certificate of election to that office, signed by the clerk of the township, whose duty it was to determine by canvass of the election returns the result of the election. It therefore follows that without the presentation of such certificate, the trustees may not be compelled to approve the bond of one claiming to have been elected to the office of township clerk, since their authority in that respect is limited to the approval of the bond of a person so elected. If the trustees should choose to approve the bond of one claiming to have been elected as successor to a clerk whose term has expired on December 31, 1915, and who has taken the oath of office, the same would not constitute a legal qualification entitling such successor to enter upon the discharge of the duties of the office in the absence of a legal election. It will be observed, from an examination of section 3300, G. C., supra, that the only authority there conferred or duty imposed upon the trustees in reference to the bond in question, is to approve the sureties and determine the amount thereof. You state that the trustees determined the bond to be correct, and this I take to mean that it was sufficient in amount, and that they determined or found that the sureties thereon were sufficient, and this you state they did in respect to both of the bonds to them presented.

Whether the action of the trustees was a substantial approval of both bonds is not necessary here to consider. There would yet remain the essential question of who, if any one, was elected, and this it is not within the authority of the trustees to determine.

Answering, therefore, your first and second question specifically, I am of opinion that no vacancy in the office of township clerk exists which may be filled by appointment by the township trustees. The clerk in office December 31, 1915, under your statement of facts, may continue in possession of the same and to discharge the duties thereof so far as it concerns the township trustees, until by legal proceedings the rightful claimant to the office is determined.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1186.

CORONER—NOT REQUIRED TO PAY ANY FEE AT TIME OF FILING DECLARATION OF CANDIDACY FOR NOMINATION FOR SUCH OFFICE.

Candidates for county coroner are not required to pay any fee at the time of filing declaration of candidacy for nomination for that office.

COLUMBUS, OHIO, January 20, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Yours under date of January 12, 1916, is as follows:

> "We are herewith enclosing communication from the deputy state supervisors and inspectors of elections of Butler county, with the request for your opinion on the following question:
>
> "'Under section 4970-1 of the General Code of Ohio, is a candidate for coroner of a county required to deposit a fee with the board of deputy state supervisors and inspectors of elections when said candidate files his certificate as a candidate?'
>
> "If your answer to the aforesaid be in the affirmative what process of computing the fee should be followed?"

Section 4970-1, G. C., 106 O. L., 548, to which reference is made, provides in part as follows:

> "At the time of filing the declaration of candidacy for nomination for any office, each candidate shall pay a fee of one-half of one per cent. of the annual salary for such office, but in no case shall such fee be more than twenty-five dollars. * * * No fee shall be required in the case of candidates for committeeman or delegate or alternate to a convention or for president or vice-president of the United States, nor for offices for which no salary is paid."

There is a well defined distinction in this state between those offices for which there is prescribed by law a fixed annual salary and those the emoluments of which consist of certain prescribed fees which are authorized and required to be paid to or collected by an officer for the performance of official services defined by law.

The annual salary of an officer, I think, has no other meaning than that specific sum which the law authorizes or requires to be paid to such officer for each year of his incumbency in such office, usually paid in equal monthly or quarterly installments, as distinguished from the compensation of those officers who are authorized to receive and collect for their personal use only certain prescribed fees for the performance of certain specific official services or duties.

It seems that there can be no doubt that the term "salary" as found in the exception at the conclusion of the above quoted section has reference to an annual salary such as is referred to in the first sentence thereof.

There is not provided by law any sum certain or salary which is authorized or required to be paid to county coroners, but on the contrary they are in that class of officers whose compensation consists of and is limited exclusively to

certain prescribed fees which that officer may receive and collect for, or upon the performance of certain official duties and services.

I am therefore of opinion that county coroners are not paid a salary within the meaning of that term as found in section 4970-1, G. C., supra, and are not, therefore, by the terms of said section required to pay any fee at the time of filing a declaration of candidacy for nomination for that office.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1187.

WORKMEN'S COMPENSATION LAW—IN HEARING BEFORE INDUSTRIAL COMMISSION COSTS MADE IN TAKING DEPOSITIONS BY A CLAIMANT MAY NOT BE TAXED BY COMMISSION AGAINST A PARTY.

In a hearing before the Industrial Commission of Ohio, under the workmen's compensation law, the costs made in taking depositions by a claimant may not be taxed by the commission against a party.

COLUMBUS, OHIO, January 20, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of the following letter from your department in which you request my opinion on the question therein contained, which is as follows:

> "In a claim pending before the commission involving an injury sustained by an employe of an employer who has been authorized to pay compensation direct, under section 22 of the compensation act, where it has been necessary for the claimant to file depositions of various witnesses, transcript of which testimony is filed with the Industrial Commission as proof of his claim, should the commission in its finding of fact and order assess the costs for taking such depositions against either party, and is there authority under the statute for such procedure on the part of the commission?"

In answer to your question I find that the only provisions of the workmen's compensation law which provide for the subpoenaing of witnesses and the taking of depositions and the payment of witness fees, etc., are contained in sections 1465-47, 1465-48, 1465-49, and 1465-50 (102 O. L., 526-527).

It is provided in section 1465-49 of the General Code, that witness fees shall be paid from the state treasury in the same manner as other expenses are audited and paid upon the presentation of proper vouchers approved by any two members of the board. No witness subpoenaed at the instance of a party other than the board of an inspector shall be entitled to compensation from the state treasury unless the board shall certify that his testimony was material to the matter investigated. The provisions above referred to are the only ones in the workmen's compensation law relating to the payment of witness fees, the taking of depositions, etc., that there is no provision therein for the taxing of fees or costs against a party. It will be noted that the above sections provide for the payment of witness

fees, etc., out of the state treasury upon the audit of the claim or account, and upon the certification of any two members of the board or commission.

Therefore, answering your question directly, I am of the opinion that the Industrial Commission has no authority to tax costs against a party in a hearing before it, for the reason that the finding of the commission is limited to the allowance of compensation, medical, surgical, nursing and hospital services, and funeral expenses, and that the costs in proper cases upon certification are paid from the state treasury within the limits of appropriations in accordance with sections 1465-47, et seq., of the General Code.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1188.

POLL BOOKS—TALLY SHEETS—WHERE TRANSMITTED IN REGISTRATION CITIES AND WHERE REGISTRATION NOT REQUIRED—THOSE OF REGULAR ELECTIONS IN ODD NUMBERED YEARS FOR TOWNSHIP OFFICERS AND JUSTICE OF PEACE RETURNED TO TOWNSHIP CLERK—WHERE OTHER RETURNS SHOULD BE MADE—TICKET NOMINATED BY SINGLE PETITION PRINTED IN SEPARATE COLUMN—INDEPENDENT CANDIDATES NOMINATED BY SEPARATE PETITIONS IN LIST TO RIGHT OF TICKETS—RETURNS OF ELECTIONS FOR ELECTION OF OFFICERS OF NEWLY CREATED MUNICIPALITY.

Except in registration cities the returns of the November elections held in the even numbered years for the election of state, district and county offices are required to be transmitted, one poll book and tally sheet to the deputy state supervisors of elections of the county and the other poll book and tally sheet to the clerk of the township or to the clerk or auditor of the municipal corporation in which the election precinct for which the election returns are made is located. In registration cities the returns of such elections are required to be delivered, one poll book and tally sheet to the clerk of the court of common pleas of the county, and the other poll book and tally sheet to the board of deputy state supervisors of elections of the county at its office.

Both poll books and tally sheets of regular elections held in November of odd numbered years for township officers (except members of boards of education) and justices of the peace, except in election precincts in registration cities, are required to be returned to the clerk of the township. The returns of such elections of township offices and justices of the peace in precincts in registration cities are required to be made to the deputy state supervisors of elections of the county. The returns of elections of members of boards of education, except in registration cities, are required to be made to the clerk of the board of education of the district in which such election is held. In registration cities the returns of elections of members of the board of education and of municipal offices are required to be made to the board of deputy state supervisors of elections of the county. In municipalities, except registration cities, the returns of the election of municipal offices, except members of boards of education, are required to be made to the clerk or auditor of the municipality.

Where a ticket or list of candidates, not containing the names of more candidates for any one office than may be elected, is nominated by a petition, and there

is designated a proper name or title for such ticket or list of candidates, it is required that such ticket be printed in a separate column on the ballot to the right of all party tickets, under the name so designated, having printed above such designated name or title a circular space similar to that above party tickets.

The names of all independent candidates nominated by separate petitions should be placed in a list to the right of party tickets and tickets nominated by petition, without any name, title or designation thereover and without any circular space over the same, and the names of such independent candidates for the several offices to be elected should be placed under the title of such offices in alphabetical order according to surnames. Tickets or lists of candidates for offices may not be nominated by a single petition in townships nor in municipalities of less than 2,000 population in which no primary election is held for the nomination of candidates.

The returns of elections held under authority of section 3536, G. C., for the election of municipal offices of a newly created municipal corporation are required to be made to the clerk of the township in which such municipality is located, and such clerk is required to canvass the same and issue proper certificates of election to those persons by him determined from such returns to have been elected.

COLUMBUS, OHIO, January 20, 1916.

HON. JOSEPH T. MICKLETHWAIT, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—Yours under date of January 11, 1916, is as follows:

> "As there will be held in this county soon a special municipal election when part of the following questions will be pertinent thereto, I shall be pleased to have your opinion on them as soon as you can furnish me the same:
>
> 1. "Where are the returns of the elections held in November each year to be made, and what disposition is to be made of the poll books, except those returned to the Board of Deputy State Supervisors of Elections? Is any different disposition to be made at the elections held in even-numbered than in odd-numbered years, or in municipalities where registration is required?
>
> 2. "Where a ticket is nominated by a single petition as provided by section 4996, G. C., and such petitioners designate themselves the 'Citizens' Ticket,' as provided by section 5003, G. C., is such a ticket or list of candidates entitled to a separate column and a circle over such ticket, on the ballot?
>
> 3. "In case of candidates nominated by single petitions under the same section, would not the names of the several candidates for the different offices have to be grouped in one column, without any designation whatever on the ballot except 'Independent Ticket'?"

Your first inquiry comprehends only the general elections held in november of the even numbered years and regular elections held in November of the odd numbered years, and as to the former, involves first a consideration of section 5093, G. C., which provides as follows:

> "The judges and clerks in each precinct shall make out the returns of the election in duplicate, sign and certify one of the poll books and tally sheets thereof and immediately transmit it to the deputy state supervisors by the presiding judge or such other judge as he may designate. The other poll book and tally sheet signed and certified in like manner

shall be forthwith deposited with the clerk of the township or the clerk or auditor of the municipal corporation. as the case may require, by another judge designated by the presiding judge, and shall be preserved one year from the date of such election. Such returns shall be securely sealed in an envelope and addressed transversely upon the upper end thereof to the proper officer with whom they are to be deposited, with the designation of the township, precinct and county. In registration cities, such delivery shall be made as provided in the chapter relating to registration."

In this section is found the general provision for the returns of general elections held in November of the even numbered years. Its provisions are clear and unequivocal, requiring that one of the poll books and tally sheets shall be transmitted to the board of deputy state supervisors of elections and the other to the clerk of the township or auditor of the municipal corporation, except in registration cities, which will be hereafter noted. It will be also further noted that it is here provided in mandatory terms that the poll books and tally sheets so returned to the township clerk or the clerk or auditor of the municipality, shall be preserved one year from the date of such election. The exception to the provisions of the above section, to which reference is therein made as to registration cities, is found in section 4937, G. C., 103 O. L., 846, which provides as follows:

"After having set down the number of votes for each person, certified and signed it in the poll books and tally sheets in the manner prescribed by law, the judges of elections shall put under cover one of the poll books and tally sheets, seal it and direct it to the clerk of the court of common pleas. The other poll book and tally sheet shall be sealed in like manner and directed to the board of deputy state supervisors. Before separating, they shall designate two of their number as messengers, by lot, if they cannot agree, one of whom shall personally and within twenty hours from the close of the polls deliver to the clerk of the court of common pleas the poll book and tally sheets so addressed to such clerk, and the other shall personally and within twenty hours deliver the other poll book and tally sheet to the board of deputy state supervisors at its office."

It will be readily observed that it is here provided that the poll books and tally sheets, when made out in duplicate, in registration cities, shall be delivered within twenty hours, one to the deputy state supervisors of elections of the county and the other to the clerk of the court of common pleas of the county. There is here found no provision as to the length of time poll books returned to the clerk of courts shall be preserved. In the absence of such provision the presumption would arise at least that it was the purpose and intention that the returns so directed to the clerk of courts should be perpetually kept on file and preserved.

From a consideration of the foregoing statutory provisions, I conclude that, except in registration cities, the returns of the November elections held in the even numbered years, for the election of state, district and county officers, are required to be transmitted, one poll book and tally sheet to the deputy state supervisors of elections of the county and the other poll book and tally sheet to the clerk of the township, or to the clerk or auditor of the municipal corporation in which the election precinct from which the election returns are made is located. In registration cities the returns of such elections are required to be delivered, one poll book and tally sheet to the clerk of the court of common pleas of the county and the other poll book and tally sheet to the board of deputy state supervisors of elections of the county at its office.

As to the returns of elections held in odd numbered years for township officers, justices of the peace, municipal officers and members of boards of education, section 5111, G. C., provides:

> "In November elections held in odd numbered years for township officers, justices of the peace, municipal officers and members of boards of education, the judges and clerks of elections in each precinct shall make and certify the returns to the clerk of the township or the clerk or auditor of the municipality in or for which the election is held or the clerk of the board of education of the school district, respectively, instead of to the board of deputy state supervisors of the county. This provision shall not apply to the returns of elections for assessors of real property."

Section 5112, G. C., provides:

> "The returns of township elections shall be made by the judges and clerks in the several precincts to the proper township clerk within one day after the election. Such clerk shall canvass the vote, declare the result and issue and deliver certificates to the officers so elected."

Section 5114, G. C., provides in part as follows:

> "The returns of municipal elections shall be made by the judges and clerks in each precinct to the clerk or auditor of the municipality. Such clerk or auditor, or, in his absence or disability, a person selected by the council, shall call to his assistance the mayor, and, in his presence, make an abstract and ascertain the candidates elected, as herein required with respect to county officers. * * *"

Section 5115, G. C., provides as follows:

> "In registration cities the returns of the election of municipal officers, members of boards of education or justices of the peace shall be made to the board of deputy state supervisors of the county in which such city is located, and canvassed by a board of canvassers, consisting of such board of deputy state supervisors and the city auditor."

It will be observed that it is thus provided by sections 5111 and 5112, G. C., that in the odd numbered years the returns of elections of township officers, except in townships in which there is a registration city, shall be made to the clerk of the township in which such election is held. Since it is required that "the returns," without qualification or limitation, shall be made to the township clerk, the phrase "the returns" in its ordinary meaning, would include all the returns. This presumption is strengthened by the further provision of section 5111, G. C., that the certification to the clerk of the township shall be instead of to the deputy state supervisors of the county, thus precluding any inference that might otherwise arise to the effect that one poll book should be returned to the clerk of the township and the other to the deputy state supervisors of elections.

Sections 5111 and 5112, G. C., must be read together and given such construction as to give operative force to both under familiar rules of statutory construction. The only purpose, perhaps, in the retention of section 5112, when section 5111 was enacted in its present form, was to preserve the provision in the last sentence of section 5112 for the canvassing of the returns of the election of township officers.

The phrase "township officers," as used in section 5111, G. C., it would seem, was not intended to include members of township boards of education, since it is therein specifically provided that returns of elections of members of boards of education shall be made to the clerk of the board of education in the district in which such election is held. This view is supported by the provisions of section 5120, G. C., that in "school elections" the returns shall be made to the clerk of the board of education of the district and canvassed by the board. I take it that "school elections" as here used, includes in every case the election of members of boards of education.

It will be observed that by the provisions of section 5115, G. C., supra, it is required that in all registration cities "the returns," which as above stated I deem to include all returns of the elections of municipal officers which are to be held in November of the odd numbered years, together with the returns of the election of members of boards of education and justices of the peace, be made to the board of deputy state supervisors of elections of the county in which such registration city is located.

I therefore conclude that both poll books and tally sheets of regular elections held in November of odd numbered years for township officers, (except members of boards of education) and justices of the peace, except in election precincts in registration cities, are required to be returned to the clerk of the township. The returns of such elections of township officers and justices of the peace in precincts in registration cities are required to be made to the deputy state supervisors of elections of the county. The returns of elections of members of boards of education, except in registration cities, are required to be made to the clerk of the board of education of the district in which such election is held. In registration cities the returns of elections of members of the board of education and of municipal officers are required to be made to the board of deputy state supervisors of elections of the county. In municipalities, except registration cities, the returns of the election of municipal officers, except members of the board of education, are required to be made to the clerk or auditor of the municipality.

The statutes above referred to and considered do not apply to special elections as to which there is special provision governing the returns thereof.

Your second question involves a consideration of a number of statutes. Sections 4996 and 4999, G. C., 103 O. L., 844, authorize the nomination of candidates for office by petition. Section 5003, G. C., to which you refer, provides as follows:

> "Besides containing the names of candidates, all certificates of nomination and nomination papers shall specify as to each candidate:
>
> 1. "The office for which he is nominated;
>
> 2. "The party or political principle which he represents, expressed in not more than three words;
>
> 3. "His place of residence, with street and number thereof, if any.
>
> "In nominations by petition, the certificate may designate instead of a party or political principle any name or title which the signers may select. Candidates nominated by petition without distinctive appellations shall be certified as independent candidates. In case of electors of president and vice-president of the United States, the names of the candidates for president and vice-president shall be added to the party or political appellation."

Under the provision of this section a list of candidates for the several offices to be elected may be nominated by one petition. That is to say, the names of candidates for each of the several offices to be elected may be placed at the head of a single petition or the parts thereof in the form prescribed and the names of

the signers of such petition or parts thereof counted for each of the several candidates for the various offices to be filled, so long as there are not more candidates named in such petition for any office than there are incumbents to be elected to such office. A number of candidates so nominated would, I take it, constitute a ticket within the meaning of that term as used in statutes prescribing the form of ballot. The signers of such petition may designate a name or title for such ticket.

By the provisions of section 5017, G. C., 106 O. L., 346, it is required that the ballot "shall contain the names of all the candidates whose nomination for any offices specified in the ballot have been duly made and not withdrawn in accordance herewith, arranged in tickets or lists. * * *"

Section 5018, G. C., provides as follows:

> "In general the arrangement of the ballot shall conform as nearly as practicable to the plan hereinafter given. The tickets of the various political parties shall be printed in parallel columns headed by the chosen device upon a shaded background, and the party names in such order as the secretary of state directs, precedence being given to the political party which held the highest number of votes for governor at the next preceding November election, and so on, provided, however, that the names of candidates for United States senator shall appear upon the ballot next below the name of the candidates for governor. The tickets, or lists, of candidates, nominated by nomination papers, with their party names or designations, shall be printed at the right of and parallel with the tickets of political parties in such order as the secretary of state directs, precedence being given to the order herein prescribed for party tickets. No ticket or list of candidates containing more candidates for any office than are to be elected shall be printed under the name of any party."

Here it is provided that tickets or lists of candidates so nominated pursuant to the provisions of section 5003, G. C., supra, shall be printed with their party names or designations at the right of or parallel with tickets of political parties, in such order as the secretary of state directs. If, therefore, the names of several candidates for different offices who are nominated by what is termed one petition in the manner above suggested, constitute a ticket as before indicated, all such tickets are required to be put in separate columns in the order prescribed.

Section 5021, G. C., 103 O. L., 22, provides in part as follows:

> "The ballot shall be so printed as to give each elector a clear opportunity to designate by a cross mark in a large blank circular space, three-quarters of an inch in diameter, below the device and above the name of the party at the head of the ticket or list of candidates his choice of a party ticket and desire to vote for each and every candidate thereon. * * *"

Specific requirement is here found that the ballot shall be so printed as to give each elector an opportunity to express his choice, by placing a cross mark in a circular space at the head of a list of candidates as well as by placing the mark in a circular space at the head of a party ticket.

The terms "list of candidates" cannot be here construed to apply to other than those lists or tickets which are above referred to as having been nominated by one petition and cannot be made to include those candidates nominated by

separate petition, which are required to be certified as independent candidates. By separate petitions any number of candidates may be nominated for the same office and it would be impracticable to determine the voters' choice among such candidates from a cross mark placed above any list of such independent candidates.

Upon consideration of the provisions of the statutes above referred to, I am of the opinion, in answer to your second inquiry, that where a ticket or list of candidates, not containing the names of more candidates for any one office than may be elected, is nominated by a petition or certificate, and there is designated therein a proper name or title for such ticket or list of candidates, it is required that such ticket be printed in a separate column on the ballot to the right of all party tickets under the name so designated, having printed above such designated name or title a circular space similar to that above party tickets.

It should be here observed, however, that no ticket or list of candidates may be nominated by petition as above suggested in townships, nor in municipalities, with a population less than two thousand in which no primary election is had for making nominations.

Your third inquiry refers to the nomination of candidates for office by separate petitions without distinctive titles or designation. It is provided in section 5003, G. C., supra, that candidates so nominated shall be certified as independent candidates.

Section 5017, G. C., 106 O. L., 346, requires, as stated above, that the ballot shall contain the names of all candidates duly nominated and not withdrawn, and it will be remembered also that section 5018, G. C., 104 O. L., 11, provides that:

> "The tickets, or lists, of candidates nominated by nomination papers, with their party names or designations, shall be printed at the right of and parallel with the tickets of political parties * * *."

This provision applies as well to independent candidates nominated in the manner stated in your third question, by separate petitions, as to tickets nominated in the manner suggested in your second inquiry, i. e., tickets nominated by single petition. Independent candidates nominated by separate petitions will constitute a list of candidates which are by the above provision required to be placed on the ballot to the right of party tickets and tickets nominated by petition or nomination papers.

While it is provided in the same section that "no ticket or list of candidates containing more candidates for any office than are to be elected shall be printed under the name of any party," this has no application to lists of independent candidates. Such lists of independent candidates are not authorized to be printed under any name or designation. More detailed provision is not found for the form in which such lists of independent candidates for other offices shall be printed upon the ballot. I think, however, it is the uniform practice to print the names of all candidates for each office in such list in groups under the designation or title of the office for which nominated, in alphabetical order, according to surnames, as provided in section 5028, G. C., 103 O. L., 520, for the printing of the names of candidates in townships and municipalities having a population less than two thousand.

Answering your third inquiry, I am of opinion that the names of all independent candidates nominated by separate petitions should be placed in a list to the right of party tickets and tickets nominated by petition, without any name, title or designation thereover and without any circular space over the same; and that the names of such independent candidates for the several offices to be elected should be placed under the title of such office in alphabetical order according to surnames.

In your further communication under date of January 17, 1915, you state that the special election to which you made reference in your letter above quoted, is a special municipal election authorized to be held under the provisions of section 3536, G. C., in newly created municipal corporations. Said section 3536, G. C., provides as follows:

> "The first election of officers for such corporation shall be at the first municipal election after its creation, and the place of holding the election shall be fixed by the agent of the petitioners. Notice thereof, printed or plainly written, shall be posted by him in three or more public places within the limits of the corporation, at least ten days before the election. The election shall be conducted, and the officers chosen and qualified, in the manner prescribed for the election of township officers, and the first election may be a special election held at any time not exceeding six months after the incorporation, and the time and place of holding it shall be fixed by such agent, and notice thereof shall be given as is required herein for the municipal election."

It is assumed that the municipality in question, if it may be considered such at all, has a population of less than two thousand, and is therefore unauthorized to nominate candidates by primary election. From this it follows that candidates for municipal offices to be elected at the anticipated special election authorized under section 3536, G. C., supra, may be nominated only by petition, and unless so nominated may not have their names printed upon the ballot, by reason of the provision of section 4949, G. C., 104 O. L., 9.

There is, however, to be found no special provision as to the time of the filing of nomination petitions for nomination of candidates to be voted for at a special election of municipal officers to be held under section 3536, G. C., supra, and the time of the filing of such petitions would, therefore, be governed by the general provisions of section 5004, G. C., 104 O. L., 10, which provides that:

> "Certificates of nomination and nomination papers of candidates shall be filed as follows:
>
> * * * * * * * * * *
>
> "For township or municipal officers, justices of the peace, or members of the board of education, with the board of deputy state supervisors of the county, not less than sixty days previous to the date of election:"

A compliance with the statutory requirements referred to, relative to the nomination of candidates, will necessitate fixing the date of such special election at such time as will give reasonable time and opportunity for candidates to file petitions for nomination at least 60 days prior to the date of election. Since no primary election may be held in the municipality in process of organization, as stated above, no ticket may be nominated by one petition. All candidates must in such election be placed upon the ballot in accordance with the provisions of section 5028, G. C., 103 O. L., 520.

The returns of such special municipal election are not specifically provided for since prior thereto there can be no clerk or auditor of such municipality to whom the returns may be made, under the provisions of section 5114, G. C., supra.

It will be observed that it is provided by section 3536, supra, that "the election shall be conducted, and the officers chosen and qualified, in the manner prescribed for the election of township officers." There is here adopted by reference and implication, in my judgment, the provision of section 5112, G. C., supra, and the

same made applicable to the returns of special elections of municipal officers under section 3536, G. C., supra, and the returns of such election are required by virtue of said section 5112, so adopted, to be made to the clerk of the township in which the municipality is located, and such clerk is required to canvass the same and issue proper certificate of election to those persons by him determined from such returns to have been elected.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1189.

APPROVAL OF TRANSCRIPT FOR BOND ISSUE, BOARD OF EDUCATION OF WASHINGTON TOWNSHIP, PICKAWAY COUNTY, OHIO.

COLUMBUS, OHIO, January 20, 1916.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—IN RE bonds of Washington township, Pickaway county, Ohio, in the sum of $27,000.00, being fifty-four bonds of $500.00 each, numbered consecutively from one to fifty-four, falling due two every six months commencing March 1, 1917, and ending March 1, 1930.

I have examined the transcript of the proceedings of the board of education and other officers of said rural school district, and I find the same regular and in conformity with the provisions of the General Code.

I am therefore of the opinion that said bonds prepared in the form set forth in the resolution authorizing their issue, when properly executed and delivered, will constitute valid and binding obligations of the said school district.

I enclose the transcript herewith.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1190.

WORKMEN'S COMPENSATION LAW—MINIMUM PERIOD FOR WHICH COMPENSATION MAY BE AWARDED FOR LOSS OF ONE-THIRD OF FOURTH FINGER IS FIVE WEEKS—WHERE DISABILITY FOR LOSS OF ONE-THIRD OF FOURTH FINGER IS FOR GREATER PERIOD THAN FIVE WEEKS—AWARD MAY BE MADE UNDER SECTION 1465-79, G. C.

1. *The minimum period for which compensation may be awarded for the loss of one-third of the fourth finger is five weeks, as provided in the schedule of section* 33 *of the workmen's compensation law, or section* 1465-80, *G. C.* (103 *O. L.*, 85).

2. *Where disability for the loss of one-third of the fourth finger is for a greater period than five weeks, as provided in section* 33 *of the workmen's compensation law, or section* 1465-80, *G. C.*, (103 *O. L.*, 85) *compensation may be properly awarded under section* 32 *of the workmen's compensation law, or section* 1465-79, *G. C., for temporary disability.*

COLUMBUS, OHIO, January 20, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of the following letter from your department

in which you request my opinion with reference to the allowance of compensation under section 33 of the workmen's compensation law, or section 1465-80, of the General Code (103 O. L., 72):

> "In a case of injury resulting in the amputation of one-third of the fourth finger, for which a specific allowance of five weeks' compensation at two-thirds wages is provided in section 33 of the compensation act, and where the actual period of disablement lasts for more than five weeks, does the statute require or allow the payment of compensation to cover the period of disability in excess of the specific period provided for by section 33?
>
> "The attached statement sets forth in detail the facts in the case in which the question arose."

Omitting such parts of section 33 of the act, referred to above, as are not applicable to your question, the section reads as follows:

> "In case of injury resulting in partial disability, the employe shall receive sixty-six and two-thirds per cent. of the impairment of his earning capacity during the continuance thereof, not to exceed a maximum of twelve dollars per week, or a greater sum in the aggregate than thirty-seven hundred and fifty dollars. In cases included in the following schedule, the disability in each case shall be deemed to continue for the period specified and the compensation so paid for such injury shall be as specified herein, to wit:
>
> * * * * * * * * *
>
> "For the loss of a fourth finger, commonly known as the little finger, 66 2-3% of the average weekly wages during fifteen weeks * * *
>
> "The loss of the third, or distal phalange, of any finger shall be considered to be equal to the loss of one-third of such finger. * * *"

This section provides that in cases enumerated in the schedule the disability in each case shall be deemed to continue for the period specified and the compensation shall be as therein provided. It would seem from the language of the statute just quoted that compensation for an injury resulting in partial disability shall not be paid for a less period than is provided in the schedule. The statement attached to your letter shows that there was a temporary disability extending beyond the period specified for one-third loss of the fourth finger. Your question then is whether or not compensation can be awarded covering this further period of temporary disability.

Section 32 of the act, or section 1465-79 of the General Code (103 O. L., 85) provides as follows:

> "In case of temporary disability, the employe shall receive sixty-six and two-thirds per cent. of his average weekly wages so long as such disability is total, not to exceed a maximum of twelve dollars per week, and not less than a minimum of five dollars per week, in which event he shall receive compensation equal to his full wages; but in no case to continue for more than six weeks from the date of the injury, or to exceed three thousand, seven hundred and fifty dollars."

The section just quoted refers to injuries resulting in temporary disability. There is a temporary disability resulting to the employe in the case you cite in

your letter which is for a greater period than that provided in the schedule under section 33 of the act.

We think that the purpose and object of the workmen's compensation act was to compensate the injured employe during the period of his disability, and that therefore sections 32 and 33 should be construed together, and that compensation can be properly awarded covering a temporary disability where the period extends for a longer time than is specified in the schedule of section 33 for partial disability.

The question submitted in your letter is identical with one which arose under the workmen's compensation law of the state of New Jersey. The New Jersey law in section 2, clause A, provides compensation for injuries producing temporary disability, and clause B provides for disability total in character and permanent in quality. Clause C provides for disability partial in character but permanent in quality, and it is further provided in this section and clause, that in cases included in its following schedule the compensation shall be that named in the schedule.

In the case of The Nitram Company v. Creigh, reported in 86 Atl., 435, compensation was awarded for temporary disability to which was added the period specified in the schedule for a partial disability. The employer objected to the award, the case was taken to the supreme court of that state, and the award was sustained, the syllabus of the case being as follows:

> "Where a servant employed under the workmen's compensation law got his fingers mashed and some of them were amputated and such injury produced temporary disability partly due to an affection preventing him from going to work, damages were properly allowed both under clause A, concerning temporary disability and clause C, providing for disability partial in character but permanent in quality even though the damage would exceed the maximum recovered under clause B, relating to total and permanent disability."

Therefore, in answer to your question, I am of the opinion that compensation can properly be allowed for temporary disability which exceeds that of partial disability as specified in the schedule contained in section 33 of the workmen's compensation law, or section 1465-80 of the General Code, and that section 33 provides the minimum amount which shall be paid in cases therein specified.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1191.

STATE CIVIL SERVICE COMMISSION—MAY CLASSIFY PERSONS WHO HAVE NOT BEEN INCLUDED IN UNCLASSIFIED SERVICE OR UNSKLLED LABOR CLASS OR ANY CLASS OTHER THAN COMPETITIVE CLASS, UPON GROUND OF PRACTICABILITY OF COMPETITIVE EXAMINATIONS TO TEST MERIT AND FITNESS FOR POSITIONS FOR WHICH THEY ARE APPLICANTS—THOSE EXEMPT FROM COMPETITIVE CLASS IN CLASS NOT NAMED.

The State Civil Service Commission, under authority of section 486-9, *G. C., as amended* 106 *O. L.,* 406, *and related sections, may classify the persons remaining in the employ of the state, the several counties, cities and city school districts thereof, who have not been included in the unclassified service or unskilled labor class or any class other than the competitive class, upon the ground of practicability of competitive examinations to test their merit and fitness for the position for which they are applicants. When such classification is made those persons whose merit and fitness for a position it is decided practicable to determine by competitive examination may be included in the competitive class, while those persons whose merit and fitness for a position to be filled are found by said commission to be impracticable to determine by competitive examinations may be exempted from said competitive class, and when so exempted are removed from the operation of the civil service law, and are not within any class named therein.*

COLUMBUS, OHIO, January 20, 1916.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Sometime since you submitted to me an inquiry which was reserved for consideration until certain proceedings involving the constitutionality of the new civil service law could be determined. Those proceedings having settled the constitutionality of this law, I now respectfully submit my answer.

Your inquiry is as follows:

"Subdivision (b) of section 486-8 of the new civil service law, reads as follows:

"'The classified service shall comprise *all* persons in the employe of the state, the several counties, cities and city school districts thereof *not specifically included in the unclassified service*, to be designated as the *competitive class*, and the *unskilled labor* class.'

Paragraph 1, under subdivision (b), reads as follows:

"'The *competitive class* shall include all positions and employments now existing or hereafter created in the state, the counties, cities and city school districts thereof, for which it is *practicable* to determine the merit and fitness of applicants by *competitive examinations*. Appointments shall be made to, or employment shall be given in, all positions in the *competitive class* that are not filled by promotion, reinstatement, transfer or reduction, as provided in this act, and the rules of the commission, by appointment from those certified to the appointing officer in accordance with the provisions of this act.'

"Your opinion on the following question is respectfully requested:

"Inasmuch as the new law states that the classified service shall comprise *all persons* not *specifically included in the unclassified service,* has

this commission authority to exempt any positions from the classified service on the ground of impracticability? In other words, if this commission decides that it is impracticable to determine the merit and fitness of applicants for any position by *competitive examination*, does this exempt the position from the classified service or only from the *competitive class* of the classified service?"

Your inquiry must be answered by determining the persons and positions included in the classified service rather than by determining what persons or positions may be excepted therefrom. This requires a consideration of all the provisions of the civil service law, 106 O. L., page 400, which apply to the classified and unclassified service.

It is provided in the section you quote that the civil service of the state shall be divided into two general classes, viz.: The classified and unclassified service. No attempt is made anywhere in the whole law to define the unclassified service. This is so because the law itself specifically designates what person shall be included in that service, which specifications are to be found in the succeeding paragraphs of said section 486-8. These provisions having clearly and definitely designated the persons included in the unclassified service, the legislature in subdivision (b), which you quote, defines the persons and positions that shall comprise the classified service. They are, as therein defined, all persons in the employ of the state and the several counties, cities and city school districts thereof "not specifically included in the unclassified service." The term "specifically," as here used, must be held to apply to the precise or definite person or persons in the different paragraphs of subdivision (a) as hereinbefore noted, and to such other persons who may be designated by the state civil service commission, under authority granted to it by the provisions of paragraphs 10 tnd 12 of said subdivision (a). That is to say, the persons specifically included in the unclassified service constitute two classes: First, those named by the legislature and specified in the law, and second those to be designated by the state commission, under the provisions of paragraphs 10 and 12 aforesaid, from a class which is named by the legislature. It is clear, therefore, that as to the unclassified service, the legislature has delegated no administrative duty whatever to the state commission save and except the duty under the prescribed conditions of said paragraphs 10 and 12 aforesaid, which duty, it must be noted, is expressly limited and confined to the persons specified in said paragraphs. Not only is this true, but no similar authority can be found in any other section of the civil service law, with the exception of that granted in paragraph 2 of section 486-14, which paragraph refers to positions requiring particular and exceptional qualifications, and which positions, while removed from the competitive class, still remain in the classified service.

The legislature having thus definitely fixed and determined what persons shall constitute the unclassified service, and having provided that all persons not in the unclassified service shall comprise the classified service, it would seem to leave but little to conjecture as to the persons who are thus to constitute the classified service. In other words, the legislature, up to this point, in its plan or scheme of civil service, has clearly and definitely fixed the division between classified and unclassified service. Having done so, it then undertakes to divide the classified service into two classes, viz.: The competitive and the unskilled labor class. This division seems to be in some conflict with the provisions of paragraph 3 of section 486-1 of the civil service law, wherein the classified service and competitive classified service are designated as synonymous terms. Nor can it be said to be in entire harmony with the unskilled labor clause of paragraph 12 of subdivision (a) aforesaid, because that clause apparently recognizes that unskilled labor positions may

be in the competitive classified service unless excepted by the state or municipal civil service commission, as therein provided, whereas by the provisions just quoted, the unskilled labor class is expressly separated from the competitive class. However, these matters do not reflect upon your inquiry except as they may indicate that the provisions of the first clause of subdivision (b) may not have been thoroughly understood by the law making power.

The competitive class thus constituted is made to include all positions and employments now existing "or hereafter created in the state, the counties, cities and city school districts thereof for which it is practicable to determine the merit and fitness of applicants by competitive examination."

Here then we find for the first time a qualification applied to the competitive class. While, as before suggested, it would seem that, not only by the express terms of said subdivisions (b) but by other provisions of the law hereinbefore noted, the competitive classified service included all remaining positions in the state and other political subdivisions named in the law, yet it seems that still another condition is to be met before said competitive class may be fully determined. Did the legislature, therefore, intend by this language:

> "for which it is practicable to determine the merit and fitness of applicant by competitive examinations,'

to add a further qualification to admission into the competitive class? That such is the purpose of the law seems to be indisputable. Independent of any other considerations, the language of this statute itself precludes any other conclusion. Its plain and unequivocal terms are that the competitive class shall include all positions for which it is practicable to determine the merit and fitness of applicants therefor by competitive examinations. This is a qualification imposed by language that cannot be ignored. It means that it is not enough that a position is not included in the unclassified or unskilled labor class, or any other class theretofore named in the statute, to warrant it being classified in the competitive class. Such position must possess another attribute or quality. It must be a position that it is practicable by competitive examination to determine the merit and fitness of an applicant therefor. It must be noted, too, in this connection that this condition so imposed is in complete harmony with the constitutional requirement that appointments "in the civil service * * * shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations." Not only, however, is this law in harmony with the constitutional provision aforesaid, but this construction of the law is in harmony with the repeated interpretations by the courts of New York of constitutional and statutory provisions very similar to our constitution and the statutory law under consideration, not only in language and expression, but in effect. A citation to but one authority is sufficient.

In the case of Chittenden v. Wurster, 152 N. Y., 345, Judge Haight, in delivering the majority opinion of the court of appeals, said:

> "We have carefully read the evidence in this case and not a word have we found tending to show that a competitive examination is practicable for a position where the appointee receives, opens, reads and answers the letters of his chief; where he is to counsel and advise him with reference to the conduct and management of his office, sign his name to checks or warrants, collect and pay out his money, have the combination of his safe and the custody and control of its contents. A candidate may be ever so competent and still lack many of the necessary elements of a trustworthy officer; he may be ever so learned and still lacking in

> judgment and discretion; he may be discreet and still without character; he may be honest and yet meddlesome and a person in whom you could not confide. To our minds the framers of the constitution or of the statutes never contemplated or intended that a competitive examination was practicable for such a position."

It is manifest, even to a casual observer, that there are many positions in the service of the state and its political subdivisions to which the foregoing remarks apply and which, it must be assumed, were known to the legislature, and which are not specifically included in the unclassified service or any other class of service in the civil service law under consideration. More than that, there are many positions not otherwise classified which by the operation of this law, without this condition, would fall into the competitive class which could not be filled at all, because they would not be worth the trouble of qualifying for an appointment thereto. Many other and further considerations might be urged outside of the language of the law itself to support this interpretation, but I will not pursue this branch of our discussion further.

I conclude that by the terms of said paragraph 1 of section (b), all positions placed in the competitive class must be determined to be positions which may be filled by persons whose merit and fitness therefor it is practicable to determine by competitive examination. From this it follows that such qualification is a condition precedent and, if a condition precedent, it is only fair to assume that the legislature by some appropriate provision has constituted some authority to determine these qualifications, not for the purpose of exempting any persons and position from the competitive service, but for the purpose of placing them therein. That duty, in my judgment, is imposed upon your commission by the provisions of section 486-9, G. C., as amended 106 O. L., 406. The provisions of said section to which I refer are as follows:

> "As soon as practicable after the taking effect of this act, the commission shall put into effect rules for the classification of offices, positions and employments in the civil service of the state and the several counties thereof; for appointment, promotions, transfers, lay-offs, suspensions, reductions, reinstatements and removals therein and examinations and registrations therefor."

The provisions aforesaid delegate to your commission complete authority to classify offices, positions and employments and, therefore, to determine by such classification what offices, positions and employments shall be placed in the competitive class. The exercise of the power thus conferred involves a determination of questions of fact and, therefore, requires the exercise of judgment and discretion, and the duty thus conferred may be said to be more than a mere ministerial duty. I think, however, that the commission may exercise such power and that the same was fully contemplated, not only by the provision of said section 486-9, G. C., but by the other provisions of the civil service law.

It is provided in said paragraph 1 of subdivision (b) that "appointments shall be made to or employments shall be given in, all positions in the competitive class that are not filled by promotion, reinstatement, transfer or reduction, as provided in this act, and the *rules of the commission,* by appointment from those certified to the appointing officer in accordance with the provisions of this act." This language plainly implies that in addition to the provisions of law pertaining thereto the rules of the commission shall also have the effect of law and control with and in addition to the law. Again, it is provided in section 486-7, G. C., that

"the commission shall prescribe, amend and enforce administrative rules for the purpose of carrying out and making effectual the provisions of this act."

While the duties prescribed in these sections are designated as administrative duties, yet such duties may frequently call for the exercise of discretion.

People v. Salsbury, 96 N. W., 941.

These various provisions, when considered in connection with said section 486-9, in my judgment, emphasize a purpose in the law to invest your commission with more than mere ministerial duties, and make it manifest that under said section 486-9, authority is conferred upon you to exercise your judgment and discretion in classifying offices, positions and employments with reference to the facts that may apply to each. The discretion, however, thus vested in your commision must be exercised with due regard for the requirements of the law as expressed in said paragraph 1 of subdivision (b), for when so exercised it is subject to review by the courts. This is so because while the duty of classification is imposed upon you in the first instance, yet if such classification is made in conflict with the express requirements of the law the courts will take jurisdiction of the matter when presented in a proper action, and hold such classification void as in case of any other unlawful act. It is expressly held in the case of Chittenden v. Wurster, reported in 14 N. Y., App. Div. 483, that when the character and functions of any particular position are ascertained the question whether competitive examination for appointment to that position is practicable or not, is a question of law and may be reviewed by a court of competent jurisdiction in a proper action.

Again, it is especially provided in section 486-29, G. C., (106 O. L., 418) that the right of any taxpayer to bring an action to restrain the payment of compensation to any person appointed to or holding any office or place of employment in violation of the provisions of the civil service law shall not be limited or denied by reason of the fact that said office or place of employment shall have been classified as or determined to be classified as not subject to competitive examination. From this it appears that while your commission is authorized to make the classification above noted, and in so doing is empowered to exercise its judgment and discretion, yet such classification, when completed, may be reviewed by the courts of competent jurisdiction.

Coming now to a specific answer to the inquiry submitted, I am of the opinion that your commission has full authority to classify the persons remaining in the employ of the state, the several counties, cities and city school districts thereof which have not been included in the unclassified service and the unskilled labor class, or any other class except the competitive class; that such classification may be made so as to include in one division thereof all persons whose merit and fitness for a position it is practicable to determine by competitive examination, which said division shall constitute the competitive class; and in another division those persons whose merit and fitness for the positions to be filled are found by your commission to be impracticable to determine by competitive examinations, which last named positions may be exempted from the competitive class, and when so exempted are removed entirely from the operation of the civil service laws and are not within any class named therein.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1192.

ROADS AND HIGHWAYS—ROAD IMPROVEMENT COMMENCED UNDER SECTION 6956-1 ET SEQ., G. C., PRIOR TO REPEAL BY CASS HIGHWAY LAW—ASSESSMENT ACCORDING TO BENEFITS—REAL ESTATE LYING WITHIN AND WITHOUT A MUNICIPAL CORPORATION—ABUTTING PROPERTY OF IMPROVED ROAD WHICH WAS BUILT ENTIRELY BY GENERAL TAXATION MAY BE ASSESSED—SEWAGE DISPOSAL PLANT OWNED BY CITY AND LYING OUTSIDE OF CITY AND WITHIN ONE MILE ASSESSMENT DISTRICT, MAY BE ASSESSED.

1. *Where a road improvement was commenced under section 6956-1 et seq., G. C., prior to their repeal by the Cass highway law, and the road improvement began at the east corporation line of a city and extended in an easterly direction from that point, real estate within such city and lying within one mile of the western end of the road improvement may be assessed for a part of the cost of the improvement in question, the assessment to be made according to the benefits derived from the improvement.*

2. *Real estate lying within one mile of the eastern end of the road improvement in question and abutting upon another improved road, which other improved road is an extension of the road now being improved, and which other road was built entirely by general taxation, may be assessed for a part of the cost of the road improvement in question, the assessment to be made according to benefits.*

3. *A tract of land owned by the city in question and lying outside said city and immediately south of the improved road in question and within the assessment district for such road, and which land is used by the city for a sewage and garbage disposal plant, may be assessed for a part of the road improvement in question, which assessment must also be made according to benefits.*

COLUMBUS, OHIO, January 21, 1916.

HON. T. B. JARVIS, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR:—I have your communications of December 2 and December 11, 1915, in which you state that under the provisions of section 6956-1 et seq., of the General Code, which sections were repealed by the Cass highway law (106 O. L., 574), a certain proceeding was commenced in your county prior to the repeal of the sections in question.

This proceeding was for the improvement of a section of highway beginning at the east corporation line of the city of Mansfield and extending in an easterly direction from that point. The petition was filed and granted, the intermediate steps were taken, the contract was let and the greater part of the work was completed before the Cass highway law went into effect, and you therefore correctly observe that the proceeding is to be concluded under said section 6956-1 et seq., of the General Code.

You now make certain inquiries in regard to the assessment of that part of the cost of the improvement to be charged against and collected from owners of real estate, which inquiries may be phrased as follows:

1. "May real estate within the city of Mansfield and lying within one mile of the western end of the road improvement be assessed for any part of the cost of the improvement in question?

2. "May real estate lying within one mile of the eastern end of the

road improvement in question and abutting upon another improved road, which other improved road is an extension of the road improved in the proceeding now under discussion and which other road was built entirely by general taxation, no part of its cost being specially assessed against any real estate, be assessed for any part of the cost of the road improvement now under consideration?

3. "The city of Mansfield owns a tract of land immediately south of the improved road in question, which land is used for a sewage and garbage disposal plant and lies outside the limits of the city. The city uses the road in question in conveying garbage to its disposal plant. May the land owned by the city of Mansfield and described above, be assessed for any part of the cost of the road improvement in question?"

Replying to your first inquiry, it may be observed that, as a general proposition of law, where a right to impose an assessment is claimed it must clearly appear that such power has been granted by statute; but authority being shown, in general terms, to make an assessment, whoever insists that his property is exempt from the burden will be required to support his claim by a provision equally clear.

Lima v. Cemetery Association, 42 O. S., 128.

The section of the law in question relating to the lands to be assessed, section 6956-10, G. C., provided that not less than twenty nor more than thirty-five per cent. of the cost and expense of an improvement should be assessed upon and collected from the owners of real estate lying and being within one mile from either side, end or terminus of the improvement, and assessed according to the benefits derived from the improvement, as determined by the commissioners, and that the assessments so made should be in addition to all other assessments authorized by law, notwithstanding any limitation upon the aggregate amount of assessments on such property. At no place in the act under consideration was there any language which could have been construed to create an exception to the above rule in favor of property lying and being within a municipality. In the absence of any further provision in the act shedding any light upon this question, there would seem to have been little doubt as to the authority of the commissioners in making assessments under section 6956-10, G. C., to assess lands lying within a municipal corporation, provided such lands were situated within one mile from either side, end or terminus of the improvement.

That the legislature did not intend to limit the jurisdiction of the county commissioners under this law to unincorporated territory was, however, clearly established by the provisions of section 6956-2, to the effect that in locating roads and road improvements within the territorial limits of any municipality the county commissioners should be confined to the platted streets of such municipality. This provision clearly indicted that the legislature intended to confer upon the county commissioners the power and authority to actually construct roads within municipalities under authority of the sections now being considered. It would be impossible to reach the conclusion that the commissioners had authority to construct roads within municipalities under section 6956-1, et seq., of the General Code, and did not have authority to assess lands lying within municipalities. I therefore advise you, in answer to your first question, that the county commissioners, under the facts disclosed by your communications and set forth above, are authorized to assess upon and collect from the owners of real estate in the city of Mansfield lying and being within one mile from the western end of the road

improvement in question a part of the cost and expense of such improvement, which assessment must be made according to the benefits derived from the improvement, as determined by the commissioners. The view above expressed is in accord with that of my predecessor, Hon. Timothy S. Hogan, as set forth by him in an opinion rendered to Hon. Cheever W. Pettay, prosecuting attorney of Harrison county, on February 21, 1912, and found at page 1187 of the attorney-general's report for that year.

The discussion of the pertinent sections of the law rendered necessary in answering your first question makes it unnecessary, in answering your second question, to do more than to cite the provision of section 6956-10, relating to assessments and already referred to herein, and in view of that provision I advise you that the lands referred to by you in your second question, and lying and being within one mile from the eastern end of the road improvement in question, may be assessed for a part of the cost and expense of the improvement in question, according to the benefits derived therefrom.

Your third question is one of some difficulty in view of the absence of any Ohio authority and the conflicting decisions of other states. The question is as to the right to levy special assessments against real estate owned by a municipality. In the particular instance referred to by you the real estate lies outside the corporate limits of the municipality, but by the great weight of authority the question of whether the real estate is located within or without the municipality is immaterial. It should first be observed that the fact that property is exempt from general taxation does not render it exempt from local assessments.

Lima v. Cemetery Association, 42 O. S., 128;
Watterson v. Halliday, 2 O. N. P., (n. s.) 693;
Gilmour v. Pelton, 5 O. D. R., 447.

The case of Dick v. City of Toledo, 11 O. C. C., 349; 5 O. C. D., 157, is cited in support of the proposition that the public grounds of a municipal corporation should be assessed for their proportionate share of the total expense of a street improvement, but a careful reading of the opinion of the court leaves some doubt as to whether the case is authority for such a proposition. The decisions of the courts of the other states are in such conflict that it is impossible to frame a general rule.

Judge Freeman, in a note appended to the case of Herrick and Stevens v. Sargent and Lohr, 132 Am. St. Rep., 291, 301, makes the following observation:

> "The authorities relative to the question whether land owned by the public is exempt from local assessment are not entirely harmonious. The weight of authority * * * is to the effect that such lands are not exempt."

It was held in the case of Newberry v. City of Detroit, 164 Mich., 413, that a municipal park is not exempt from assessment for paving an adjoining street where the statutes constitute as the assessment district the parcels of land situated on the street, and direct the cost of paving to be assessed according to frontage.

In the case of Edwards v. Jasper County, 117 Ia., 365, the court held that property in a city owned and used for public purposes by a county was not exempt from special assessments for street improvements. The statutes of Iowa, considered by the court in its decision, were very similar to the Ohio statutes bearing on the question now under discussion.

It was held in the case of Town of Franklinton v. Parish of Washington,

126 La., 2, that the exemption of a court house square from taxation does not extend to a special assessment for paving sidewalks levied against all abutting real estate.

In the case of Commissioners of Franklin County v. City of Ottawa, 49 Kans., 747, the court was called upon to construe a statute which provided generally for assessing the cost of street improvements, there being no statutory declaration as to whether county property within a city might or might not be assessed. The court held that a city had power to levy a special assessment for the improvement of a street in front of the court house square within a city, and that if the claim for such improvement is disallowed by the board of county commissioners, the district court, upon appeal, may adjust the amount thereof, and such a judgment may be paid as other judgments against a county.

In the case of County of McLean v. City of Bloomington, 106 Ill., 209, the court held that mandamus will lie to compel a county to pay a special assessment levied against the county for the improvement of a street, the county being the owner of the lot occupied by the court house and abutting on the street improved.

The above case was cited and followed in the case of Whittaker v. Deadwood, 23 S. D., 528.

In the case of Adams County v. City of Quincy, 130 Ill., 566, the right of the city of Quincy to levy a special assessment for a street improvement against a lot occupied by the county court house was sustained. The court house property was by statute exempted from general taxation.

A similar question was before the court in the case of City of Mt. Vernon v. Illinois, 147 Ill., 359. In this case the court distinguished between property of the state and property of cities, villages and counties, holding that state property could not be specially assessed but that such rule did not apply to the property of cities, villages and counties. The court made the following observation as to the method of enforcing the payment of special assessments levied against public property:

> "Although the property of the city or county cannot be sold so as to pass the title thereto to private parties, yet mandamus will lie to compel the payment of the amount assessed out of the city or county treasury."

The case of Lima v. Cemetery Association, supra, is authority for the proposition that in Ohio the power to levy special assessments against benefited real estate is not necessarily dependent upon the power to sell such real estate in order to enforce the collection of such assessments, and that a political subdivision may have the power to levy a special assessment against a particular piece of real estate, even though it does not have the power to sell such real estate in order to enforce collection.

The court was called upon in this case to pass upon the validity of a special assessment levied against a cemetery association, and in sustaining the validity of the assessment the court held that while the lands of an incorporated cemetery association so far as exempted cannot be sold to pay an assessment for the improvement of a street, the municipal corporation may enforce the assessment by such remedies as the statute and courts of equity afford.

The Illinois, Kansas, Iowa, Louisiana and South Dakota cases cited above deal with the question of the right of a municipal corporation to levy special assessments against the property of a county. The case presented by you is as to the right of a county to levy a special assessment against the property of a municipal corporation, but I am unable to distinguish in principle between the two situations, and am of the opinion that in the absence of a statutory distinction the same rule must apply to both.

The section of the General Code relating to the power of municipal corporations to levy and collect special assessments, being section 3812, G. C., authorizes special assessments upon the abutting, adjacent and contiguous or other specially benefited lots or lands in the corporation. The section of the General Code under which the assessment now under consideration is to be made, being section 6956-10, G. C., which section is now repealed but is still applicable in the case presented by you on account of the saving provisions of the Cass highway law, provides for an assessment upon the owners of real estate lying and being within one mile from either side, end or terminus of the improvement according to benefits. Both provisions are general in their nature and contain no exemption as to property owned by a county or a municipality. It is interesting, therefore, to look for a moment at the question of the right of a municipality to levy special assessments against county property. I find no reported case in Ohio dealing with this question, but learn that the general practice has been for municipal corporations to levy special assessments against property owned by a county and specially benefited, and it appears that such assessments have been paid without protest.

The proposition that in Ohio a municipal corporation may, under authority of section 3812, G. C., levy a special assessment against property owned by a county, has, therefore, the sanction of practice, and it is a well established rule of statutory construction that the contemporaneous and long continued practice of officers required to execute or take cognizance of a statute is strong evidence of its true meaning, and should not be disregarded except for cogent reasons. 26 Am. and Eng. Encyc. of Law, 635.

If municipal corporations in Ohio have authority to levy special assessments against property owned by a county and specially benefited by an improvement, then it would seem equally clear that a county may, under the same conditions, levy a special assessment against property owned by a municipality.

I therefore advise you that under the facts presented by you the land owned by the city and lying outside the city limits, and used for the purpose of a sewage and garbage disposal plant, may be assessed for a part of the cost and expense of the improvement, and this assessment, like all others, must be made according to the benefits derived from the improvement.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1193.

FIRE MARSHAL TAX—HOW COMPUTED IN YEAR 1915 WHEN STATUTE WAS AMENDED BY LEGISLATURE AND SAME TOOK EFFECT BEFORE TAX WAS DUE—AMENDED STATUTE GOVERNS—GROSS PREMIUM RECEIPTS *LESS* RETURNED PREMIUMS AND CONSIDERATIONS RECEIVED FOR RE-INSURANCE BASIS FOR COMPUTATION.

The fire marshal tax due in November, 1915, should have been computed under the provisions of section 841, G. C., as amended, 106 O. L., 502, upon the gross premium receipts of the fire insurance company after deducting returned premiums and considerations received for re-insurance.

COLUMBUS, OHIO, January 21, 1916

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Under date of December 28, 1915, you certified to me certain claims

of the state of Ohio for collection, among which are included a number of claims against fire insurance companies for the so-called fire marshal tax. The companies against which this tax is charged as delinquent, contest the collection of the same upon the ground that the amount charged is in excess of the tax authorized by the statute.

Section 841 of the General Code, prior to its amendment by the general assembly in 1915, provided that:

> "Each fire insurance company doing business in this state shall pay to the superintendent of insurance in the month of November each year, in addition to the taxes required by law to be paid by it, one-half of one per cent. upon the gross premium receipts of such company on all the business transacted by it in Ohio during the year next preceding, as shown by its annual statement under oath of the insurance department."

This section (G. C., 841) was amended by an act passed May 5, 1915, and filed in the office of the secretary of state on May 10, 1915 (106 O. L., 240). In the section as there amended it was provided that this tax of one-half of one per cent. should be computed upon the gross amount of premiums received by such companies from policies covering risks within this state during the preceding calendar year *"after deducting return premiums and considerations received for re-insurance,* as shown by the next preceding annual statement, verified under oath as required under the provisions of section 9590 of the General Code."

This amendment went into effect on August 8, 1915.

The section was again amended by an act of the general assembly on May 27, 1915, filed in the office of the secretary of state on June 3, 1915, and which became effective on September 1, 1915. This last amendment effected no change in the basis or method of computing the tax. In both amending acts referred to, section 841, of the General Code, was specifically repealed.

The charges certified to me for collection were computed under the provisions of said section 841 before its amendment by the general assembly of 1915, and were based upon the gross premium receipts of said companies for the preceding year without making any deductions for returned premiums and considerations received for re-insurance, which deductions are required under the provisions of both amending acts. The resulting question is, therefore, whether the tax should have been computed under the provisions of section 841 of the General Code, before its amendment, or under the provisions of said section after amendment.

The section both before and after its amendment provided that the tax "shall be paid in the month of November of each year." I find no provision of law which makes this tax a lien on a charge as of an earlier date, and the reference to the report of the preceding year is for the sole purpose of establishing a basis of computation whereby the amount to be paid may be ascertained.

If section 841 of the General Code had been repealed without amendment by the act of May 5, 1915, or by the subsequent act of May 27, 1915, no authority or method of procedure would have existed in November of 1915, under which to require payment of such tax. I am therefore of the opinion that the authority to compute, charge and collect the fire marshal tax for the year 1915 must be found in section 841 of the General Code, as amended and in force on the first day of November, 1915 (106 O. L., 502).

A brief history of the fire marshal tax may be of interest in this connection. The original act was passed April 16, 1900 (94 O. L., 388), and provided for a tax to be paid in November of each year, of one-half of one per cent. upon the gross premium receipts of such companies from the business transacted by them for the

year next preceding as shown by their annual statements, etc. Although the section was amended in 95 O. L., 474, and in 97 O. L., 418, no change was made in respect to the method of computing the tax. From April 29, 1902, to May 8, 1914, the fire marshal tax was computed upon the balance of the gross receipts of such companies after deducting return premiums and considerations received for re-insurance. The history of the law and the reasons for this interpretation are set forth in detail in an opinion of my predecessor, Hon. Timothy S. Hogan, to Hon. Price Russell, superintendent of insurance, under date of September 10, 1914, to be found in Vol. II of the annual report of the attorney-general for the year 1914, at page 1516, in which he held that:

> "the term 'gross premium receipts' as used in section 841, General Code, providing for the so-called fire marshal tax, includes all premiums received by an insurance company on the business transacted in Ohio, and no deductions whatever can be made therefrom."

Under this opinion the tax charged in November, 1914, was computed upon the gross premium receipts of said company as shown by its report for the next preceding year without any deductions. To this method of computation many of the insurance companies objected. The matter was taken up by the attorneys for the objecting insurance companies with Mr. Russell as superintendent of insurance, and with this department, and an understanding was finally reached that all the companies should pay the tax as charged against them in November, 1914, without further controversy, and that an amendment to the law should be secured, authorizing a deduction of returned premiums and the amounts paid for re-insurance from the amount of the gross premium receipts upon which such tax should thereafter be computed. This amendment was passed by the legislature (106 O. L., 240 and 502), and I believe that it was generally understood by the legislature and the insurance companies that the language used in the section as amended amounted practically to a legislative interpretation of the provisions of said old section 841 of the General Code, although the act was drawn and adopted simply as an amendment.

In view of my construction of the original act and the effect of the amendment made by the legislature in 1915, as above indicated, the understanding existing between the state departments and the insurance companies in pursuance of which the amendment to the act was secured, is immaterial, and I call attention to this understanding only for the purpose of showing that the legislative intent is not violated by my conclusion.

I therefore advise you that the fire marshal tax, due in November, 1915, should have been computed under the provisions of section 841 of the General Code, as amended (106 O. L., 502), and that the amounts certified for collection are in excess of the proper charge, and should be reduced to meet the requirements of said section as amended.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1194.

BOARD OF ADMINISTRATION—SUCCESSOR OF TRUSTEES OF MASSILLON STATE HOSPITAL—AS SUCH AUTHORITY HAS RIGHT TO CHANGE CONTRACT WITH THE WHEELING AND LAKE ERIE RAILROAD COMPANY AND ITS RECEIVER.

Under section 1839, *G. C., the board of administration is the successor of the trustees of the Massillon State Hospital, and as such has the right to agree to a change in the contract with The Wheeling and Lake Erie Railroad Company and its receiver, relative to the operation of spur track at such institution.*

COLUMBUS, OHIO, January 21, 1916.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—Under date of December 30, 1915, you wrote to me as follows:

"Please note the enclosed communications from the manager of The Wheeling and Lake Erie Railroad Company, in reference to repairs at the hospital siding at Massillon.

"You have on file in your office quite a bunch of correspondence relating to this switch. It seems that when the road went into the hands of a receiver some years since, they took advantage of the law that allowed them to abrogate any contract which showed a loss; and the contract they had with the state when the switch was put in, required that they keep up the maintenance and pay into the state treasury 33 1-3% of all freights collected until they had paid in the money advanced by the state to purchase right of way and build the track, which, we understand, amounted to $25,000. The last inquiry the writer made at the auditor's office showed they have paid in now something like $18,000.

"When the original contract was cancelled by the board then in charge at Massillon, they (the board) agreed for the state to keep up the repairs on the switch, and also agreed to pay a switching charge of $1.50 per car. Since that time the state has paid out quite a considerable sum for maintenance as well as the $1.50 switching charge per car; and, as the writer wrote Mr. McMaster, it certainly seems as if we were getting the worst of the deal.

"They now suggest, in order to clean the matter up for all time to come, that they take over the track and right of way, and agree to keep up repairs and deliver all our freight at a switching rate of $1.50 per car. This arrangement would, of course, involve the cancellation of the original contract to pay into the state treasury $25,000.

"As far as the board of administration is concerned, we can only say that such an arrangement would be satisfactory to us, as the track is badly in need of repair and there are two wooden bridges which will have to be replaced soon; and if some such arrangement can be entered into legally we would like to have it done.

"May we ask you for an opinion at your very earliest convenience?"

The communications which you enclosed with your letter are as follows:

"December 21, 1915.

"Mr. T. E. Davey, Chairman Ohio Board of Administration, Columbus, O.

"Dear Sir:—The spur track leading from our main line to the Massillon State Hospital requires immediate attention to insure safety.

"Under the terms of the contract the expense incident to the maintenance of this track is chargeable to the state. Our company has made repairs to the amount of $887.92 for which we have not as yet been reimbursed by the state. The estimate for necessary repairs to put the track in safe condition amounts to approximately $3,500.00.

"If the state will pay the $887.92 due and agree to pay bills promptly upon presentation, we will have the necessary repairs made to place this track in safe condition for operation, otherwise we will be compelled to cease making delivery of cars at the hospital until such repairs are made.

"If the board desires to cancel the contract and turn the track over to this company without further refund payments, we will agree to put the same in safe condition for operation, cancelling present bills against the state for work on that particular track, and further agree to assume all cost in connection with future maintenance without change in the switching rate of $1.50 per car.

"Either proposition will be perfectly satisfactory to us, but please understand that prompt action is absolutely necessary.

"Very truly yours,

"(Signed) H. W. McMaster."

"December 24, 1915.

"Mr. T. E. Davey, The Ohio Board of Administration, Columbus, Ohio.

"Dear Sir:—Replying to yours of the 22nd inst. My letter to you of the 21st was along the lines of Mr. Coe's report of his meeting with you at Columbus a few days ago, and is the only proposition that will be submitted.

"We have been trying for the past three years to get this matter straightened out so that both the hospital people and our local officers would know just what their duties were with reference to the contract.

"I note your comment regarding the contract. This is a matter in which the present management had nothing to do, further than to carry out the terms of the contract as executed, and it is only for the reason that we wish to get the matter in such shape as to permit of this track being properly maintained that we offer the alternate proposition to the board of administration of either carrying out the terms of the present contract, which provides that the state maintain the track, or cancel it and turn the track over to this company in order that we may keep it in safe condition at all times.

"Very truly yours,

"(Signed) H. W. McMaster."

Immediately upon receipt of your letter I caused our files to be searched for a copy of the contracts referred to, but did not locate the same. However, I found on file in the office of the auditor of state the original contract, and obtained from Mr. H. W. McMaster, general manager, a copy of the amended contract. From said papers I ascertained that on the 24th day of September, 1904, the trustees of Massillon State Hospital entered into a contract with The Wheeling and Lake Erie Railroad Company whereby said trustees agreed to procure the necessary right of way for a spur track leading from the main track of the railroad company to the Massillon State Hospital upon which to construct said spur track, and agreed to deed the said right of way to the railroad company, and at the same time granted permission to the railroad company to enter upon

the grounds occupied by the Massillon State Hospital, and to construct and maintain said tracks properly thereon and extend the same; that the railroad company agreed, upon receipt of a deed of the right of way, to construct said spur track, and to maintain the same during the continuance of said agreement, the material used in the construction thereof to remain the property of the railroad company; that it was estimated that the cost of securing the right of way and the building of the spur track would be $30,000.00, of which $25,000.00 was to be paid by the state of Ohio through the trustees of Massillon State Hospital, and all sums in excess thereof by the railroad company. The railroad company agreed to reimburse the state through the said trustees by paying them 33 1-3% of the gross earnings on all freight to and from the hospital until the said sum with interest at 5% had been paid.

There are other and further conditions of the agreement which I do not deem it necessary to mention. The said lease was duly signed by The Wheeling and Lake Erie Railroad Company and the trustees of Massillon State Hospital. Thereafter, the said railroad company went into the hands of a receiver, and Hon. B. A. Worthington was appointed such receiver. On the representation that the said contract was resulting in a material loss to the railroad company, and that the receiver was not inclined to carry out the said contract, said contract was, after conference between the then attorney-general, auditor of state and possibly the governor, amended on the 23rd day of July, 1909, in the following particulars:

In consideration of the receiver continuing to operate over the spur track, the board of trustees of the Massillon State Hospital agreed to bear the cost and expense of maintaining and removing said spur track, including bridges, etc., the maintenance and removal to be done by the railroad company, and the trustees to pay within thirty days for such maintenance and removal. It was further agreed that a switching charge of $1.50 per car would be made by the railroad company without any refund. In all other respects the contract of September 24, 1904, was continued in force.

The only authority I have been able to find for the contract in the first instance is the appropriation made in 97 O. L., page 588, wherein $25,000.00 was appropriated to the Massillon State Hospital for "railroad switch."

Section 1835, G. C.—both prior to and as amended in 106 O. L., page 26—provides that the board of administration "shall have *full* power to manage and govern the following institutions: * * * Massillon State Hospital," and section 1838, G. C., provides:

> "The board, in addition to the powers expressly conferred, shall have all power and authority necessary for the full and efficient exercise of the executive, administrative and fiscal supervision over all said institutions."

Section 1839, G. C., provides that the board on its organization shall succeed to and be vested with the title and all rights of the trustees of Massillon State Hospital in and to land, money or other property, real and personal, held for its benefit or for other public use, without further process of law, but in trust for the state of Ohio, and terminated after August 15, 1911, the existence of the board of trustees of Massillon State Hospital. In said section the board of administration was further "authorized and directed to assume and continue, as successor thereof, the construction, control and management of said institutions, subject to the provisions of this act."

The method of operation of a spur track for the purpose of carrying coal and other supplies to the institution in question is undoubtedly within the full

power of the board of administration, and if at any time it shall deem it advisable for the best interest of the state to change the method of such operation, it would seem to me that it would have full and complete authority so to do.

In your letter you state that it would be a saving to the state if the agreement made on September 24, 1904, as modified by the agreement of June 24, 1909, was abrogated, and I therefore believe that your board is fully authorized to enter into an agreement with the receiver of The Wheeling and Lake Erie Railroad Company abrogating the former agreement.

If it should be determined that the agreement heretofore existing between your board, as successor of the board of trustees of Massillon State Hospital and the receiver of The Wheeling and Lake Erie Railroad Company, should be abrogated, and that a new agreement be entered into with said receiver whereby the said receiver of said road agrees, in consideration of the abrogation of the former contracts, to put the spur track in safe condition for operation, cancel the present bills against the state for work done on said track, and further agrees to maintain and assume all cost in connection with further maintenance of said tract without change in the switching rate of $1.50 per car, the same should be duly approved by the court which appointed the receiver, and the entry approving the same should distinctly show that the said agreement was to be binding not only upon the receiver and his successors, but also upon any person or corporation acquiring title to said The Wheeling and Lake Erie Railroad through order of court, and upon The Wheeling and Lake Erie Railroad Company, its successors and assigns.

The contemplated contract abrogating the contract of September 24, 1904, to be entered into between your board and the receiver of the railroad company cannot seek to adjust any amounts due the state under said contract of September 24, 1904, for the reason that the amounts due thereunder are claims due the state, and under section 268, G. C., only the auditor of state and attorney-general are authorized to abate a claim due the state.

Any agreement entered into in conformity to this opinion should be filed with the auditor of state in order that he may be advised that no further payments will accrue under the original contract of September 24, 1904.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1195.

PUBLIC UTILITIES COMMISSION—SALARY OF MEMBER CANNOT BE REDUCED DURING HIS TERM OF OFFICE—CONSTITUTIONAL INHIBITION—STATUTE INEFFECTIVE.

The salary of an officer cannot be reduced during his term of office, and the enactment of a law for that purpose is ineffective in view of the provisions of section 20 of article II of the constitution.

COLUMBUS, OHIO, January 22, 1916.

The Public Utilities Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Permit me to reply to your request for an opinion which is as follows:

> "On the twenty-first day of August, 1913, Mr. O. H. Hughes assumed the office of a member of The Public Utilities Commission of Ohio by

virtue of an appointment by Governor Cox until February 1, 1916, at a salary of $6,000 per annum. Mr. Hughes continued in such commissionership until the fifteenth day of December, 1915, and received such salary until the eighth day of June, 1915, when, without protest, he accepted his monthly salary on the basis of $4,500 per annum, to which the salaries of the members of this commission had been reduced by the general assembly.

"On the seventh inst. Mr. Hughes submitted a bill to this commission for the sum of $687.50, being balance, claimed by him, of salary as commissioner from July 1, 1915, (the amount involved from June 8, to 30, 1915, is omitted, presumably because of the lapse of the unused balance of appropriations expiring on the latter date) to December 15, 1915, representing the difference between salary of $6,000 per year, to which he claims he was entitled under article 2, section 20, of the constitution of the state of Ohio, and the salary of $4,500 per year, which he received for said five and one-half months period.

"The commission will be pleased to receive your opinion as to its legal right to pay this bill."

In addition to your letter you enclose duplicate copy of a voucher of your commission, which is as follows:

State of Ohio — Dept. Voucher No._____
THE PUBLIC UTILITIES COMMISSION OF OHIO — Columbus, Ohio, January 7, 1916.
Audited_____
To_____O. H. Hughes_____Dr.
Competitive Bids—Emergency_____

ACCOUNT APPROPRIATION FOR___Personal Service___Balance in Ap. $___	
Jan. 7. Balance on salary as commissioner from July 1, 1915, to December 15, 1915, representing the difference between salary of $6,000 per year to which Commissioner Hughes claims he was entitled under article 2, section 20, of the constitution of the state of Ohio, and the salary of $4,500 per year, which he received for the above five and one-half months period_____	$687.50

Received of the auditor of state his warrant on the treasurer of state in full for the above account.

THE PUBLIC UTILITIES COMMISSION OF OHIO.
By_____
Present to the auditor of state.

The salary of Mr. O. H. Hughes, who, on the 21st day of August, 1913, according to your letter, assumed the office of member of the Public Utilities Commission of Ohio by virtue of an appointment at the hands of the then governor, was fixed by the provisions of section 490 of the General Code (103 O. L., 805), which was section 4 of an Act to Create the Public Utilities Commission of Ohio, etc., and which is as follows:

"Section 4. Each of the members of the Public Utilities Commission shall receive from the state an annual salary of six thousand dollars ($6,000.00), payable in the same manner as other state officers are paid."

Under the provisions of section 487 of the General Code (103 O. L., 804), the governor was authorized to appoint three members to comprise the Public Utilities Commission, the term of one being made to expire on the first day of

February, 1919, and it was to that position that Mr. Hughes was appointed, hence, as stated in your letter, his term of office which began on the 21st day of August, 1913, was to expire on the 1st day of February, 1919, at a salary of $6,000.00 as provided in section 490 of the General Code, supra.

Among the provisions of amended senate bill No. 101, to amend certain sections and to repeal section 490 of the General Code, abolishing certain state officers and reducing the compensation of state officials, which was approved by the governor on March 8, 1915, is to be found section 2250-2, of the General Code (106 O. L., 28), which is as follows:

> "Each of the members of the Public Utilities Commission of Ohio shall receive an annual salary of four thousand five hundred dollars, payable in the same manner as the salaries of other state officers are paid."

I find upon an examination of the records of the office of the auditor of state, that during the period of five and one-half months from July 1, 1915, to December 15, 1915, Mr. Hughes received pay for services at the usual intervals at the rate of $4,500.00 per annum, and that the same was accepted by him and receipted for in full for services indicated on the payroll, and for the period covered by each payroll prepared in your office, but I do not find that at any time since the enactment of section 2250-2, of the General Code, supra, that he expressly agreed to accept compensation for his services at the rate of $4,500 per annum, or that he waived his right to the full amount of $6,000 per annum, provided in section 490 of the General Code, in its original form.

In the case of State ex rel. v. Raine, Auditor, to be found in 49 O. S., 580, a question similar to the one under consideration, and in which the constitutionality of the statute was assailed on the ground that it increased the salary of the county commissioners of Hamilton county during the term for which they had been elected, and for that reason contravened section 20 of article II of the constitution of 1851, was under consideration, and the court held:

> "A statute, whatever terms it may employ, the only effect of which is to increase the salary attached to a public office, contravenes section 20 of article II of the constitution of this state, in so far as it may affect the salary of an incumbent of the office during the term he was serving when the statute was enacted."

Section 20 of article II of the constitution, supra, continues as it was in the constitution of 1851, and it is my opinion that insofar as section 2250-2 of the General Code, supra, is concerned, it is ineffective as to the making of a change or authorizing the withholding of compensation to which Mr. Hughes was entitled as a member of the Public Utilities Commission when he assumed the office for a term of six years, which was fixed at $6,000 per annum, and which amount had been appropriated for the period from July 1, 1915, to December 15, 1915, when he relinquished the office, and that in the absence of any other fact in the possession of your commission which has not been communicated to this office to the contrary, your commission has a legal right to pay the sum of $687.50 to Mr. Hughes, that being the difference between the amount paid on the basis of $4,500 per annum and the amount claimed on the basis of $6,000 per annum.

The voucher submitted by you and quoted above is returned to you herewith, the same being in duplicate.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1196.

TAXES AND TAXATION—APPROVAL OF PARTIAL LIST OF INSTRUCTIONS TO COUNTY AUDITORS INTERPRETING PROVISIONS OF PARRETT-WHITTEMORE LAW.

COLUMBUS, OHIO, January 22, 1916.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter under date of January 19, 1916, transmitting for my consideration and approval, a partial list of instructions to county auditors, involving the interpretation of some of the provisions of the so-called Parrett-Whittemore law, 106 O. L., 246-272. A copy of said list of instructions is as follows:

"To County Auditors:

"A number of questions have arisen as to the construction of the act of May 8, 1915, 106 O. L., 246, commonly known as the Parrett-Whittemore law.

"The tax commission of Ohio has decided such questions in accordance with the advice and opinion of the attorney-general as follows:

"There may be a re-assessment of real estate or any class thereof in any taxing district or subdivision thereof as follows:

"*First*—When the tax commission, under the provisions of section 79 of the act, so orders.

"*Second*—When the county auditor, under the provisions of section 55 of the act, deems it advisable.

"*Third*—When the county auditor grants a petition for re-assessment, under the provisions of section 55 of the act.

"*Fourth*—When the county board of revision grants such petition on appeal and orders the re-assessment.

"*Fifth*—When the tax commission grants such petition on appeal and orders the re-assessment.

"*Sixth*—When the board of revision, under the provisions of section 44 of the act, so orders.

"When a re-assessment of real estate or any class thereof is ordered in any taxing district or subdivision thereof, it shall be made by the assessor of such district or an assistant assessor to be appointed by the auditor, and it shall be made in accordance with the general provisions of the act and the General Code relating to the assessment of real estate.

"The work of making such re-assessment may be commenced at any time the county auditor directs.

"County auditors are not assessing officers, and cannot originate or change any assessments of real or personal property, except in pursuance of the provisions of sections 5398, 5399, 5400, 5401 and 5574, of the General Code, which refer to omitted real and personal property, and except in pursuance of the provisions of sections 5404, 5405, 5406, of the General Code, referring to the assessment of the property of incorporated companies, and except in pursuance of sections 5407 to 5414, of the General Code, referring to the assessment of the shares of banks.

"County auditors may exercise the powers conferred by sections 5398, 5399, 5400, 5401 and 5574, of the General Code, in the current year, either before or after the completion of the tax list.

"Values fixed by county auditors in exercising the powers conferred by these sections may be reviewed by the board of revision.

"Values fixed by county auditors under the provision of section 5405, of the General Code, upon the property of incorporated companies, may be reviewed by the board of revision.

"Values fixed by county auditors under the provision of section 5412 of the General Code, upon the shares of stock of banks may not be reviewed by the board of revision for the reason that the tax commission is given that power.

"In accordance with this construction of the law, the commission directs that you make a careful investigation as to the necessity of a re-assessment of real property or any class thereof in any or all taxing districts or subdivisions thereof in your county for the year 1916, and upon such investigation you direct that a re-assessment of real property be made in such taxing district or subdivision thereof as you may, in your opinion, deem it to be advisable.

"County auditors are specifically directed by this commission to order a re-assessment of all real estate which has been changed by the erection, within the past year, of any building or structure or addition or improvement, or by the destruction or removal of any building or structure.

"Detailed instructions as to the use of the card system, etc., and as to the powers and duties of boards of revision, will be issued in the near future."

In compliance with your request I have examined said list of instructions and I find that your commission, in compliance with the requirement of section 70 of the act above referred to, being section 5623 of the General Code, has decided all questions therein considered in accordance with the advice and opinion of the attorney-general.

I am therefore returning said list of instructions with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1197.

CIVIL SERVICE—APPLICANTS FOR EXAMINATIONS—TRAVELING EXPENSES MAY NOT BECOME CHARGE AGAINST STATE.

The payment of traveling expenses of applicants for civil service examinations may not become a charge against the state and be paid from state funds.

COLUMBUS, OHIO, January 22, 1916.

State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—I have your letter of January 17, 1916, as follows:

"Attached to this letter you will find a communication from the Hon. A. V. Donahey, under date of January 14th, in answer to a communication —carbon copy of which we are also sending you.

"It appears from Mr. Donahey's reply that the payment of expenses to persons who are asked to come to Columbus to take examinations may

be somewhat irregular, but it is often a source of considerable saving to the state.

"Will you kindly give us, at the earliest possible moment, an opinion as to whether or not we have authority to pay out funds appropriated for our department in this way?"

From the correspondence attached to your letter and named therein, it appears that your commission very frequently finds, before a date set for an examination at some distant point, that but one or two applicants will attend. As it is necessary, in order to conduct said examination, to send at least one examiner from your office, and sometimes two, considerable expense is involved in holding said examination. It appears further from said correspondence that in certain cases where but one or two applicants are expected to attend said examinations, you have requested them to report elsewhere for said examinations and have paid their traveling expenses to other points, upon the theory that it was much cheaper to send said applicants to other points than to pay the expenses of examiners from your office to conduct said examinations. Some question having arisen as to the legality of this procedure, you have submitted the inquiry stated in your letter in regard to the legality of payments thus made of the expenses of said applicants when directed to attend examinations at other points.

There is no authority of law, either express or implied, for the payment of the expenses of candidates under the conditions described in said correspondence. Under these circumstances the only safe course is to abandon the practice of such payments entirely. While, as suggested, it may be a matter of economy to the state, yet that in itself is not sufficient to give it the warrant of law.

In cases such as are described in your correspondence, I respectfully suggest that your commission would be warranted in placing the examination wholly in charge of local officials, as provided in section 486-5, G. C., as amended 106 O. L., 502, as follows:

"The commission may designate persons in or out of the official service of the state to serve as examiners or assistants under its direction. Each such person shall receive such compensation for each day actually and necessarily spent in the discharge of his duties as examiner or assistant as shall be determined by the commission; provided, however, that if any such examiner or assistant is in the official service of the state, or any political subdivision thereof, it shall be a part of his official duties to render such services in connection with such examinations, without extra compensation."

This plan, if followed, would eliminate all expense and would, in my judgment, prove a very practical solution of your trouble. At any rate, under no circumstances may the traveling expense of applicants become a charge against the state and be paid from state funds.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1198.

PROSECUTING ATTORNEYS—MAY NOT USE MONEYS DRAWN UNDER SECTION 3004, G. C., to PAY ASSISTANTS, CLERKS OR STENOGRAPHERS WHO ARE APPOINTED UNDER AND BY VIRTUE OF SECTION 2915, G. C.

Prosecuting attorneys may not use moneys drawn under section 3004, G. C., to pay assistants, clerks or stenographers who are appointed under and by virtue of section 2915, G. C.

COLUMBUS, OHIO, January 22, 1916.

HON. E. E. LINDSAY, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—I am in receipt of your letter of January 19th, asking for an opinion as follows:

"I shall be pleased to have your official opinion in regard to the power or authority of a prosecuting attorney to employ help in his office and pay for the same under section 3004 under the following facts and circumstances:

"Our county is somewhat large in population and I have about fifteen hundred dollars per annum at my disposal under this section.

"I get along without an assistant attorney but cannot do the people justice or fulfill the duties of the office without office help.

"Sec. 2915 provided that a prosecuting attorney may appoint such assistants, clerks and stenographers as he deems necessary for the proper performance of the duties of his office, and fix their compensation, not to exceed in the aggregate the amount fixed by the common pleas judge.

"Sec. 2914 provides that the common pleas judge may fix an aggregate amount to be expended for the year for assistants, clerks and stenographers of the prosecuting attorney's office.

"Sec. 3004 provides a fund for expenses of the prosecutor's office in the performance of his official duties and in the furtherance of justice, not otherwise provided for.

"The expenses under both sections 2915 and 3004 are payable out of the general fund of the county.

"I took the matter up with the common pleas judge a year ago under Sec. 2914 and he was of the opinion that I could pay for such help under Sec. 3004; and further expressed himself that said section provided enough for this purpose and for all other purposes for which it could be used, and refused to fix an amount under Sec. 2914.

"I, therefore, did employ help in the office during the year and paid them under said Sec. 3004, and used only about half of the fund for this purpose and all others.

"A state examiner reports that this is unlawful. I desire to be set right. He says such help should be paid under Sec. 2915, but it would seem to me that the provisions of that section are a nullity without the court acting under Sec. 2914, and if the court refuses to act under this section then payment for such services is not 'otherwise provided for.'"

Section 3004 of the General Code provides as follows:

"There shall be allowed annually to the prosecuting attorney in addi-

tion to his salary and to the allowance provided by section 2914, an amount equal to one-half the official salary, to provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice, not otherwise provided for. Upon the order of the prosecuting attorney the county auditor shall draw his warrant on the county treasurer payable to the prosecuting attorney or such other person as the order designates for such amount as the order requires, not exceeding the amount provided for herein, and to be paid out of the general fund of the county.

"Provided that nothing shall be paid under this section until the prosecuting attorney shall have given bond to the state in a sum not less than his official salary to be fixed by the court of common pleas or probate court with sureties to be approved by either of said courts, conditioned that he will faithfully discharge all the duties enjoined upon him, by law, and pay over, according to law, all moneys by him, received in his official capacity. Such bond with the approval of such court of the amount thereof and sureties thereon and his oath of office inclosed therein shall be deposited with the county treasurer.

"The prosecuting attorney shall annually before the first Monday of January, file with the county auditor an itemized statement, duly verified by him, as to the manner in which fund has been expended during the current year, and shall if any part of such fund remains in his hands unexpended, forthwith pay the same into the county treasury. Provided, that as to the year 1911, such fund shall be proportioned to the part of the year remaining after this act shall have become a law."

Section 3004, G. C., provides for a fund to be used only for expenses not otherwise provided for and by its terms provides a fund different and in addition to that provided for in section 2914, G. C. The expense of assistants, clerks and stenographers is provided for in section 2914, G. C., and such expense may not be paid out of funds drawn from the county treasury under section 3004, G. C. The logical deduction from the fact that the court makes no allowance under section 2914, G. C., is that, in his opinion, such assistants, clerks or stenographers are not necessary.

The foregoing interpretation of section 3004, G. C., has been the uniform interpretation of that statute since its enactment.

I, therefore, hold that if the court refuses to make an allowance under section 2914, G. C., for assistants, clerks and stenographers, or either, that the prosecuting attorney may not use any of the funds drawn from the county treasury by virtue of section 3004, G. C., for either of such purposes.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1199.

INDUSTRIAL COMMISSION—WITHOUT AUTHORITY TO COMMUTE AN AWARD FOR PERMANENT TOTAL DISABILITY TO A LUMP SUM.

The industrial commission of Ohio has no authority under section 40 of the workmen's compensation law, section 1465-87, G. C., 103 O. L., 72, to commute an award for a permanent total disability to a lump sum.

COLUMBUS, OHIO, January 24, 1916.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication under date of November 9th, requesting my opinion as follows:

> "The industrial commission respectfully requests that you render it an opinion as to whether or not the commission has the right to commute into a lump sum the award made in a case of permanent total disability.
>
> "By way of explanation, I might state that in cases of permanent total disability, where the amount of compensation would continue during the life of the claimant, the commission is often requested by said claimant to make a lump sum award in an amount which the claimant specifies for a particular purpose.
>
> "The question upon which the commission is asking an opinion is as to its right under the law to make a lump sum award in such cases of permanent total disability."

Your question is as to the right, under the workmen's compensation law of Ohio, of the industrial commission to make a lump-sum award in cases of permanent total disability.

Section 40 of the workmen's compensation law, or section 1465-87 of the General Code (103 O. L., 72), provides as follows:

> "The board, under special circumstances, and when the same is deemed advisable, may commute periodical *benefits* to one or more lump sum payments."

Your question, without doubt, arises out of section 34 of the workmen's compensation act, or section 1465-81 of the General Code (103 O. L., 72), and the construction that shall be placed upon the language of that section, to wit: wherein it says that in cases of permanent total disability the award shall be 66 2/3 per cent. of the average weekly wage, and shall continue until the death of such person so disabled, etc.

The specific authority given in section 40 of the workmen's compensation act, or section 1465-87 of the General Code, supra, is to commute periodical *benefits* to one or more lump sums. It would seem that there is a distinction to be made between the meaning of the words "compensation" and "benefits" as used in this statute.

Section 32 of the act (1465-79, G. C.) provides that in cases of temporary disability the employe shall receive 66 2/3 per cent. of his average weekly wages so long as such disability is total, not to exceed a maximum of $12.00 per week and not less than a minimum of $5.00 per week, unless the employe's wages shall be less

than $5.00 per week, in which event he shall receive *compensation* equal to his full wages, etc.

Section 33 of the act (1465-80, G. C.) provides for an injury resulting in partial disability, and further provides what compensation shall be paid for certain injuries contained in the schedule to that section.

Section 34 of the act (1465-81, G. C.) provides that in cases of permanent total disability the award shall be 66 2 '3 per cent. of the average weekly wages, and shall continue until the death of such person so totally disabled. Section 34 further provides that if the employe's average weekly wage is less than $5.00 per week at the time of the injury he shall receive *compensation* in an amount equal to his average weekly wages.

It is apparent from the language used in sections 32, 33 and 34, above referred to, that the award is the payment of *compensation* to injured employes.

Section 35 of the act (1465-82, G. C.) provides that in case the injury causes death within a period of two years the *benefit* shall be in an amount and to the persons defined as dependents.

Section 36 of the act (1465-83, G. C.) provides that the *benefit* in case of death shall be paid to such one or more of the dependents of the decedent for the *benefit* of all the dependents as may be determined by the board, etc. It is further provided in section 36 that the dependents or persons to whom *benefits* are paid shall apply the same to the use of the several beneficiaries thereof, etc.

The word "benefits" as used in sections 35 and 36 of the workmen's compensation act plainly refers to the award paid to the dependents of a killed employe—the distinction between the words "compensation" and "benefit" being that *compensation* is the award which is paid to injured employes, while *benefits* means the award which is payable to the dependents of a killed employe.

Section 40 of the act provides for the commutation of periodical *benefits* to a lump sum, and the construction we give to the word "benefits," as used in this section, means an award payable, under the provisions of section 35 of the act, to the dependents of a killed employe, and does not refer to the compensation payable to an injured employe. Benefits payable to the dependents of a killed employe are for a certain amount fixed by the statute, while awards for permanent total disability cannot be for a fixed or certain aggregate amount, because the amount payable in a permanent total disability claim depends entirely upon the length of life of the injured employe, which is based upon his average weekly wage at the time of the injury. Section 34 provides that the award shall continue until the death of such person so totally disabled.

There is no provision in the statutes which provides what mortality table shall be used in calculating a lump sum payment, neither is there a provision contained in the statutes as to what rate of interest shall be charged against a lump sum payment. In the absence of any express provision in the statutes authorizing the commutation of periodical payments to a lump sum in permanent total disability cases we are of the opinion that the same cannot legally be made.

Therefore, answering your question direct, I am of the opinion that the industrial commission of Ohio cannot commute periodical payments in case of a permanent total disability to a lump sum award for the reasons above stated.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1200.

BOARD OF EDUCATION—WITHOUT AUTHORITY TO PAY TEACHER'S SALARY AND EXPENSES WHILE ATTENDING CONTINUATION SCHOOL OR UNIVERSITY; NOR TO EXCHANGE TEACHERS WITH ANOTHER STATE OR COUNTRY; NOR TO MAKE ALLOWANCE TO A TEACHER FOR SUCCESSFULLY MAINTAINING SCHOOL SAVINGS BANK—BOARD MAY ESTABLISH ELEMENTARY SCHOOL IN GENERAL CITY HOSPITAL—CINCINNATI.

The board of education of a school district is without authority in law:

1. *To send a teacher under the employ of said board to a continuation school or to a university and pay a part or all of said teacher's salary and expenses while attending said continuation school or university.*

2. *To send said teacher into the school of another state or country in exchange for the services of a teacher to be sent into said district from such other state or country.*

3. *To make an allowance to a teacher, in addition to salary, for successfully maintaining a school children's savings bank.*

The board of education of a city school district may establish and maintain an elementary school in the general city hospital and contract with a teacher to give instructions in the branches mentioned in section 7648, G. C., to children who are residents of said city district and who are confined in said hospital.

COLUMBUS, OHIO, January 24, 1916.

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

GENTLEMEN:—In your letter under date of December 21, 1915, you request my opinion as follows:

> "Our examiner, during the course of his examination of the Cincinnati school district, has encountered some unusual expenditures of the school funds, and we would request your written opinion as to the legality of same.
>
> "1. Said board sent a teacher to Munich, Bavaria, to take a three months' course in a continuation school, allowing full salary and $300.00 for expenses.
>
> "2. Last June (1915) a teacher, in order to study at either the Leland Stanford university or the University of California, was given a year's leave of absence at half pay.
>
> "3. The board authorized an exchange of teachers by the boards of education of Cincinnati and Portland, Oregon, each board to pay its own teacher.
>
> "4. Said board has authorized the superintendent to make similar arrangements with the boards of education of South American cities for exchange of teachers.
>
> "5. Said board allowed twelve teachers $25.00 each, and one teacher $50.00 (additional to salary) for having successfully maintained school children's savings banks in their respective rooms.
>
> "6. The board employs a teacher at the general city hospital at a salary of $800.00 per year, the theory being that the children in said institution may be properly educated."

Section 7690, G. C., provides as follows:

"Each board of education shall have the management and control of all of the public schools of whatever name or character in the district. It may appoint a superintendent of the public schools, truant officers, and janitors and fix their salaries. If deemed essential for the best interests of the schools of the district, under proper rules and regulations, the board may appoint a superintendent of buildings, and such other employes as it deems necessary, and fix their salaries. Each board shall fix the salaries of all teachers, which may be increased, but not diminished during the term for which the appointment is made. Teachers must be paid for all time lost when the schools in which they are employed are closed owing to an epidemic or other public calamity."

The rule is well settled in this state that, inasmuch as the control and management of the schools of Ohio are conferred upon boards of education by provision of the first part of section 7690, G. C., as above quoted, the courts will not interfere with such boards in the exercise of the duty so conferred upon them, unless they have grossly abused the discretion confided in them.

State ex rel. v. McCann, 21 O. S., 198.
State ex rel. v. Board of Education, 76 O. S., 297.
Board of Education v. State ex rel. Wiskham, 80 O. S., 133.

Under provision of section 4749, G. C., the board of education of each school district shall, when properly organized, be a body politic and corporate and, as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing and disposing of real and personal property and taking and holding in trust for the use and benefit of such district, any grant or devise of land and any donation or bequest of money or other personal property, and the exercise of such other powers and privileges as are conferred by the provisions of the statutes relating to public school districts and the public schools of the state.

It will be observed that under provision of the latter part of section 4749, G. C., boards of education may exercise, in addition to the powers expressly conferred by the provisions of said statute, such other powers and privileges as are conferred by the statutes therein referred to.

Numerous authorities might be cited in support of the proposition that public officers, such as members of the board of education, have no power except such as is expressly conferred by the statute or necessarily implied from the power so expressly conferred.

If, therefore, the board of education referred to in your inquiry has authority in law to expend the funds of its district for the purposes mentioned in said inquiry, such power must be expressly conferred upon said board by the statutes governing it and defining its power and duties, or must be necessarily implied from the powers thus conferred.

Upon a careful examination of all of said statutes, I am compelled to conclude that said board of education has no authority, either expressed or implied, to expend the funds of its district for the purposes mentioned in items 1 to 5, inclusive, as set forth in said inquiry.

Section 7690, G. C., above quoted, provides that each board of education shall fix the salaries of all teachers, which may be increased, but not diminished during the term for which the appointment is made and further provides that teachers must be paid for all time lost when the schools in which they are employed are closed owing to an epidemic or other calamity. By provisions of other statutes, the board of education is held strictly accountable for the proper expenditure of the funds of the district.

It is significant that the legislature enacted the provisions of section 7870, G. C., authorizing boards of education to pay the teachers and superintendents of their respective districts their regular salaries for the week they attend the county teachers' institute, providing the same is held while the schools are in session. Said section further provides that if the institute is held when the public schools are not in session such teachers or superintendents shall be paid two dollars per day for actual daily attendance as certified by the county superintendent, for not more than five days of actual attendance, to be paid as an addition to the first month's salary after the institute, by the board of education by which such teacher or superintendent is then employed. In case such teacher or superintendent is unemployed at the time of the institute, such salary shall be paid by the board next employing said teacher or superintendent, if the term of employment begins within three months after the institute closes.

It seems clear that if the legislature considered that such payments were not legal in the absence of an express provision of the statute authorizing their payment, it cannot be said that a board of education may send a teacher to a continuation school or to a university and pay a part or all of said teacher's salary and expenses while attending said continuation school or university in the absence of express statutory authority.

While the board of education of a school district may contract with a teacher for services to be rendered in one of the schools of said district and, under the above provisions of section 7690, G. C., may fix the salaries of such teachers, I find no authority in law warranting said board of education in sending said teachers into the school of another state or country in exchange for the services of teachers to be sent into said district from such other state or country, even though said foreign teachers might comply with the provisions of the statutes prescribing the qualifications of a teacher in an elementary school or in the several classes of high schools in this state.

An allowance to a teacher, in addition to salary, for successfully maintaining a school children's saving bank would be in the nature of a bonus and a board of education has no authority under any provision to expend money for this purpose.

As to the authority of the board of education of the school district referred to in your inquiry to employ a teacher at the general city hospital, I am of the opinion that, under the above provisions of section 7690, G. C., taken in connection with the provisions of section 7644, G. C., that

> "Each board of education shall establish a sufficient number of elementary schools to provide for the free education of the youth of school age within the district under its control, at such places as will be most convenient for the attendance of the largest number thereof,"

said board of education may establish and maintain an elementary school in said hospital and contract with a teacher to give instructions in the branches mentioned in section 7648, G. C., to children who are residents of said city district and who are confined in said hospital.

I am of the opinion, therefore, in answer to your questions, that the board of education of the school district referred to in your inquiry was without authority in law to expend the funds of said district for the purposes mentioned in items 1 to 5, inclusive, of said inquiry, and that said board has authority, within the limitations above prescribed, to expend the funds of said district for the purposes mentioned in item 6 of said inquiry.

Respectfully,

EDWARD C. TURNER,
Attorney-General.

1201.

MUNICIPAL CORPORATION—EXPENDITURE COSTING OVER $500.00—COUNCIL MUST FIRST AUTHORIZE AND DIRECT SAME BY ORDINANCE BEFORE DIRECTOR OF PUBLIC SERVICE MAY PROCEED WITH IMPROVEMENT—ENGINEER FOR SUCH IMPROVEMENT MUST HAVE SALARY FIXED BY COUNCIL BEFORE HE CAN BE EMPLOYED—COUNCIL CANNOT DIRECT EMPLOYMENT OF A CERTAIN ENGINEER.

Before the director of public service may proceed with an improvement costing over $500.00, *council must authorize and direct the expenditure therefor by ordinance in pursuance of section* 4328, *G. C.*

An engineer employed on such an improvement is a "person" employed within the department of public service and his salary must, therefore, be fixed by council under the provisions of section 4314, *G. C., before he can be employed. Council in fixing such salary is not authorized to direct the employment of a certain engineer.*

COLUMBUS, OHIO, January 24, 1916.

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

GENTLEMEN:—Under date of December 20, 1915, you submitted for my opinion the following questions:

"1. When an Ohio city has resolved upon certain improvements, and through councilmanic action or a vote of the people have issued bonds, and the proceeds thereof are in the treasury, is further councilmanic action necessary ordering the director of service to proceed with the work?

"2. Under the above conditions may the director of service, without further authority from council, employ an engineer to proceed with the preparation of plans for the work contemplated under the bond issue?

"3. Presuming the engineer to have been employed and the plans prepared ready for adoption by the council, is councilmanic action, other than their adoption in order that they may be submitted to the state board of health, necessary to further procedure as regards said improvement?

"4. Is it within the province of a city council, by resolution or ordinance, to instruct the director to employ a certain engineer, whose selection we will say is against his best judgment, and could they, under the conditions above outlined, block the director in going ahead with the work other than their final refusal to approve the plans for submission to the state board of health?"

Section 4328, G. C., provides as follows:

"The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized

and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

It is to be noted that the director of public service is not authorized to make any expenditure within his department, other than the compensation of persons employed therein, in excess of $500.00, unless such expenditure be first authorized and directed by ordinance of council, and that when so authorized and directed the director of public service shall proceed to advertise for bids.

I assume in answering your first question that the improvement contemplated will involve an expenditure of more than $500.00. Such being the case my answer to your first question is that it is necessary that council authorize and direct the expenditure of the money by ordinance of council before the director of public service my proceed to advertise for bids for such improvement.

Your second question involves a further consideration of section 4328, G. C. I assume that the engineer who is to be employed on the preparation of plans for the work contemplated is an engineer other than the one known as the city engineer who is permanently employed, and the question arises as to whether or not a person so employed would be considered as a person employed in the department. If such an engineer is not considered as a person employed in the department, it would be necessary, under the provisions of said section 4328, to proceed to advertise for bids and to employ such engineer on competitive bidding. This I do not believe is within the contemplation of council but rather since under the provisions of section 4327 the director of public service is authorized to determine the number of persons—among whom are engineers—necessary for the execution of the work and the performance of the duties of the department, his determination that an engineer other than the city engineer is necessary for the execution of the work under consideration would make such person so employed a person employed within the department. Such being the fact, the director of public service should create the position in question and then ask council to fix the salary of the person to be employed therein, under the provisions of section 4314, G. C.

The question as to whether under said section 4314, G. C., the right to fix a salary rests with council rather than under the provisions of section 4327 by inference rests with the director of public service has received judicial construction in the case of Smith, Solicitor, v. Lotschuetz, Auditor, 10 O. N. P. (n. s.), 257 (affirmed by the circuit court without report May, 1910), the first paragraph of the syllabus of which is as follows:

"A director of public service has no power under sections 4324, 4325 and 4326 of the General Code, which give him the management and supervision of his department, to fix the salaries or compensation of employes therein, but the exclusive right to fix such salaries and compensation is reposed in the city council by section 4214, General Code."

For a discussion of the question, in view of the condition of the statute, I would call your attention to the opinion beginning at the bottom of page 260.

Your third question presumes that the engineer was employed and plans prepared ready for adoption by council, and inquires whether councilmanic action is necessary to further procedure in regard to said improvement after the said plans have received the approval of the state board of health?

My answer to your first question fully covers this question, but in order that there may be no mistake I would state even if the council has adopted the plans

and the same have received the approval of the state board of health, if the expenditure for the improvement involves more than $500.00, proceedings should be taken by the director of public service under section 4328, G. C.

In this connection I would point out that even if the director has proceeded to advertise for bids and has received the same, yet in the awarding of the contract on such bids the provisions of section 4403, G. C., relative to the board of control, should be complied with.

Your fourth question asks whether or not council can determine what engineer shall be employed?

The answer to your second question hereinbefore made covers this question. However, I would further point out that under the provisions of section 4211 council is only given legislative powers, and it is distinctly stated in said section that council "shall neither appoint nor confirm any officer or employe in the city government except those in its own body, except as is otherwise provided in this title."

I do not find any provision in the statutes relative to the duties of the director of public service, which statutes are within the same title as section 4211, that shows any legislative intent that council shall have any authority whatever to appoint any person to a position in the department of public service. Consequently I would state that council is without authority to instruct the director, by resolution or ordinance, to employ a certain engineer. The only power of council in the premises would be that after the position of engineer for said improvement has been determined by the director of public service, under section 4327, G. C., to fix the salary for said position under the provisions of section 4314, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1202.

SECRETARY OF STATE—WHEN CORPORATION CAN CHANGE ITS UNISSUED COMMON STOCK INTO PREFERRED STOCK BY *AMENDMENT*—EXCEPTION TO GENERAL RULE AS NOW PROMULGATED.

The secretary of state having for many years followed the opinion of a former attorney-general, to the effect that a corporation can change its unissued common stock into preferred stock by amendment, and accepted amendments, to that effect, it is not improper for the secretary of state to accept amendments to that effect, provided the unanimous consent of its stockholders to make such change has been obtained, since neither the state nor the stockholders or creditors of the corporation would be injured thereby.

COLUMBUS, OHIO, January 25, 1916.

HON. C. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Under date of November 13, 1915, I received a letter from Hon. T. H. Hogsett, of the firm of Tolles, Hogsett, Ginn & Morley, attorneys at law, Cleveland, Ohio, relative to my opinion to you under date of October 1, 1915, wherein Mr. Hogsett contends that a corporation has the right to change by amendment to its articles of incorporation part of its common stock into preferred.

As you well know, I have been giving this matter considerable attention and, under date of January 11, 1916, I rendered you an opinion relative to The Farr Brick Company. In the course of said opinion I stated as follows:

"In this connection I believe that a review of the opinions or rulings of this department will be helpful. Former Attorney-General Sheets, in the year 1903, rendered two opinions,—one dated January 6th, and the other August 15th, in both of which opinions Mr. Sheets held that there was no statutory authority in Ohio to change common stock to preferred stock by amendment of the articles of incorporation. In both of these opinions, however, the author stated that he had no doubt that the stockholders of the corporation, by unanimous consent, might change the common stock to preferred stock, and that the courts would respect and enforce such an agreement, his conclusion in this latter respect, however, being not upon authority of any statutory provision, but upon the ground that the rights of the state not being affected or involved, the courts would doubtless enforce any legitimate or fair contract made among the stockholders themselves.

"Under date of November 21, 1904, Attorney-General Ellis, in an opinion to the then secretary of state, held that a corporation by amendment under section 3238-a, Revised Statutes, (now section 8719 of the General Code) could change common stock to preferred stock. This opinion was followed by the secretary of state, and certificates of amendment whereby common stock was changed to preferred stock, were accepted and recorded by him until October 1, 1915, under which date I rendered to you the opinion referred to in your letter in which I held that there is no statutory authority in Ohio to change the common stock of a corporation to preferred stock by an amendment of its articles of incorporation.

"I am by no means persuaded that the conclusion expressed in my opinion of October 1, 1915, just referred to, is erroneous, for I am still unable to find any statutory authority in Ohio to accomplish such change in the character of the capital stock of a corporation by amendment under section 8719 of the General Code."

Mr. Hogsett contends in his letter that the conversion of common stock into preferred "cannot be made except by agreement of all of the stockholders. The courts have expressly held that all of the stockholders can effect such conversion by agreement."

There is no doubt that no harm can be done to the corporation or its creditors if such an amendment is allowed by unanimous consent of all the stockholders.

In view of that fact I would suggest that the interests of the state or the creditors or stockholders of the corporation would not be affected by accepting an amendment changing the unissued common stock into preferred, up to the percentage allowed by law, and that, due to the fact that the ruling of Attorney-General Ellis has been acted upon in many instances, it would not be improper for you to permit such practice to continue, provided, of course, that the certificate itself shows that the unanimous consent of the stockholders has been obtained.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1203.

ROADS AND HIGHWAYS—PROCEEDINGS FOR A ROAD IMPROVEMENT STARTED UNDER SECTION 6903, G. C., BEFORE ITS REPEAL BY CASS HIGHWAY LAW—ROAD SHOULD BE COMPLETED UNDER FORMER SECTIONS—BONDS ISSUED UNDER CASS HIGHWAY LAW, SECTION 6929, G. C.—HOW LEVIES SHOULD BE MADE.

1. *Where proceedings for a road improvement were started under section 6903, et seq., G. C., repealed by the Cass highway law, and the petition for such improvement had been granted prior to the going into effect of the Cass law, the improvement should be completed under said section 6903, et seq., G. C.*

2. *Where bonds are issued under section 108 of the Cass highway law, section 6929, G. C., in anticipation of a tax levied against a county, a tax levied against a township and special assessments levied against the owners of benefited real estate, the county commissioners should, in the legislation providing for the issue of bonds, provide for levying and collecting annually, by taxation, on all the taxable property of the county, an amount sufficient to pay the county's proportion of the interest on said bonds, and to provide the county's proportion of a sinking fund for their final redemption at maturity; they should provide for levying and collecting annually, by taxation, on the taxable property of the township in which the road improvement is located, an amount sufficient to pay the township's proportion of the interest on said bonds and to provide the township's proportion of a sinking fund for their final redemption at maturity; and they should also provide, in addition to said levies, for the levying of a tax upon all the taxable property of the county to cover any deficiency in the payment or collection of the taxes levied upon the township, and any deficiency in the payment or collection of the special assessments.*

COLUMBUS, OHIO, January 25, 1916.

HON. C. P. KENNEDY, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—Under date of December 31, 1915, I have a communication from Mr. Dow W. Harter, assistant in your office, which communication reads as follows:

> "A number of questions have arisen under the new highway act which are perplexing our office, and we would appreciate an opinion from your office covering the following matters:
>
> "Upon the filing of a petition for the improvement of a county road, signed by the owners of a majority of the foot frontage of the lots and lands abutting on said road, a resolution was adopted in February, 1915, by the board of county commissioners, finding the route specified in the petition was a part of a county road, determining the improvement of the road as prayed for in said petition by establishing a grade, grading, draining, curbing, paving and improving the same, and directed the county surveyor to go upon said road and make all necessary surveys, profiles, plans, and specifications, for such improvement. The county surveyor, in pursuance of this resolution, has prepared surveys, profiles, plans, specifications and estimates, which have been filed with the present board of county commissioners since the first Monday in September, 1915.
>
> "The question arises whether further steps looking toward the improvement of this road shall be taken in accordance with the provisions of the so-called Cass highway law, amended senate bill number 125, volume 105-6

Ohio laws, page 574, or whether the county commissioners shall disregard the preliminary resolution heretofore passed after the filing of the petition and start anew under the Cass law, or whether the whole improvement shall be carried out under section 6903, et seq., General Code, the old Dodge law as was contemplated when the petition was filed and the original resolution passed.

"When a county improvement is to be made under an agreement between the county commissioners and the trustees of a township, or townships, and it is found necessary to issue bonds to provide for the township's portion of the cost and expense of such improvement, are said bonds issued by the county commissioners under authority of section 108 of the Cass law, and, if so, upon what property is the tax levied to provide a sum to pay the interest thereon and to create a sinking fund for their retirement at maturity?"

The first question presented by Mr. Harter's communication is as to the right of county commissioners to complete a road improvement under section 6903, et seq., of the General Code, repealed by the Cass highway law, where the petition for the improvement was filed and granted by the county commissioners prior to the going into effect of the Cass highway law. A very similar question was presented to this department by Hon. F. J. Bishop, prosecuting attorney of Ashtabula county, and in opinion No. 1045, rendered by me to Mr. Bishop on the 29th day of November, 1915, it was held that where proceedings for the improvement of a road were started under section 6956-1, et seq., of the General Code, and the commissioners, prior to the going into effect of the Cass highway law on the 6th day of September, 1915, had made a favorable finding upon the petition presented to them, a right existed in the petitioners to have the improvement completed, and that under the saving provisions of the Cass highway law it is the duty of the county commissioners to proceed with the construction of the improvement and to prosecute the work to completion under the law in force at the time the petition was filed, and the resolution making a favorable finding thereon adopted by the board of county commissioners. The same principles are applicable where the improvement was started under sections 6903, et seq., of the General Code, and I therefore advise you, in answer to Mr. Hunter's first question, that the improvement should be completed under section 6903, et seq., of the General Code, as was contemplated when the petition was filed and granted by the county commissioners. I enclose for your information a copy of the opinion rendered to Mr. Bishop and referred to by me.

Coming now to consider the second inquiry contained in Mr. Harter's letter, it may be observed that under section 100 of the Cass highway law, section 6921, G. C., authorizing the county commissioners of a county to enter into an agreement with the trustees of a township or townships in which a road improvement is in whole or part situated, the agreement may provide for a division of the cost and expense of the improvement between the county and the township or townships.

Under section 105 of the act, section 6926, G. C., the county commissioners are authorized to levy a tax upon the taxable property of the county for the purpose of meeting the county's proportion of the cost and expense of road improvements carried forward under chapter VI of the act.

Under section 106 of the act, section 6927, G. C., the county commissioners are authorized to levy a tax upon the taxable property of a township for the purpose of meeting such township's proportion of the cost and expense of road improvements carried forward under the chapter in question.

Under section 98 of the act, section 6919, G. C., a number of methods of paying the cost and expense are provided, which methods call for an assessment

of all or some part of the cost and expense against the owners of benefited real estate.

The county commissioners are by section 108 of the act, section 6929, G. C., authorized to issue bonds in anticipation of the taxes and assessments referred to above. The section in question reads as follows:

> "The county commissioners in anticipation of the collection of such taxes and assessments may, whenever in their judgment it is deemed necessary, sell the bonds of said county in the aggregate amount necessary to pay the estimated cost and expenses of such improvement. Such bonds shall state for what purpose they are issued, and shall bear interest at a rate not to exceed five per cent. per annum, payable semi-annually, and in such amounts and to mature at such times as the commissioners shall determine, subject to the provision, however, that said bonds shall mature in not more than ten years prior to the issuance of such bonds, the county commissioners shall provide for levying and collecting annually a tax upon all the taxable property of the county to provide a sum sufficient to pay the interest on such bonds and to create a sinking fund for their retirement at maturity. The sale of such bonds shall be advertised once not later than two weeks prior to the date fixed for such sale in a newspaper published and of general circulation within such county, if there be any such paper published in said county, but if there be no such paper published in said county then in a newspaper having general circulation in said county. Such bonds shall be sold to the highest responsible bidder for not less than par and accrued interest. The county commissioners may reject any or all bids. The proceeds of such bonds shall be used exclusively for the payment of the costs and expenses of the improvement for which they are issued."

It should be noted in the first instance that there is an error in the punctuation of this section. The second sentence of the section is in reality two sentences, and under the familiar rule that the courts will, in the construction of a statute, disregard the punctuation or re-punctuate it if need be, the section in question should be re-punctuated by placing a period after the word "years," in the second sentence of the section as printed, thus separating this sentence in order to make the same conform to the manifest intention of the legislature and render it intelligible.

26 Am. and Eng. Encyc., 2nd Ed., 631.

Bearing in mind the fact that the bonds authorized by this section may be issued in anticipation of collection of taxes levied upon a county, taxes levied upon a township and special assessments, it becomes necessary to consider the force and effect of the following sentence found in the section in question:

> "Prior to the issuance of such bonds, the county commissioners shall provide for levying and collecting annually a tax upon all the taxable property of the county to provide a sum sufficient to pay the interest on such bonds and to create a sinking fund for their retirement at maturity."

It is apparent that the legislature in using the above quoted language did not intend that where, under section 6929, G. C., bonds were issued in anticipation of a tax on a county, a tax on a township and special assessments against benefited

real estate, then the entire interest and redemption fund for such bonds should be provided by a levy on the county duplicate. Where bonds are issued in anticipation of a tax on a county, then the tax levied for the payment of such bonds is to be levied on the county, and where bonds are issued in anticipation of a tax on a township then the tax levied for the payment of such bonds is to be levied on the township. Where bonds are issued in anticipation of special assessments, the interest and redemption fund is to be created by the special assessments in question. It is manifest that the legislature in using the above quoted language had in mind a tax similar to that provided for by section 5630-1, G. C., 106 O. L., 495, which section reads as follows:

> "Bonds issued by county commissioners in the manner provided by law in anticipation of the collection of special assessments levied against the property abutting upon a proposed improvement, or to be benefited thereby, or in anticipation of the collection of taxes upon the taxable property of any township, or townships, of the said county within which such improvement is to be made, shall be full, general obligations of such county, for the payment of the principal and interest of which, when due, the full faith, credit and revenues of such county shall be pledged. The county commissioners shall, prior to the issuance of the bonds above mentioned, provide for the levying of a tax upon all the taxable property of the county to cover any deficiency in the payment or collection of such special assessments or township tax."

It would not have been within the power of the legislature to provide that bonds should be issued in anticipation of a county tax, a township tax and special assessments, and then further provide that the township tax and the special assessments should not be levied, but that the entire interest and redemption fund should be provided by a levy on the taxable property of the county.

Wasson v. Commissioners, 49 O. S., 622;
Hubbard v. Fitzsimmons, 57 O. S., 436;
State ex rel. Brennan v. Benham, 89 O. S., 351;
Cooley on Taxation, page 227;
27 Am. and Eng. Encyc. of Law, 2nd Ed., 595;
37 Cyc., 723.

It is elementary that there is a presumption in favor of the constitutionality of a statute, and that when a statute is susceptible of two constructions, one of which supports the act and gives it effect, and the other renders it unconstitutional and void, the former is to be adopted. The whole statute and all its parts are also to be taken together, and any particular provision must, if possible, receive a construction consistent with the rest of the act.

In view of the above considerations, it would be impossible to reach a conclusion different from that herein announced even if it be conceded that the language now under discussion is of doubtful import. It is my opinion that the legislature, by the use of the language in question, intended to provide that as between a county and the holder of bonds issued under section 6929, G. C., such bonds should be the full and general obligation of the county, that the credit and revenues of the county should be liable for the payment of such bonds, and that prior to the issuance of such bonds the commissioners should provide for levying and collecting annually a tax upon all the taxable property of the county sufficient to cover any deficiency in the township tax or assessments, to the end that there

might be provided under all circumstances and conditions, a sum sufficient to pay the interest on such bonds and to create a sinking fund for their retirement at maturity.

When a county road improvement is to be made under an agreement between the county commissioners and the trustees of a township, and it is necessary to issue bonds to provide for the township's proportion of the cost and expense of such improvement, the county commissioners may issue such bonds under authority of section 108 of the Cass highway law, section 6929, G. C., and the county commissioners should, in the legislation providing for the issue of bonds, provide for levying and collecting annually, by taxation, on all the taxable property of the county, in case any of the county's proportion of the cost and expense of such improvement is to be provided by the bond issue, an amount sufficient to pay the county's proportion of the interest on said bonds, and to provide the county's proportion of a sinking fund for their final redemption at maturity, they should provide for levying and collecting annually, by taxation, on the taxable property of the township in which the road improvement is located, an amount sufficient to pay the township's proportion of the interest on said bonds, and to provide the township's proportion of a sinking fund for their final redemption at maturity, and they should also provide, in addition to said levies, for the levying of a tax upon all the taxable property of the county, to cover any deficiency in the payment or collection of the taxes levied upon the township.

While not involved in Mr. Harter's inquiry, it should be further observed that where bonds are issued under section 6929, G. C., in anticipation not only of county and township taxes, but also in anticipation of special assessments, the bond legislation should further provide for the levying of a tax upon all the taxable property of the county to cover any deficiency in the payment or collection of the special assessments.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1204.

ROADS AND HIGHWAYS—COMPENSATION AND EXPENSES OF DEPUTIES OR ASSISTANTS OF COUNTY HIGHWAY SUPERINTENDENT WHEN ENGAGED ON TOWNSHIP ROAD WORK—HOW PAID—UNDER CASS HIGHWAY LAW, CONTRACTS INVOLVING MORE THAN $200.00 MUST BE IN WRITING—OTHERS SHOULD BE—PLANS AND SPECIFICATIONS MUST BE PREPARED BY COUNTY HIGHWAY SUPERINTENDENT WHEN COST OF ROAD, BRIDGE OR CULVERT EXCEEDS $200.00.

1. *The compensation and expenses of deputies or assistants of the county highway superintendent, when engaged on road work carried forward by the township trustees, are to be paid from the county treasury.*

2. *Under the Cass highway law all contracts for road, bridge or culvert work costing more than two hundred dollars and all contracts for extra work not contemplated by the original contract and rendered necessary by unforeseen contingencies must be in writing. There is no statutory requirement that contracts must be in writing where the cost of the improvement does not exceed two hundred dollars, but the practice of entering into written contracts even in such cases is to be recommended.*

3. *Plans and specifications must be prepared and estimates furnished by the county highway superintendent in all cases where the cost of the road, bridge or culvert exceeds two hundred dollars. County commissioners may, in their discretion, enter into contracts for improvements costing not more than two hundred dollars without requiring the county highway superintendent to prepare plans and specifications and furnish estimates.*

COLUMBUS, OHIO, January 26, 1916.

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

GENTLEMEN:—I have your communication of December 27, 1915, in which you request my opinion upon the following questions:

(1) "Are the per diem and expenses of deputy or deputies in the county highway superintendent's office to be paid from the county treasury when working under the direction of the township trustees?

(2) "Does section 144 of the Cass law provide that the county commissioners must enter into contract in writing for all road and bridge improvements, or are contracts in writing only necessary where the cost of the improvement exceeds two hundred dollars?

(3) "Does this section make it necessary for the county highway superintendent to prepare plans and specifications and furnish estimates for road and bridge improvement, the cost of which does not exceed two hundred dollars ($200.00), or is it optional with the county commissioners whether or not they have plans and specifications prepared for contract such as above mentioned?"

In connection with your first question it should be noted that any deputies of the county highway superintendent engaged on road work for or under the direction of the township trustees, must be the "assistants" referred to in section 138 of the Cass highway law, section 7181, G. C. The subordinates which the county highway superintendent is authorized to appoint in connection with road and bridge work are either the "assistants" referred to in section 7181, G. C., or

the "assistants," "superintendents" and "inspectors" referred to in section 212 of the act, section 1219, G. C. The "assistants," "superintendents" and "inspectors" whose appointment is authorized by section 1219, G. C., must be employed upon work carried forward under the direction of the state highway department, and it therefore follows that any assistants or deputies employed upon road work carried forward by the township trustees, must be the "assistants" referred to in section 7181, G. C. As to the compensation and traveling expenses of these assistants it is provided by section 7181, G. C., that such compensation and expenses shall be paid out of the county treasury. The township trustees may call upon the county highway superintendent under sections 3298-3, 3298-7, 3298-14 and 3298-15 of the General Code, to perform services in connection with a road improvement carried forward by the trustees. These services consist of the making of surveys, plats, plans, profiles, cross sections, estimates and specifications, and the making of an apportionment or tentative assessment against benefited real estate, and it is also apparent from section 3298-7, G. C., that a certain degree of supervision is to be exercised by the county highway superintendent over construction work carried forward by township trustees, inasmuch as payments for such work are to be made upon estimates furnished by the county highway superintendent. There is no provision, however, for the payment of any part of the compensation or expenses of the county highway superintendent or of his assistants when engaged on township work out of the township treasury, and no provision for the reimbursement by the township of the county which is charged with the payment of such compensation and expenses.

I therefore advise you, in answer to your first question, that the compensation and expenses of deputies or assistants of the county highway superintendent when engaged on road work carried forward by the township trustees, are to be paid from the county treasury, and that no scheme of reimbursement is provided by the law, it evidently being the intention of the legislature to cast this expense upon the county.

It should be noted, however, that when an inspector for township road work is appointed by the township trustees under the provisions of section 3298-6, G. C., the compensation of such inspector is to be paid out of the township treasury. Under section 3373, G. C., the compensation and expenses of the township highway superintendent are to be paid from the township treasury, and by the terms of section 3376, G. C., all claims for dragging roads are also to be paid out of the funds of the township.

The pertinent provision of section 144 of the Cass highway law, section 7187, G. C., referred to by you in your second and third inquiries, reads as follows:

> "Plans and specifications must be prepared in all cases where the cost of the bridge or culvert exceeds two hundred dollars, and contracts in writing must be entered into in such cases."

It will be noted that this provision applies in terms only to bridge and culvert work, and an answer to your second and third questions involves a consideration not only of this provision but also of the following provision, found in section 156 of the act, section 7199, G. C.

> "If, in the opinion of the county commissioners, it is advisable to provide for the improvement, maintenance and repair of any portion of the highways of the county by contract, such contract, if the cost and expense of the improvement, maintenance or repair of any section of highways, or of any bridge or culvert, exceeds two hundred dollars, shall be let by

competitive bidding. All such contracts shall be awarded by the county commissioners or township trustees on estimates, plans and specifications to be furnished by the county highway superintendent, to the lowest and best bidder. If the estimated cost of such work is less than five hundred dollars, and more than two hundred dollars, the same may be let at competitive bidding after advertising the same by posters in at least three public places in the county, for ten days prior to the letting, and if the estimated cost of such work is more than five hundred dollars, the same shall be let by competitive bidding, after advertisement once not later than two weeks prior to the letting of contracts, in some newspaper published and of general circulation within the county, if there be any such newspapers published in said county, but if there be no such newspapers published in said county, then in a newspaper having general circulation in said county. All bids for such work shall be filed in the office of the township clerk or county auditor."

An answer to your second question also involves a consideration of the following language found in section 126 of the act, section 6947, G. C.:

"Before entering into a contract the county commissioners shall require a bond payable to the state of Ohio * * *."

In the case of Hughes v. Village of Clyde, 41 O. S., 349, the court was called upon to consider the effect of the use in the statute of the phrase "entered into," its use in the statute construed by the court in that case being similar to the use of the phrase "entering into" in the statute now under consideration. The court held that the acceptance of a bid legally made under the statute considered by it did not conclude the matter, but only gave to the bidder a right to a contract embracing the stipulations, expressed or implied, in the records or files relating to the improvement.

It should also be noted that section 127 of the act, section 6948, G. C., provides that all contracts for extra work not contemplated by the original contract and rendered necessary by unforeseen contingencies, must be in writing. In view of the foregoing considerations I advise you as follows in reference to the necessity for a written contract for road, culvert or bridge work under the Cass highway law:

(1) All contracts for work costing more than two hundred dollars must be in writing.

(2) All contracts for extra work not contemplated by the original contract and rendered necessary by unforeseen contingencies must be in writing.

(3) There is no statutory requirement that contracts must be in writing where the cost of the improvement does not exceed two hundred dollars, but although written contracts are not required by the statute in such cases, it is my view that the public business will be more satisfactorily transacted for all parties concerned if the practice of entering into written contracts without regard to the amount involved be generally adopted. If the amount involved be two hundred dollars or less, and no written contract be entered into, the person to whom the contract is awarded should in all cases be required to make his proposal in writing and, of course, the action of the county commissioners in accepting the same should appear upon their journal.

Coming now to consider your third question, which relates to the necessity for plans, specifications and estimates to be furnished by the county highway superintendent, it is provided by section 7187, G. C., that as to bridges and culverts, plans

and specifications must be prepared in all cases where the cost of the bridge or culvert exceeds two hundred dollars. Section 7199, G. C., provides that all contracts for the improvement, maintenance or repair of any highway, bridge or culvert, exceeding two hundred dollars in amount, shall be awarded on estimates, plans and specifications to be furnished by the county highway superintendent. I find no similar provision as to contracts involving two hundred dollars or less, and the language used by the legislature in the two provisions referred to above seems to indicate that it was the intention of the legislature that where the cost of a road or bridge improvement or repair did not exceed two hundred dollars, such improvement might be let without requiring the county highway superintendent to first prepare plans and specifications and furnish estimates. Section 7187, G. C., provides that the county highway superintendent shall furnish estimates at any time when called for by the county commissioners.

In view of the above provisions I conclude that where a road or bridge improvement does not exceed two hundred dollars in cost, the question of whether the county highway superintendent shall first prepare plans and specifications and furnish estimates, rests in the discretion of the county commissioners, and they may require plans, specifications and estimates, or they may enter into a contract for the work without requiring the county highway superintendent to prepare plans and specifications and furnish estimates. If they do enter into a contract for such work without requiring the county highway superintendent to prepare plans and specifications and furnish estimates, they should call their action to the attention of the county highway superintendent, for the reason that even though plans and specifications be not prepared and estimates furnished by him, yet the work is to be done under his supervision, and the compensation of the contractor can be paid only upon his approval. Plans and specifications must be prepared and estimates furnished by the county highway superintendent in all cases where the cost of the bridge, road or culvert exceeds two hundred dollars.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1205.

BONDS OF TOWNSHIP OFFICERS DO NOT REQUIRE GOVERNMENT STAMPS UNDER SCHEDULE A OF THE EMERGENCY REVENUE ACT OF 1914.

Schedule A of the emergency revenue act of 1914, *United States Statutes at Large, Vol.* 38, *p.* 761, *does not authorize a tax or require the stamping of bonds given by township officers to qualify them to perform the duties of their office.*

COLUMBUS, OHIO, January 26, 1916.

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

GENTLEMEN:—I am in receipt of the following letter from Mr. E. E. Emerick, clerk of Lake township, Ashland county, Ohio:

> "I wish to be informed if the bonds of township officers require government stamps. Please let me hear from you."

As the question asked is of general interest and concerns rights of practically

all the officers in the several sub-divisions of the state government, I deem it advisable and proper to answer the same, and in harmony with former practice, I am directing my opinion to your department.

The emergency revenue act of 1914, entitled "An act to increase the internal revenues and for other purposes," United States Statutes at Large, Vol. 38, page 761, under schedule A, provides as follows:

> "BOND. For indemnifying any person or persons, firm or corporation who shall become bound or engaged as surety for the payment of any sum of money, or for the due execution or performance of the duties of any office or position, and to account for money received by virtue thereof, and all other bonds of any description, except such as may be required in legal proceedings, not otherwise provided for in this schedule, 50 cents."

This language standing alone would seem broad enough in scope to require the stamping of bonds required for the proper qualification of township officers. Section 15 of the act, however, contains the following proviso or limitation:

> "* * * Provided, that it is the intent hereby to exempt from the stamp taxes imposed by this act such state, county, town, or other municipal corporations in the exercise only of functions strictly belonging to them in their ordinary governmental, taxing or municipal capacity. * * *"

The question arising therefore is whether the giving of a bond by the township officer, as one of the necessary steps to qualify him for the performance of official duties, is the exercise of a governmental function of the state or one of its subdivisions.

The principle involved was considered and decided by the United States circuit court of appeals, sixth circuit, in the case of Bettman v. Warwick, 106 Fed. Rep., 46, in which the court, confirming the decision of the circuit court of the United States for the southern district of Ohio, held that the bond required of a notary public as part of his qualification for office was not subject to the revenue tax provided in the act of June 13, 1898, entitled: "An act to provide ways and means to meet war expenditures and other purposes."

The language of the 1898 act, under which it was sought to exact a tax upon the bond of a notary public, was very similar to the provision of the present law, and was as follows:

> "BOND. For indemnifying any person or persons, firm or corporation, who shall have become bound or engaged as surety for the payment of any sum of money, or for the due execution or performance of the duties of any office or position, and to account for money received by virtue thereof, and all other bonds of any description, except such as may be required in legal proceedings, not otherwise provided for in this schedule, fifty cents."

The 1898 act also contained a proviso or exemption in section 17, similar to the exempting clause of the present law above quoted, which was as follows:

> "Provided, that it is the intent hereby to exempt from the stamp taxes imposed by this act such state, county, town or other municipal corporations in the exercise only of functions strictly belonging to them in their ordinary governmental, taxing or municipal capacity."

The circuit court of appeals confirming the decision of the lower court held that a notary public was a state officer exercising state functions, and by the language of the statute itself exempt from the payment of a tax upon his bond of qualification. The court went further in its opinion and stated that regardless of specific exemptions contained in the statute itself, it was incompetent for the federal government to tax a state function or the means by which state functions are exercised. Numerous authorities are cited by the court in support of this principle, which is set forth in the first branch of the syllabus, as follows:

> "The United States and the states act separately and independently of each other in the field within which each is sovereign, and neither have power to impose a tax which will interfere with the exercise of the sovereignty of the other within their own sphere, either by taxing their functions or the means by which they are exercised. A power in the federal government to exact a tax upon the right to qualify, under a state law, for the performance of the duties of a state office, is inconsistent with the existence of any supreme governmental authority in the state, and the converse is true as regards the power of the state to tax the means employed by the federal government to carry into execution the powers vested in it by the constitution."

Upon the principle laid down by the court in the above case, and the authorities there cited by the court, I am of the opinion that the federal act of 1914, "to increase the internal revenue and for other purposes," does not authorize a tax upon or require the stamping of bonds of township officers.

I am sending a copy of this opinion to Mr. E. E. Emerick, clerk of Lake township, Loudonville, Ashland county, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

P. S. The above opinion is in harmony with the ruling of the treasury department of the United States, given December 28, 1914, Vol. 16, Treasury Decisions, Internal Revenue.—E. C. T.

1206.

LIEN STATUTES, SECTIONS 8312, 8313, 8314, G. C., APPLICABLE ONLY TO PRIVATE CONTRACTS—SEE SECTIONS 6947 AND 3298-4, G. C., CASS HIGHWAY LAW FOR ROAD IMPROVEMENT CONTRACTS.

COLUMBUS, OHIO, January 27, 1916.

HON. JOSEPH T. MICKLETHWAIT, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—Yours under date of January 14, 1916, is as follows:

> "Are sections 8312, 8313 and 8314, as amended in 105 O. L., page 522, applicable to public contracts, made by the county or public corporations, such as enumerated and set forth in section 8310, as amended 103 O. L., page 369?

"Will you approve and follow opinion No. 1154 by your predecessor, Honorable Timothy S. Hogan, found in Vol. 2 of the opinions of the attorney-general for 1914?"

The opinion of my predecessor, Hon. Timothy S. Hogan, to which you refer, is found at page 1235 of the report of the attorney-general for the year 1914, and holds that section 8312, G. C., as amended 103 O. L., 370, had no application to work done by a public agency such as a township, municipality or county and was intended to apply only to work carried on by persons, firms or corporations in a private capacity, and that section 8324, G. C., prescribes the only procedure for procuring a lien upon funds due under a public contract.

Sections 8312, 8313 and 8314 of the General Code, 103 O. L., 369, were amended in 106 O. L., 522. These sections are designed to prescribe the procedure or to provide the machinery by which laborers, material men, subcontractors and other persons may secure to themselves a lien upon certain classes of property, appurtenances and structures described and defined in section 8310 and section 8311, G. C., 103 O. L,. 369, and the real estate upon which the same are located, for their respective claims for work or labor performed upon, machinery, material or fuel furnished in the construction, erection, alteration, repair or removal of any of those classes of property, structures or appurtenances in said sections named.

It is impracticable to here quote said sections 8312, 8313 and 8314, G. C., as amended, 106 O. L., 522, but it is sufficient to say that the persons, contractors, subcontractors, material men and the claims thereof, and the owners, part owners, mortgagees and lessees therein referred to will be found upon examination to be those mentioned, defined and described in sections 8310 and 8311, G. C., 103 O L., 369. Original sections 8312, 8313 and 8314 were a part of house bill 290, 103 O. L., 369, and manifestly had direct reference to the preceding sections of the same act, 8310 and 8311, G. C.

Under a familiar rule of construction these amended sections will be interpreted as if having been set into the original act instead of the original sections thereof. So that so far as pertinent to your inquiry, the application of sections 8312, 8313 and 8314, G. C., supra, is dependent upon the scope and operation of sections 8310 and 8311, supra, which provide as follows:

"*Section* 8310. Every person who does work or labor upon, or furnishes machinery, material or fuel, for constructing, altering, or repairing a boat, vessel, or other water craft, or for erecting, altering, repairing, or removing a house, mill, manufactory, or any furnace, or furnace material therein, or other building, appurtenance, fixture, bridge or other structure, or for digging, drilling, boring, operating, completing, or repairing of any gas well, oil well or other well, or for altering, repairing or constructing any oil derrick, oil tank, oil or gas pipe line, or furnishes tile for the drainage of any lot or land by virtue of a contract, express or implied, with the owner, part owner, or lessee, of any interest in real estate, or the authorized agent of the owner, part owner, or lessee, of any interest in real estate, and every person who shall as subcontractor, laborer, or material man, perform any labor, or furnish machinery, materials, or fuel, to each original or principal contractor, or any subcontractor in carrying forward, performing, or completing any such contract, shall have a lien to secure the payment thereof upon such boat, vessel, or other water craft, or upon such house, mill, manufactory, furnace, or other building or appurtenance, fixture, bridge or other structure, or upon such gas well, oil well, or other well, or upon such oil derrick, oil tank, oil or gas pipe line, and upon the machinery or

material so furnished, and upon the interest, leasehold, or otherwise, of the owner, part owner, or lessee, in the lot or land upon which they may stand, or to which they may be removed, to the extent of the right, title and interest of the owner, part owner, or lessee, at the time the work was commenced or materials were begun to be furnished by the contractor, under the original contract, and also to the extent of any subsequent acquired interest of any such owner, part owner, or lessee.

"*Section* 8311. Any person who performs labor or furnishes machinery, material or fuel for the construction, alteration or repair of any street, turnpike, road, sidewalk, way, drain, ditch, or sewer, by virtue of a private contract between him and the owner, part owner, or lessee of lands upon which the same may be constructed, altered, or repaired, or of lands abutting thereon, or any person who shall, as subcontractor, laborer, or material man, perform labor or furnish machinery, material or fuel to such original or principal contractor or to any subcontractor in carrying forward or completing such contract, shall have a lien for the payment thereof against the lands of such owner, part owner or lessee, upon which said street or other improvement above mentioned is constructed or upon which any such above mentioned improvement abuts, as provided in section 1, hereof."

Section 1, mentioned in the conclusion of section 8311, has reference to section 8310, supra.

Without consuming unnecessary time and space in undertaking to trace their legislative history, it is sufficient here to say that section 8308, G. C., had its origin in section 1, and section 8316, G. C., in section 3, and section 8324, G. C., hereinafter referred to, in section 10 of the act of May 4, 1877, 74 O. L., 168.

Section 1 of said act became section 3184, section 3 became section 3186, section 10 became section 3193, R. S., and section 8308, G. C., by the act of May 2, 1913, 103 O. L., 369, became section 8310, G. C.

These sections were subject to various changes and amendments but until after the codification of 1910, what was carried into the code as section 8308 was confined in its scope and operation to *persons who did work or labor upon or furnished machinery, material or fuel,* upon contracts of certain enumerated classes. Section 8316, G. C., applied alike to persons who performed labor or furnished material by virtue of private contracts on additional enumerated classes.

Section 8324, G. C., included within its scope and operation only subcontractors, material men, laborers or mechanics who performed labor or furnished material, fuel or machinery upon all those classes of contracts enumerated in both sections 8308 and 8316 and in addition thereto included contracts for the construction, improvement, or repair of any turnpike, road improvement, sewer, street or other public improvement or public building between the owner or any board, officer or public authority and a principal contractor. That is to say, prior to the changes thereof effected in 103 O. L., 369, sections 8308 and 8316 included within their terms only persons who do or perform work or labor or furnish material, machinery or fuel, while section 8324 included only subcontractors, material men, laborers and mechanics. Section 8316 was specifically limited to private contracts and section 8324 included all the contracts within sections 8308 and 8316 and in addition thereto certain specifically enumerated public contracts.

By the act in 103 O. L., 369, section 8308, G. C., was specifically repealed but was re-enacted and given code section number 8310 by the attorney general. In such re-enactment or amendment there was inserted therein, beginning at the end of the fourteenth line thereof, the following:

> "and every person who shall as subcontractor, laborer or material man perform any labor, or furnish machinery, materials, or fuel, to each original or principal contractor, or any subcontractor in carrying forward, performing, or completing any such contract,"

and there was added to said original section 8308, at the conclusion thereof:

> "to the extent of the right, title and interest of the owner, part owner, or lessee, at the time the work was commenced or materials were begun to be furnished by the contractor, under the original contract and also to the extent of any subsequent acquired interest of any such owner, part owner, or lessee."

Section 8308, now section 8310, G. C., was thus made to include subcontractors, laborers and material men along with section 8324, G. C., which was not repealed by this act but was not made to include those classes of public contracts within section 8324, in addition to those in section 8308, then repealed, and section 8316 also then repealed. Section 8316, G. C., was, however, in effect amended by section 28 of the act and given code number 8311 and made to include both persons who perform labor or furnish machinery, material or fuel and subcontractors, laborers or material men who perform labor or furnish machinery, material or fuel, but continues specifically to be limited to "private contracts."

Some of the difficulties met with may be obviated if it be consistently borne in mind that we are here dealing with purely statutory liens and that in every case such lien must be founded upon clear statutory authority therefor.

If we examine carefully section 8310, G. C., supra, it will conclusively appear that all those classes of property, structures and appurtenances therein enumerated are of a character and nature clearly distinguishable from those structures, appurtenances, improvements and property with which public agencies are in the ordinary course of affairs accustomed to deal, with a bare exception of bridges. No substantial reason can be suggested, however, for including bridges constructed by public agencies to the exclusion of all the other works of a structural character in which public agencies may be engaged and I am, therefore, inclined to the view that the term "bridges" as here used includes only private bridges. That is to say, that section 8310, G. C., deals exclusively with work done, improvements made and construction prosecuted under private contract. This position, I think, is strengthened when it is observed that in section 8311, supra, where the structures and improvements named are of such character as are frequently constructed, improved, repaired or removed by public agencies, and which might give rise to an inference that contracts of public agencies were intended to be included, there is specific limitation to "private contracts."

In view of the specific limitation of section 8311, G. C., to private contracts and the character of property and structures enumerated in section 8310, G. C., I am clearly of opinion that it was not the legislative intent that they should apply to contracts of public officers or agencies. This position is supported, in my judgment, when it is remembered that the legislature again distinguished between public and private contracts in section 8324, which includes only subcontractors, laborers, material men and mechanics. I, therefore, concur in the conclusion of my predecessor and am of the opinion that sections 8312, 8313 and 8314 have no application to contracts of public officers for public improvement.

Relative to contracts entered into by public agencies, attention is called in particular to section 127 of the highway law, 6947, G. C., 106 O. L., 607, which requires that the county commissioners, before entering into a contract for the im-

provement of a public highway, shall require a bond for the use of the county in a sum equal to the contract price, conditioned for the faithful performance of the contract and also conditions for the payment of all material and labor furnished for or used in the construction of the road for which such contract is made, and which is furnished to the original contractor or subcontractor, agent or superintendent of either engaged in said work, and also to section 63 of the highway law, section 3298-4, G. C., 106 O. L., 598, which requires that the township trustees shall let the contract for road improvement to the lowest and best bidder who shall give bond for the faithful performance of the contract in an amount not less than the contract price and for the payment of all material and labor furnished for or used in the construction for which such contract is made.

It is unnecessary to suggest that these provisions impose upon the county commissioners and trustees a mandatory duty as to the contracts therein referred to.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1207.

JUDGES—COMMON PLEAS—COURT OF APPEALS—REIMBURSEMENT FOR EXPENSES—INTERPRETATION OF SECTION 2253, G. C.—"YEAR" AS USED REFERS TO THE OFFICIAL YEAR AND NOT TO CALENDAR YEAR—ALLOWANCE, PERSONAL TO JUDGE.

The word "year" as used in section 2253, G. C., as amended, 104 O. L., 251, relative to the expenses of common pleas judges and judges of the courts of appeals refers to the official year and not to the calendar year, nor to the year determined by the commencement of the actual tenure of office of the judge appointed to fill a vacancy. The official year of a judge of the court of appeals begins on the 9th day of February.

The maximum limitation of section 2253, G. C., is applicable to the amount of expenses for which any one person holding the office of judge may be reimbursed in any one official year; accordingly, if two persons successively hold the same official position in any one judicial year each of them is entitled to reimbursement for expenses not exceeding $300.00 incurred in that year.

COLUMBUS, OHIO, January 27, 1916.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of January 20, 1916, requesting my opinion upon the following facts:

Hon. T. T. Ansberry was appointed to fill a vacancy on the bench of the court of appeals caused by death. He took the oath of office on January 9, 1915, and resigned within a year of the time of taking office. Judge Ansberry rendered three expense vouchers aggregating $355.20 from January 11, 1915, to December 29, 1915, inclusive, for which warrants on the state treasurer, aggregating $300.00 have been issued to him leaving a balance of $55.20 for which he has not been reimbursed. Is Judge Ansberry entitled to any further allowance of expenses?

Section 2253, G. C., as amended 104 O. L., 251, provides in part as follows:

"In addition to the annual salary and expenses provided for in sections 1529, 2251, 2252, 2252-1, each judge of the court of common pleas and of

the court of appeals, shall receive his actual and necessary expenses, not exceeding three hundred dollars in any one year, incurred, while holding court in a county in which he does not reside, to be paid from the state treasury upon the warrant of the auditor of state, issued to such judge; * * *"

This department has previously held that the word "year," as used in this context, means the official year; that is, the year determined by the commencement or termination of an official term. It does not refer to the calendar year nor to a year commencing on the date when a judge appointed to fill a vacancy may have assumed office.

The official year of judges of the courts of appeals is therefore determined by section 1514, G. C., as amended 103 O. L., 411. Without quoting that section it is sufficient to state that the term of office of a judge of the court of appeals begins on the 9th day of February next after his election. Therefore, the year for the purpose of section 2253 begins as to judges of courts of appeals on the 9th day of February and ends with the 8th of February.

These things being true it is impossible for me to advise you as to just how much if anything remains due to Judge Ansberry. While the allowance is referable to an official year yet it is personal to the judge being a mere limitation on the amount of actual and necessary personal expenses for which he may be reimbursed. That being the case, if more than one person serves in one judicial position in a given official year each person so serving is entitled to reimbursement for expenses incurred by him during the year to the amount of $300.00. So that if two persons successively hold the same judicial position during parts of the same official year, the aggregate expense allowance limit for the position is $600.00 for that year, $300.00 for each person. It follows, therefore, that Judge Ansberry was entitled to reimbursement for actual and necessary expenses incurred by him between January 11 and February 8, 1915, not exceeding $300.00 in all regardless of the amount which his predecessor has drawn from the state treasury in the same year; and that Judge Ansberry is also entitled to reimbursement for expenses incurred by him during his incumbency on and after February 9, 1915, up to $300.00. In short, the limit on Judge Ansberry's expenses for the period referred to in your letter is in the aggregate $600.00, not $300.00, provided, however, that not more than $300.00 thereof be incurred on and after February 9, 1915.

Your statement of facts makes it appear almost certain that Judge Ansberry did not draw more than $300.00 from the state treasury on account of expenses incurred by him prior to February 9, 1915. He has, therefore, up to date not overdrawn his expense allowance for either year. The only question then is as to whether the expense vouchers presented by him show the incurring of expenses in excess of $300.00 between February 9, 1915, and the date of his resignation. If such is shown to be the case then Judge Ansberry must be denied reimbursement to the extent of such excess; but if as heretofore stated the amount of expenses incurred by him within the period last above referred to was less than $300.00 he is entitled to reimbusement in full therefor.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1208.

TAX COMMISSION—AUTHORITY UNDER PARRETT-WHITTEMORE LAW—HAS POWER TO DIRECT COUNTY BOARD OF REVISION TO ORGANIZE PRIOR TO 2ND MONDAY IN JUNE, 1916—SAID BOARD CAN *ONLY* PASS UPON UNFINISHED BUSINESS OF DISTRICT BOARD OF COMPLAINTS—WHAT COMPLAINTS CAN AND CANNOT BE PASSED UPON BY COUNTY BOARD OF REVISION AT SUBSEQUENT SESSIONS.

The tax commission has power, under the provisions of section 39 of the Parrett-Whittemore law as amended 106 O. L., 433, section 5592, G. C., and section 40 of said law, section 5593, G. C., as found in 106 O. L., 257, to direct the duly appointed and qualified members of the board of revision of any county to organize at any time prior to the second Monday in June 1916, and said board of revision may, when properly organized, proceed under the direction of the tax commission to complete any unfinished business of the district board of complaints of such county in compliance with the provision of the latter part of section 1 of said law.

If the tax commission, in the exercise of the authority conferred upon it by said section 39 as amended and section 40 of said Parrett-Whittemore law, directs the duly appointed and qualified members of the county board of revision of any county to convene at any time prior to the second Monday in June, 1916, for the purpose of organization and for the further purpose of completing any unfinished business of the district board of complaints of such county, said board of revision will be without authority in law to hear complaints upon valuations of real or personal property on the tax list for the year 1915, filed after the final adjournment of said board of complaints for said year, or which may be filed after said board of revision has been called into session by said tax commission, and said board of revision will be confined at said session to the hearing of such complaints against the valuations of real or personal property upon the tax list for said year 1915, as were filed with said district board of complaints and as were not disposed of by said board prior to its final adjournment for said year.

COLUMBUS, OHIO, January 28, 1916.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—In your letter under date of January 25th, you request my opinion upon the following questions:

> "1. Has the commission the power to call the board of revision of any county in session, at any time between January 1 and the second Monday in June, 1916?
>
> "2. If the commission has that power and exercises it, may the board of revision so called into session hear complaints upon valuations of real or personal property upon the tax list of 1915, filed after the adjournment of the board of complaints, and also any which may be filed after the board of revision has been called into session, or is such board confined to the hearing of complaints filed with and not disposed of by said board?"

Section 32 of the Parrett-Whittemore law, as originally enacted, 106 O. L., 255, being section 5581 of the General Code, provided for the appointment of the members of the county board of revision in the month of April, 1916, and annually there-

after. Section 39 of said law (section 5592, G. C.) as originally enacted, 106 O. L., 256, provided that:

> "Each county board of revision shall organize annually on the second Monday of June by the election of a chairman for the ensuing year."

These sections of said law as originally enacted were amended by the legislature, 106 O. L., 433, and section 32 as amended now provides for the appointment of members of the county board of revision on or before January 10, 1916, and on or before April 10th of each year thereafter, and section 39 as amended provides that:

> "Each county board of revision shall organize annually, on the second Monday in June *or at such time as may be directed by the tax commission of Ohio,* by the election of a chairman for the ensuing year."

Under provision of the latter part of section 1 of said law any unfinished business of the district board of complaints of a county shall be completed by the county board of revision of such county.

Section 40 of the law (section 5593, G. C.) provides that:

> "County boards of revision shall hold sessions beginning on the second Monday of June and the first Monday of August respectively *and convene at such other times as the tax commission of Ohio may order.*"

It was evidently the intention of the legislature in enacting the aboxe provisions of sections 1 and 40 of said act, and in amending said section 32 of said act so as to provide for the appointment of the members of the county board of revision for the year 1916 on or before January 10th, of said year, and in amending said section 39 of the act so as to authorize said county board of revision to organize at such time other than the second Monday in June of any year as the tax commission may direct, to provide ample authority in the tax commission to call the board of revision of any county in session at any time in the year 1916 after the members of said board have been duly appointed and qualified.

I am of the opinion, therefore, in answer to your first question that the tax commission has power, under the above provisions of section 39 as amended and section 40 of the act, to direct the duly appointed and qualified members of the board of revision of any county to organize at any time prior to the second Monday in June, 1916, and that said board of revision may, when properly organized, proceed under the direction of the tax commission to complete any unfinished business of the district board of complaints of such county in compliance with the above provision of section 1 of the act.

Coming now to a consideration of your second question I call your attention to sections 19 and 24 of the so-called Warnes law as in force prior to January 1, 1916, the date when the Parrett-Whittemore law became effective.

Section 19 of said Warnes law provided:

> "The district board of complaints shall begin its session on the first Monday of August annually and may adjourn from day to day. The board shall complete its work within such time as may be fixed for the completion thereof by the tax commission of Ohio."

Section 24 of said law provided in part as follows:

> "Complaints against any valuation or assessment on the tax list for the current year may be filed with the county auditor before the meeting of the district board of complaints or thereafter during its session."

It will be observed that under provision of section 19 of said Warnes law, as above quoted, the time within which the district board of complaints was required to complete its work was fixed by the tax commission, and under the above provision of section 24 of said law complaints against any valuation or assessment on the tax list for the current year had to be filed with the county auditor before the meeting of the district board of complaints or thereafter during its session. The district board of complaints was neither required nor authorized to consider complaints against any valuation or assessment on the tax list for any year filed with the county auditor, as secretary of said board, after its adjournment in said year at the time fixed by the tax commission for the completion of its work for said year.

It follows that the only "unfinished business" of the district board of complaints of any county which the county board of revision of such county is required to complete, under provision of the latter part of section 1 of the Parrett-Whittemore law, will be the work of considering those complaints filed with the auditor of such county before the meeting of the district board of complaints of said county on the first Monday of August, 1915, or thereafter during the session of said board for said year.

In addition to the power conferred upon the county board of revision under provision of the latter part of section 1 of the Parrett-Whittemore law, section 44 of said law (section 5597, G. C.) provides that:

> "It shall be the duty of the board of revision to hear complaints relating to the assessment of both real and personal property laid before it by the county auditor and it shall investigate all such complaints and may increase or decrease any valuations or correct any assessment complained of, or it may order a re-assessment by the original assessing officer."

And section 45 (section 5598, G. C.) provides that:

> "The county board of revision shall have power to investigate all assessments on the tax list, with respect to the amount of property listed as well as with respect to the valuation at which the same is listed."

Said section further provides, however, that the power of the board shall extend to all cases in which real or personal property has been assessed for taxation for the current year but not to assessments, additions or corrections hereafter made by the tax commission of Ohio.

It is evident that the power of the county board of revision, conferred by the above provisions of section 44 and 45, extends only to the investigation of assessments on the tax list for the current year and may only be exercised by said board at its August session of said year when, under provision of section 52 of said Parrett-Whittemore law (section 5609, G. C.) complaints against any valuation or assessment on the tax list for the current year may be filed with the county auditor before the meeting of said county board of revision on the first Monday of August of said year or within thirty days thereafter if the board remains in session so long.

The authority of the county board of revision at its June session in 1916, under

provision of section 51 of said law (section 5605, G. C.), will be confined to the examination, revision and correction of all property statements and returns for said year placed before said board by the county auditor on the second Monday of June of said year.

It seems clear, therefore, that the county board of revision has no authority under any provision of the Parrett-Whittemore law to hear complaints upon valuations of real or personal property upon the tax list for 1915 filed after the adjournment of the district board of complaints at the close of its session for said year or which may be filed with the county auditor after the board of revision has been called into session by order of the tax commission under authority of section 40 of said law.

I am of the opinion, therefore, in answer to your second question that if the tax commission, in the exercise of the authority conferred upon it by section 39 as amended and section 40 of the Parrett-Whittemore law, directs the duly appointed and qualified member of the county board of revision of any county to convene at any time prior to the second Monday in June, 1916, for the purpose of organization and for the further purpose of completing any unfinished business of the district board of complaints of such county, in compliance with the requirement of the latter part of section 1 of said law, said board of revision will be without authority in law to hear complaints upon valuations of real or personal property on the tax list for the year 1915, filed after the final adjournment of said board of complaints for said year, or which may be filed after said board of revision has been called into session by said tax commission, and that said board will be confined at said session to the hearing of such complaints against the valuations of real or personal property upon the tax list for said year 1915 as were filed with said district board of complaints and as were not disposed of by said board prior to its final adjournment for said year.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1209.

BOARD OF EDUCATION—BIDS AND BIDDERS—ADVERTISEMENT FOR HEATING AND VENTILATING SCHOOL BUILDING—MAY HAVE SUCH GENERAL SPECIFICATIONS AS TO PERMIT BIDS BEING OFFERED FOR INSTALLATION OF *ANY* SYSTEM OF HEATING AND VENTILATING THAT MAY BE DETERMINED BY BOARD AFTER BIDS OPENED.

A board of education may advertise for bids for heating and ventilating a school building under such general specifications as to permit bids being offered for the installation of any system of heating and ventilating, which system may be determined by the board after the bids are opened.

COLUMBUS, OHIO, January 28, 1916.

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

GENTLEMEN:—I have your letter of January 19, 1916, submitting the following inquiry:

> "Is it legal for a board of education to award a contract for heating and ventilating a school building upon competitive bids received under

merely general specifications, permitting each bidder to submit with his proposal the detailed specifications of the system which he, if awarded the contract, proposes to install?"

The question involved in your foregoing inquiry is by no means a new one. Cases involving practically the same question have been considered by the courts of this state under the various statutes providing for competitive bidding with the net result that no rule has been established which is not the subject of some doubt. The laws of this state requiring competitive bidding vary to some extent in expression and language and this fact has been adopted by the courts in some instances in attempting to harmonize what would otherwise appear to be conflicting opinions. The law which controls the board of education in the inquiry submitted by you is found in paragraphs 5 and 6 of section 7625, G. C., which paragraphs are as follows:

"5. When both labor and materials are embraced in the work bid for, each must be separately stated in the bid, with the price thereof.

"6. None but the lowest responsible bid shall be accepted. The board in its discretion may reject all the bids, or accept any bid for both labor and material for such improvement or repair, which is the lowest in the aggregate."

The foregoing law requires a board of education to accept the lowest responsible bid or reject all bids. Ross v. Board of Education, 42 O. S., 374. In this respect the statute in question may be said to be one of the most imperative and restrictive found in the General Code upon this subject. For this reason it is useless in this discussion to direct attention to the construction of other statutes more liberal in their terms in this particular.

The question as presented by you involves a consideration of how general the specifications may be and whether a competition between system and not price may be legal under this law. It must be conceded in the beginning that the method suggested by your inquiry does not provide for competitive bidding as generally understood and contemplated under the laws pertaining to this subject. There is no competition, strictly speaking, unless there is an opportunity for bids on precisely the same plan and involving the same thing or service. It is the opportunity to propose to furnish a certain thing or certain services at different prices that makes competition. This means in the final analysis that prices make competition. It is urged, however, in the particular instance presented by your inquiry that there may be no competition in price if the bidding is limited to a certain specific system adopted by the board of education in the plans and specifications advertised and to which or upon which bids must be confined. This claim is urged because of the fact that heating and ventilating systems are practically all under the patent laws of the United States and controlled absolutely by their owners and that each owner has his own particular price for his own system and that when a certain system is adopted there may be no competition in the price to be paid therefor. It is further claimed in support of this contention that the only competition available in case of the purchase of a heating and ventilating system by a board of education is in determining what system shall be adopted. As in the case of the purchase of an automobile, for instance, the only competition available to the purchaser is the choice of a machine in the first instance. When the merits of different machines are considered and the purchaser has determined what machine he will buy, there is no competition as to the price of that particular machine because the company making it controls the price in every section in which it is sold.

In the case of Ohio ex rel. v. The Board of Education of Toledo, Ohio, 14 C. C., page 15, this question was considered by the court and the following observations made in reference thereto:

> "The board, it seems to us, acted exactly right in advertising as they did advertise for bids, without any mention in the notice as to the kind of system they were going finally to adopt. They gave those interested in that question an opportunity to bid on any kind of an apparatus the individual or company owned, and to name a price to the board. The natural tendency of that kind of a notice would be to make the price so given, as low in amount as possible.
>
> "But after all, the board is not required to finally adopt a system whose owner has bid a sum lower for putting it into a public building than the owner of some other system. It can leave the question of determining finally, what system it will adopt, for consideration after all the bids are in. * * *
>
> "It is clear that these bids are not competitive bids in any sense of the word. To make them competitive, it must be averred that these systems are exactly alike and equally good. No averment of that kind is contained in the petition. They must have been so similar that when a party bid upon them he was bidding upon exactly the same basis as his competitor. * * * But for these things controlled by patents, the market is not free and open. It is controlled by a single owner. We know of no way in which the law can regulate that. We do not believe that you can control the discretion of the board of education to adopt the system after the bids are in, nor do we think it would be wise to do it. So long as it is the privilege of the inventor to secure from the United States government the right to his own inventions, and so long as the law protects him in that right, we see no object in saying, that because some other person has a different patent the owner of which bids a lower sum than the owner of this one, that the discretion of the board to adopt one or the other should be controlled nor do we think it can be."

A question very similar to the one under consideration arose in the case of Ampt v. City of Cincinnati, reported in 17, C. C., at page 516, which case was afterwards affirmed by the supreme court without report, 60 O. S., 621. This case grew out of a controversy over the letting of contracts for a water works system in the city of Cincinnati. The court in passing upon the right of the trustees to permit bidders to determine to a certain extent their own plans and details for the plant made this observation:

> "The machinery required for this work is only capable of being built by ten firms in the United States. Of these eight were bidders on this work. The difficulty that presented itself at once to the trustees in making exact drawings and specifications of every part, was this: Machinery of this magnitude has as yet not reached that state of perfection, and probably never will, where all builders build to any certain and fixed plan as to details. In this respect each builder has his own detailed plans, and no two are alike, and their tools and patterns are made to produce their own work after their own plans; therefore, if the detailed plans of this complicated work was to be given in all of its parts, the trustees were either compelled to adopt the plans of one of the concerns which had produced such work, or else get up a plan of the same kind of their own. It will be seen at

once that the object of the law would be defeated if the board were to adopt the detailed plans of any one of the firms, for this would virtually destroy all bidding by firms other than the one whose plan was adopted, and place the trustees at the mercy of that firm. The price to the city would in all probability be much greater than it should be. This would destroy competition in bidding, the very thing the law was intended to bring about and this must not be except from necessity."

While the observations of the courts in the foregoing cases would seem to support the method suggested in your inquiry, yet in the case of Holbrook v. Toledo, 28 C. C., page 284, which was afterwards affirmed in 73 O. S., 400, without report, the question of the right of a municipality to limit bids for the construction of a street out of material owned and controlled exclusively by one company and covered by letters patent issued by the United States was expressly upheld. In other words, the court in that case, after a very elaborate review of all the authorities, reached the conclusion that, because under the advertisement for bids, no proposition could be made that did not involve the use of certain material which was the subject of a monopoly, this fact was not sufficient to invalidate the contract subsequently made with the company controlling this product. In commenting upon this phase of the case the court said:

"In the absence of any provision in the Ohio statutes that a city may not let just such a contract as has been let here, in the absence of any provision in this statute such as we find in the statute with reference to the city of Cincinnati, which was cited to us, containing the express terms upon which a patented improvement may be used, we are of one mind that we ought not to read into this law the restrictions and qualifications for which counsel for plaintiff contend. Wherever the exclusive right to a thing is owned or controlled, it has seemed to us that the people of a city ought not to be deprived of an opportunity to avail themselves of a useful and valuable thing simply because it is so controlled. * * * Not much encouragement would be given to the inventor of a patented pavement if his market were restricted to individuals, if municipalities were shut out of the number of purchasers of that which he has invented. Individuals do not ordinarily buy pavements. And the question then comes, whether it is public policy to discourage inventions along this line which in the end may inure to the highest benefit of the cities. We have passed through very many stages of bad roads; from the old clay roads, the corduroy and the plank roads, through the divers forms of pavement. Now we have the bitulithic pavement, which has been selected by this board of public service, and it has seemed to this court and to each member of it, that it is wise that the people who have organized themselves into municipalities should be free to avail themselves of every beneficent invention keeping pace with the world's progress."

The authorities heretofore presented are not irreconcilable and may in my judgment be said to support two methods of advertising under the statutes providing for competitive bidding and especially under the statute involved here. That is to say, a fair construction of the foregoing authorities will support the conclusion that a board of education may select a system for heating and ventilating in the first instance and confine all bids to that particular system, or it may under general specifications leave the field open to bids from the owners of all systems with the right to determine what system shall be adopted and the price to be paid therefor after said bids are opened.

This conclusion is supported by the case of State ex rel. v. The Board of Education of the City of Columbus, in the Franklin county common pleas court, which case is reported in the 20 Law Bulletin, page 156. In this case the defendant advertised for bids for plans and specifications for heating and ventilating the Central German, Park street and Second avenue school buildings of the city of Columbus. In response to this advertisement six bids were received, each bidder presenting his own plans and specifications and his own system of heating the various buildings named. The contract was awarded to a company from Toledo whose bid was the highest in price. A tax payer of the city of Columbus brought suit to enjoin the carrying out of this award upon the ground that it was not in accordance with law; that the company did not offer a separate bid for labor and materials and that its bid was not the lowest responsible bid. The court in passing upon this contention says:

"The court is not prepared to say this award is not in the interest of the public. The board awarded it to the highest bidder if we look only to the amount of money. The lowest bidder, however, means the lowest in reference to the thing bid for; it is not the price alone. The heating and ventilation of the school buildings is not alone a question of economy; it is a question as well of the health and comfort of the scholars committed to the care of the board. Smead is the lowest bidder for the thing he proposes to furnish. His is the lowest and only bid for the kind of apparatus selected by the board. The court takes judicial notice that there are various systems and methods of heating and ventilating buildings. The board selected the Smead system as the best. The statute is not to be construed so that the award must be made to the lowest bidder in price independent of utility, durability or the value of the apparatus. * * *

"The advertisement was broad and comprehensive enough to give every system an opportunity to come in and compete with every other. Unquestionably the board had a right to select from the various systems that one which was modern and which would best accomplish the objects desired. The board in making its advertisement, was required either to advertise for one system and run the risk of the objection that the advertisement was for one kind and exclude competitive bidding, or to advertise for plans and specifications for heating and ventilating certain buildings, and from the various kinds submitted award the contract to the apparatus in its judgment best adapted for the purposes intended—the board by the advertisement not determining the kind of apparatus before putting the various kinds of apparatus into competition.

"It was legal under section 3988, R. S. (said section now being section 7623, G. C., supra) to call for proposals for heating and ventilating certain school buildings without discriminating in the call for the kind of apparatus that would be selected, and the board had the legal right, in thus putting in competition the various systems, to select the system which, in its judgment, was most meritorious and to award the contract to the person who was the lowest bidder for the system thus selected. * * * The board might legally have confined in the advertisement the bidding to certain specified systems or specifications, but if it had done so, the best method would not have been adopted to secure the broadest competition and get the lowest responsible bids. The broader the competition the greater the number of those who will watch the proceedings and see that just awards are made and impartial judgments pronounced. * * *

"By section 3988, R. S., the board of education is vested with the dis-

cretionary power to determine what system of heating and ventilating shall be used in the public schools under its charge, and the board may exercise this discretion before the advertisement for bids is published or after the bids are opened. The case of Ross v. Board of Education, 42 O. S., 374, is not in conflict with this decision. But after the board has finally adopted a system and is proceeding to award the contract, the doctrine of Ross v. Board of Education applies and the lowest responsible bidder for the system thus adopted, if there be more than one bidder for such system, who has the lawful power to perform his undertaking, has the absolute legal right to have the contract awarded to him, unless the board in the exercise of its discretion rejects all of the bids."

The concluding clause of the foregoing quotation, in my judgment, states the law of this case. The board of education has the discretionary power to determine what system of heating and ventilating shall be placed in any school building and this discretion may be exercised either before or after bids are received for installing such system. If a choice of system is made before the advertisement for bids, the bidding of course will be confined to that system, but if the board does not desire to make a choice of systems until after the bids are opened, an advertisement containing general specifications which would permit bids being offered for the installation of any system, said system to be determined after the bids are opened, will in my judgment be clearly in harmony with the law and this conclusion is supported by the authorities above quoted.

In view of these considerations, the answer to your inquiry must be in the affirmative.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

Since this opinion was prepared my attention has been directed to the case of Chamberlin v. Board of Education of Dayton, et al., decided by the court of appeals for Montgomery county, July 6, 1915, in which the method of advertising as suggested in your inquiry is approved.

1210.

ROADS AND HIGHWAYS—CONSTRUCTION OF NATIONAL ROAD BY THE H. E. CULBERTSON COMPANY—AN ESTIMATE FOR WORK NOT COVERED BY PREVIOUS ESTIMATE MAY BE ALLOWED UNDER FACTS SUBMITTED.

Upon the facts submitted, an estimate for work not covered by previous estimates may now be allowed to The H. E. Culbertson Company, under its contract for the construction of the national road in Muskingum and Licking counties.

COLUMBUS, OHIO, January 28, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of January 24, 1916, relating to the contracts of The H. E. Culbertson Co., for the construction of the national road in Muskingum and Licking counties, which communication reads as follows:

"I respectfully direct your attention to your opinion to this department under date of June 19, 1915, in which you authorize the release by this department of part of the retained percentage of estimates due The H. E. Culbertson Company in the construction of the national road in Muskingum and Licking counties.

"Pursuant to your opinion, we released to the above named company $10,000.00 of the retained percentage on their Muskingum county contract, and $15,000.00 of the retained percentage on their Licking county contract, and an additional $10,000.00 on September 24, 1915.

"The last estimate paid the contractor was on December 10th, in the sum of $1,201.90 for work performed during the last half of November.

"Some work has been performed since December 1st, for which no estimate has been allowed the contractor.

"The highway department now has for expenditure under its direction $7,000.00 in the state treasury of Ohio and $11,000.00 in goverment vouchers. The sum of $22,000.00 is still retained by the federal government, and the government has never turned over its share of the released portion of retained estimates.

"The estimated cost of completing the work on the above contract is $13,300.00. The contractor now being in absolute need of funds with which to complete the work, I desire your advice in view of all the facts above, as to what payments may lawfully be made by me at the present time to the contractor, and as to what action may be taken looking toward a release of further United States government funds.

"For your information, I am attaching hereto a copy of letter from this department to Mr. L. W. Page, director of public roads, Washington, D. C., and a copy of his answer. This department has in its files a copy of the contract between the United States government and the state of Ohio with relation to the above improvement, and as same is quite voluminous, I am retaining it in my files, but shall be pleased to offer it for inspection by any representative from your department at any time."

The opinion of this department to which you refer, being opinion No. 515, was based upon your statement that the retained percentages on the Culbertson contracts amounted at that time to something less than $45,000.00, and that the contractor had appealed to you for a partial allowance from these retained percentages of approximately $25,000.00, to permit him or assist him in carrying on the work. On these facts you inquired as to what effect the release of a part of the retained percentages would have on the contracts and bonds for the completion of the work. You were advised that should you see fit to modify the original contracts and pay to the contractor a part of the retained percentages of the estimates already allowed, such action on your part would have no effect on the bonds given by the contractor. This opinion was based on the stipulation in the proposal and contract bonds to the effect that no changes, extensions, alterations, deductions or additions in or to the terms of the contracts should in any wise affect the obligation of the surety. The suggestion was made that should you see fit to pay the contractor a part of the retained estimates, it would be the part of wisdom to first obtain the formal written consent of the surety company signing the bonds and I understand that this was done. The opinion in question was directed only to the legal feature of the matter and it was expressly stated that the same should not be taken as in any way advising either for or against the wisdom of releasing any part of the retained estimates. In the preparation of the opinion referred to above, regard was had to the fact that the contract was one involving the expenditure of main

market road funds and that there was no statutory provision whatever governing the matter of retained percentages. The only provision relating to retained percentages was found in the contracts and the modification of the terms of the original contracts did not conflict with any statutory provision.

In releasing retained percentages you have evidently proceeded upon the theory that you should retain at all times in the state treasury and in government vouchers an amount sufficient to complete the work in case of a default on the part of the contractor. While not directly involved in your inquiry, I am prepared to fully endorse your view in this respect. As a result of such view, you now have in the state treasury and in government vouchers, the sum of $18,000.00, while the estimated cost of completing the work is $13,300.00, thus leaving a balance of $4,700.00, which I am not prepared to say is too large, in view of the fact that owing to contingencies the cost of completing an improvement often substantially exceeds the estimate.

Your letter to Mr. L. W. Page, director of public roads, contains a statement of the facts set forth in your communication to me and a suggestion that the department of agriculture adopt a somewhat more liberal attitude toward the state of Ohio and its contractor, the H. E. Culbertson Co. In this connection it might be observed that the original contract between the state of Ohio and the department of agriculture is very indefinite as to the method of payment of that portion of the cost of the improvement to be met by the department of agriculture. By the terms of this agreement the state is to expend state and county funds amounting to not more than $320,000.00 in the manner provided in sections 1178 to 1231, of the General Code of Ohio and house bill No. 134, being the main market road law so-called. Payments from these funds can be made by the state only upon the approval of the department of agriculture. The department of agriculture agrees to devote $120,000.00 to the work in question, but the contract does not cover the method of disbursement applicable to this $120,000.00.

Charles H. Moorefield, United States highway engineer, was detailed to represent the department of agriculture in this matter and the following is a part of his instructions from the department of agriculture taken from a copy of the same found in the files of your department:

> "You are hereby authorized to order the payment of accounts in the improving of the designated post road in Licking and Muskingum counties, Ohio, from the local fund of $320,000 lying subject to my order in the treasuries of Licking and Muskingum counties and the state of Ohio. Accounts for which you are authorized to draw such orders will comprise all regular pay rolls, partial and final payments on contracts, bills for material and unexpendable equipment, rent, clerical services, and all other obligations which may be properly charged against the improvement of the designated post road in Licking and Muskingum counties, Ohio, according to the terms of the contract of March 23, 1914, between the state highway commissioner of Ohio and the department of agriculture.
>
> "These orders should be drawn in triplicate and the approved estimate, pay roll or statement of account ordered paid should be attached to the original order, and a copy of the approved estimate, pay roll or statement should be attached to the duplicate copy of the order which you will send to this office. Enclosed is a copy of the form which you are to use in making all orders."

Mr. Page's letter to you, referred to in your communication, contains the following statement:

"The fiscal regulations of the department of agriculture would in no case permit payments from the federal fund to be premised on the department's agreement with the state of Ohio, except as reimbursements for actual expenditures made by the state, pursuant to the terms of this agreement. This is in accord with an opinion already expressed by the department solicitor. It would be entirely permissible, however, for our engineer assigned to the project to consider the releases which your department has already made to the contractor from the retained percentage, in certifying vouchers for the government's share of future estimates. That is, the releases may properly be considered as applying on the estimates which are hereafter allowed the contractor, and the government's share of such estimates may be paid in advance of the actual payments by the state of the amounts called for in the estimates, provided the releases are sufficient to cover such amounts."

You will note that Mr. Page states that it would be entirely permissible for the engineer representing the department of agriculture to consider the release which the state highway department has already made to the contractor from the retained percentage, in certifying vouchers for the government's share of future estimates.

Referring now to your statement of facts, it appears that some work has been performed since December 1st, and that no estimate has been allowed the contractor for this work. I understand that this work is of the value of about $1,000.00. I suggest that the contractor might now be allowed an estimate covering this work performed since the last estimate was allowed and that upon the approval of the proper officials of the department of agriculture this estimate may be paid to him. If the contractor is now allowed an estimate of approximately $1,000.00 for work actually performed since the last estimate was allowed and paid to him, the effect will not be to reduce the margin of safety between the estimated cost of completing the work and the funds within your control below what it was at the time the last estimate was allowed and paid. In other words, if the margin between these two items was sufficient, at the time the last estimate was paid, to guard against contingencies, and if since that time $1,000.00 worth of work has been done, then if $1,000.00 is now paid to the contractor, the margin will still be sufficient for the reason that the cost of completing the work will have been reduced by $1,000.00. This course of action is free from danger, if it be assumed that a sufficient margin of safety between estimated cost of completion and funds within your control has been maintained in the past, and would seem to offer hope of needed relief from the department of agriculture in the way of reimbursement to the state to the amount of the department's proportion of retained percentages paid to the contractor. When this estimate has been allowed, strong representations should be made to the department of agriculture toward the release by that department and the forwarding to you in the form of government vouchers of the government's proportion not only of the amount of this estimate but also of the $35,000.00 in retained percentages previously allowed and paid to the contractor.

As I understand Mr. Page's letter, he is on record to the effect that it will be entirely permissible for the government engineer assigned to the project to consider the release of $35,000.00 heretofore paid to the contractor from retained percentages in certifying vouchers for the government's share of the estimate which it is now suggested may be allowed to the contractor. This being true, the engineer in certifying vouchers for the government's share would be allowed to consider total payments by the state of about $36,000.00, and since the government's proportion of the cost and expense is either exactly or approximately three-elevenths of the entire cost, it would seem that upon the payment to the contractor

of an estimate approximating $1,000.00 and the calling to the attention of the officials of the department of agriculture, including the engineer assigned to the work, of the fact that the state, with the approval of the department of agriculture, has advanced to the contractor $35,000.00 out of retained percentages, then the department of agriculture would be authorized and indeed required by the terms of the agreement, as interpreted by it, to pay three-elevenths of an amount approximating $36,000.00, its payment to be between $9,000 and $10,000.

If the $18,000.00 now in the state treasury and in your hands in the form of government vouchers is depleted to the extent of $1,000, and then increased by a payment from the department of agriculture amounting to nearly $10,000.00, you will have within your control funds amounting to nearly $27,000.00, and will be in a position to make a further substantial advance to the contractor and still maintain an ample margin of safety between the estimated cost of completing the work and the funds directly under your control.

I suggest, therefore, that this course be followed and that representations along the line herein suggested be made to the department of agriculture and that efforts to secure relief from the present situation be at this time confined to the action above suggested.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1211.

STATE HIGHWAY COMMISSIONER—WITHOUT AUTHORITY TO RELEASE, PRIOR TO FINAL COMPLETION OF CONTRACT, ANY PORTION OF PERCENTAGE REQUIRED TO BE RETAINED BY SECTION 1212, G. C.—MAY ALLOW AND PAY AN ESTIMATE UPON MATERIAL ONLY AFTER SUCH MATERIAL HAS BEEN INCORPORATED IN THE WORK.

1. *The state highway department is not authorized to release, prior to the final completion of a contract in accordance with the plans and specifications, any portion of the percentage required to be retained by section* 1212, *G. C.*

2. *The state highway department is authorized to allow and pay to a contractor an estimate based upon material only after such material has been incorporated in the work.*

COLUMBUS, OHIO, January 28, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of January 10, 1916, which reads as follows:

> "I respectfully direct the attention of your office to the following portion of section 1212, General Code:
>
> "'No payment by the state, county or township, on account of a contract for any improvement under this chapter shall, before the completion of said contract, exceed eighty-five per cent. of the value of the work performed to the date of such payment. Fifteen per cent. of the value of the work performed shall be held until the final completion of the contract in accordance with the plans and specifications.'
>
> "I desire to know whether or not the above provision is mandatory, or if this department is authorized to release, prior to the final completion

of the contract, any portion of the fifteen per cent. retained percentage under any circumstances.

"I also respectfully request an opinion from you as to the meaning of the words 'value of the work performed.' Is this department authorized to pay the contractor on estimates based upon material delivered on the site of the improvement and not yet incorporated in the work, or are we to allow estimates based only upon material in place?"

The part of section 1212, G. C., quoted by you, was manifestly intended by the legislature for the protection of the public. The chapter in which the section in question is found, relates to the construction, improvement, maintenance and repair of roads and bridges by the state highway department, and it is elsewhere provided in this chapter that in case the contractor does not carry forward his work with reasonable progress, or is improperly performing the same, or has abandoned or fails or refuses to complete his contract, the state highway commissioner is authorized to enter upon and construct the improvement, either by contract or force account, and pay the full cost and expense thereof, from the contract price unpaid to the contractor. In case there is not a sufficient balance to pay for the work, the state highway commissioner shall require the contractor or his surety to pay the cost of completing the work. It was the intention of the legislature, in providing for the retention of fifteen per cent. of the value of the work performed, to insure that under ordinary circumstances at least there would always be a sufficient balance of the contract price unpaid to the contractor to complete the work in case of a default on the part of the contractor, thus avoiding the necessity of a suit against the contractor and his surety. The legislature in framing the provision in question, was careful to include therein not only a limitation upon payments made to the contractor before the completion of the contract, but also an affirmative statement as to the amount which should be retained until the contract is finally completed in accordance with the plans and specifications.

It seems clear that the legislative purpose would be defeated if this statute were held to be merely directory, and in view of the fact that its provisions are designed for the protection of the public, and the further fact that the language used contains not only a statement of the rule which is to govern as to payments made, but also a statement of the converse of that rule, I am of the opinion that it must be regarded as mandatory, and that the state highway department is not authorized to release, prior to the final completion of a contract in accordance with the plans and specifications, any portion of the retained percentage.

You also inquire whether, in view of the use of the expression "value of the work performed," you are authorized to pay a contractor estimates based upon material delivered on the site of the improvement and not yet incorporated in the work, or whether you are authorized to allow estimates based only on material in place. It will be noted that the statute uses only the word "work," and makes no reference to materials furnished. It is obvious that despite this fact, an estimate may be based upon materials furnished under certain circumstances. In view of the fact, however, that the legislature in its enactment has referred only to "work performed," and has made no reference to materials furnished, I am of the opinion that the more strict of the two constructions suggested by you is the one that must be adopted, and that you are authorized to allow and pay to a contractor an estimate based upon material only after such material has been incorporated in the work. This construction will obviate the possibility of litigation with material men who might, upon a claim of fraud, seek to repudiate a contract with a person engaged in the construction of a road under the supervision of your department, and recover material delivered to such contractor. Aside from this consideration,

however, the language used is not such as to warrant the conclusion that the legislature intended to authorize the allowance and payment of estimates, based upon materials delivered upon the site of the improvement but not yet in place, and upon or in connection with which no work has been performed by the contractor.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1212.

APPROVAL OF A NUMBER OF LEASES OF CANAL LANDS.

COLUMBUS, OHIO, January 28, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of January 20, 1916, transmitting to me for examination the following leases of canal lands:

	Valuation.
The Edward H. Everett Co., of Newark, O., a portion of the north fork feeder to the Ohio canal	$4,000.00
The American Bottle Co., Newark, O., a portion of the north fork feeder, Ohio canal	2,000.00
Carrie Lane, Logan, O., a portion of the abandoned Hocking canal	100.00
Frank Wilson, Logan, O., portion of the abandoned Hocking canal	133.33
Thomas Braddock, Logan, O., portion of the abandoned Hocking canal	350.00
Edward Bishop, Logan, O., portion of the abandoned Hocking canal	100.00
Geo. W. Weeks and Frank A. Henne, Troy, O., portion of the Miami & Erie canal lands in Troy, O.	100.00
J. F. Courter, Logan, O., portion of the abandoned Hocking canal	133.33

I find these leases to be in regular form, and am therefore returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1213.

APPROVAL OF TRANSCRIPT OF BOND ISSUE, VILLAGE OF MENTOR, OHIO.

COLUMBUS, OHIO, January 28, 1916.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—RE:—Bonds of the village of Mentor, Ohio, in the sum of $21,000.00, bearing interest at 5½%, being forty-two bonds of the denomination of $500.00 each, payable one every six months, commencing September 1, 1916, and ending March 1, 1937.

I have examined the transcript of the proceedings of council and other officers of the village of Mentor, relative to the issuance of the above described bonds, and I find the same regular and in conformity with the provisions of the General Code.

I am therefore of the opinion that the said bonds prepared in the form set forth in the ordinance authorizing the issuance, when properly executed and delivered, will constitute valid and binding obligations of the said village of Mentor.

I enclose the transcript herewith. Respectfully,

EDWARD C. TURNER,
Attorney-General.

1214.

WORKMEN'S COMPENSATION LAW—CLAIM FOR COMPENSATION DUE AN INJURED EMPLOYE CANNOT BE COMPROMISED BY INDUSTRIAL COMMISSION BEFORE *SUIT, ACTION* OR *PROCEEDING* IS BROUGHT AGAINST EMPLOYER FOR COLLECTION OF SUCH COMPENSATION—SECTION 1465-74, G. C., CONSTRUED.

A claim for compensation due an injured employe from his employer by virtue of the provisions of section 27 of the Ohio workmen's compensation act, or General Code, section 1465-74, 103, *O. L., 72, cannot be compromised by the Industrial Commission of Ohio before a suit, action or proceeding is brought against the employer for the collection of such compensation.*

COLUMBUS, OHIO, January 29, 1916.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of the following communication under date of January 24, 1916, from your department:

> "Enclosed herewith find two copies of the Supplemental and Amended Finding of Facts and Order issued by the commission in the case of Antonio Balbie v. Peter Praechter of Cincinnati, Ohio. This finding and order provides for the payment of compensation in the sum of $765.00, together with medical expenses amounting to $5.00. Since the employer has failed to make settlement within the time specified, the matter is placed in your hands for collection.
>
> "This claim is referred to you at this time instead of waiting until the first Monday in February, which is the usual time for certifications of this nature, because of the urgency of the case. In this connection, we are sending you herewith copy of letter received from S. S. Stewart, deputy in charge of our Cincinnati branch office, which is self-explanatory.
>
> "In the event you find it is advisable to effect a compromise of this claim, any suggestion you may make in this connection will be given prompt attention by the commission."

To your letter is attached a copy of the letter from Mr. S. S. Stewart, deputy in charge of your Cincinnati office, referred to in your communication, and which is as follows:

> "Antonio Balbie was in the office this morning and informed me that Peter Praechter, Balbie's employer, would not comply with the order

issued by the commission, January 11, 1916, but would pay $500.00 in settlement of the claim. If such a settlement is not consummated, it is the employer's intention to refuse to pay anything and allow the claim to be certified to the attorney-general, and then insist upon the matter awaiting a review by the supreme court of Judge Bigger's decision relative to the constitutionality of section 27 of the act.

"I called Mr. Yaple by long distance and gave him the information the above conveys to you. He stated that he would ask the claims department to refer the matter to the attorney-general, and that the attorney-general's office would then take the matter up with me to determine whether or not the matter should be compromised. I write this to you in order that you may be informed as to the status of this case, and beg to ask that the claim be referred at the earliest moment possible in order that it may be closed, as Balbie has long been a charge upon his friends at Milford, and I am inclined to the opinion that the compromise is far better than to allow this matter to go to suit."

It will be noted in the above letter that Peter Praechter was the employer of Antonio Balbie who was injured in the course of his employment, and in whose favor an award of $765.00 as compensation was made, and that said Praechter, according to the information given to Mr. Stewart by Balbie, is willing to pay $500.00 in settlement of the claim. You ask my opinion in reference to the proposed compromise.

This claim arises under section 27 of the workmen's compensation act, or section 1465-74 of the General Code (103 O. L., 72), and I call your attention to the language used in the latter part of the section, which is as follows:

"Any suit, action or proceeding brought against an employer under the provisions of this section may be compromised by the board, or such suit, action or proceeding may be prosecuted to final judgment as in the discretion of the board may best subserve the interest of the persons entitled to receive such compensation."

This department, in a former opinion to your commission upon the question as to its right to compromise or settle a claim for compensation arising under the provisions of section 27, held that your commission did not have authority to compromise a claim before a suit or action had been brought. Therefore, adhering to our former holding upon this same question, it is my opinion that this claim cannot be compromised until a suit, action or proceeding has been brought against the employer. I would advise that your Cincinnati representative take the matter up with the employer, Peter Praechter, and if he will consent to the payment of $500.00 as compensation to this injured employe, that a petition may then be drawn and filed in the proper court, after which your board would have authority, under the provisions of the above quoted sections, to compromise the suit, action or proceeding brought against the employer.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1215.

BOARD OF EDUCATION—TOWNSHIP RURAL SCHOOL MAINTAINING SECOND GRADE HIGH SCHOOL—PUPILS WHO ATTEND FIRST GRADE HIGH SCHOOL IN ANOTHER DISTRICT FOR FIRST THREE YEARS, AND ARE NOT GRADUATES OF A SECOND GRADE HIGH SCHOOL, ARE NOT ENTITLED TO HAVE TUITION PAID FOR FOURTH YEAR'S ATTENDANCE AT SAID FIRST GRADE HIGH SCHOOL BY TOWNSHIP BOARD MAINTAINING SECOND GRADE HIGH SCHOOL.

Pupils who have resided in a township rural school district maintaining a second grade high school and who have chosen to attend a first grade high school in another district for the first three years of the high school course rather than to attend the second grade high school in the district in which they reside, and who are not graduates of said second grade high school, are not entitled to have their tuition paid for the fourth year of their attendance at said first grade high school by the board of education of said rural school district maintaining said second grade high school.

COLUMBUS, OHIO, January 29, 1916.

HON. BENJAMIN OLDS, *Prosecuting Attorney, Mt. Gilead, Ohio.*

DEAR SIR:—In your letter under date of January 4th you request my opinion as follows:

> "Cardington village school board desires your opinion of the law upon the following statement of facts:
>
> "Cardington village maintains a *first* grade high school; Lincoln township maintains a *second* grade high school. Two pupils residing in Lincoln township have taken three years of the high school course in Cardington village school, and paid their own tuition for such time; they desire to take the fourth year and complete the course here, but insist that Lincoln township pay the tuition for the fourth year.
>
> "Is Lincoln township liable for this fourth year tuition under section 7748, R. S. of Ohio?
>
> "As you will observe, the statute provides for the payment by the township for the fourth year of *graduates* from their own school, and while these pupils have taken the full course of three years required for graduation from the Lincoln township school, they have not taken the course *in* that school.
>
> "Will you kindly give us your opinion as to whether the parents shall pay the tuition of these pupils for the fourth year, or whether Lincoln township is liable therefor?"

Pupils who are eligible for admission to high school, and who reside in a rural school district in which no high school is maintained, may attend a high school in another district, and section 7747, G. C., as amended in 104 O. L., 125, requires that the tuition of such pupils shall be paid by the board of education of the rural district in which they have legal school residence.

Section 7748, G. C., as amended in 104 O. L., 126, provides that:

> "A board of education providing a third grade high school as defined by law, shall be required to pay the tuition of *graduates from such school*

residing in the district at any first grade high school for two years, or at a second grade high school for one year. Should pupils residing in the district prefer not to attend such third grade high school, the board of education of such district shall be required to pay the tuition of such pupils at any first grade high school for four years, or at any second grade high school for three years, and a first grade high school for one year."

Said section further provides that:

"Such a board providing a second grade high school as defined by law, shall pay the tuition *of graduates residing in the district* at any first grade high school for one year; except that, a board maintaining a second or third grade high school is not required to pay such tuition when the maximum levy permitted by law for such district has been reached, and all the funds so raised are necessary for the support of the schools of such district."

It will be observed that under provision of that part of section 7748, G. C., as above quoted, where the board of education of a school district maintains a third grade high school as defined by law, a pupil eligible for admission to high school and residing in said district, may attend the high school maintained by said board of education for two years, or until such time as said pupil is graduated from said high school, and then said pupil may attend a first grade high school in another district for two years, or a second grade high school for one year, and the board of education of the district in which said pupil resides is required to pay the tuition of such pupil for such attendance in a first grade high school of another district for two years, or in a second grade high school of another district for one year, or said pupil may choose to attend the first grade high school of another district for four years, or the second grade high school of another district for three years, and a first grade high school for one year, and the board of education of the school district in which such pupil resides, is required to pay the tuition for such pupil for such attendance.

It will be observed, however, that under the further provision of said section 7748, G. C., as above quoted, the right of pupils residing in a school district which maintains a second grade high school, as defined by law, to attend the high school in another district, and have their tuition for such attendance paid by the board of education of the district in which they reside, is limited to *graduates* of such second grade high school who may attend a first grade high school in another district for one year, for the purpose of securing the fourth year of high school work, which has not been provided for by the board of education of their own district.

In any event the board of education of a school district maintaining either a second or third grade high school is not required to pay tuition for any of the pupils residing in such district attending high school in another district, when the maximum levy permitted by law has been made by said board of education, and all the funds so raised are necessary for the support of its schools.

Upon examining the provisions of the first part of section 7748, G. C., as in force prior to its amendment in 104 O. L., I find that the only material change made by the legislature in amending said section was to add to said part of said section the provision that:

"Should pupils residing in the district prefer not to attend such third grade high school, the board of education of such district shall be required

to pay the tuition of such pupils at any first grade high school for four years, or at any second grade high school for three years, and a first grade high school for one year."

It was evidently the intention of the legislature in enacting the above provisions of sections 7747 and 7748, G. C., that all the pupils of the state should receive their school education as far as possible in the respective school districts wherein they have legal school residence, and to require each board of education to educate the pupils having legal school residence within its respective district, to the full extent of the course of study therein maintained, and not to throw the burden of educating such pupils onto boards of education of districts other than those wherein such pupils have legal school residence, until they have completed the full course of study provided and maintained by the boards of education in the respective districts in which such pupils reside.

It seems equally clear that it was the purpose of the legislature in amending said section 7748, G. C., in the manner above set forth, to raise the standard of high schools in the state by giving to pupils residing in districts maintaining third grade high schools the right to attend a high school of a higher grade, and have their tuition paid for the entire time of such attendance, and limiting this right in a district maintaining a second grade high school to the graduates of such school, who are only entitled to have their tuition paid in a first grade high school in another district for the fourth year of the high school course. Said amendment will have the effect of encouraging boards of education maintaining third grade high schools to comply with the necessary requirements of the statutes governing high schools of the first or second grade.

Inasmuch as the above limitation in a rural school district maintaining a second grade high school would work a hardship on a pupil living in a village or city district maintaining a first grade high school, who has completed the elementary school course and a part of the high school course, and whose legal residence has been transferred to such rural district, before the completion of said high school course, the latter part of said section 7748, G. C., as amended provides that:

"A pupil living in a village or city district who has completed the elementary school course, and whose legal residence has been transferred to a rural district in this state before he begins or completes a high school course, shall be entitled to all the rights and privileges of a resident pupil of such district."

As I understand this latter provision of the statute it gives to such pupil the right to attend a first grade high school in another district for one year, and to have his tuition paid for such year by the board of education of the rural school district to which his legal residence has been transferred and which maintains a second grade high school.

I am of the opinion, therefore, in answer to your question that the pupils referred to in your inquiry who have resided in a township rural school district maintaining a second grade high school, and who have chosen to attend a first grade high school in another district for the first three years of the high school course, rather than to attend the second grade high school in the district in which they reside, and who are not graduates of said second grade high school, are not entitled to have their tuition paid for the fourth year of their attendance at said first grade high school, by the board of education of said rural school district maintaining said second grade high school. Respectfully,

EDWARD C. TURNER,
Attorney-General.

1216.

OHIO SOLDIERS AND SAILORS HOME—FUNDS OF DECEASED INMATES—HOW DISPOSED OF—ADMINISTRATOR OR EXECUTOR SHOULD BE APPOINTED.

Funds belonging to deceased inmates of the Ohio Soldiers' and Sailors' Home in the hands of the treasurer of the home should be paid to the administrator or executor of the estate of such deceased inmate upon the the appointment and qualification of such administrator or executor.

Claims cannot be maintained by the Ohio Soldiers' and Sailors' Home for the maintenance of deceased inmates against their estates.

COLUMBUS, OHIO, January 29, 1916.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I have yours under date of January 17, 1915, with which is enclosed correspondence relative to the disposition of funds in the hands of the treasurer of the Ohio Soldiers' and Sailors' Home, belonging to the estate of Robert McKissick, deceased. It is stated in this correspondence that Robert McKissick was admitted to the home December 10, 1911, and died there December 25, 1915, leaving in the hands of the treasurer of the home certain funds, claim to which is now being made by alleged relatives and heirs at law of the deceased. Upon this statement you make inquiry as to the proper procedure of your board and the custodian of the funds mentioned.

Assuming that the deceased died intestate, attention is directed to section 10604, G. C., which provides:

> "Upon the death of an inhabitant of this state, letters testamentary, or letters of administration on his estate, shall be granted by the probate court of the county in which he was an inhabitant or resident at the time he died. When a person dies intestate in any other state or county, leaving an estate to be administered within this state, administration thereof shall be granted by the probate court of a county in which there is any estate to be administered. The administration first lawfully granted, in the last mentioned case, shall extend to all the estate of the deceased, within the state; and exclude the jurisdiction of any other court."

Upon the appointment and qualification of an administrator of the estate of the deceased according to the provisions of sections 10604 and 10618, G. C., the treasurer of the home should pay over to such administrator all the money in his custody and possession belonging to the deceased, and take a receipt from such administrator therefor. The funds and estate of the deceased may then be regularly and lawfully paid out to creditors of the estate, and the remainder, if any, after payment of the cost of administration and lawful claims of creditors, may then be distributed among the heirs at law, if there be any.

It is further suggested in your communication that your board contemplates making claim against the estate of the deceased, Robert McKissick, for his maintenance for the four years during which deceased was an inmate of the Ohio Soldiers' and Sailors' Home.

Section 1815, G. C., provides as follows:

"All persons now inmates of, or hereafter admitted into, a benevolent institution, except as otherwise provided in this chapter, and except as otherwise provided in chapters relating to particular institutions, shall be maintained at the expense of the state. *They shall be neatly and comfortably clothed, and their traveling and incidental expenses paid by themselves or those having them in charge.*"

An examination of the chapter in which this section appears in the General Code will disclose that the exceptions to the provisions of section 1815 therein contained are limited to persons committed to the Longview Hospital, the Ohio Hospital for Epileptics, the Institution for Feeble-Minded (Sec. 1815-1, G. C.), and patients at the Ohio State Sanatorium (Sec. 1815-13, G. C., 106 O. L., 559).

No provision of the chapter of the General Code relating to the Ohio Soldiers' and Sailors' Home, being sections 1905 to 1918, G. C., inclusive, in any way modifies or limits the provisions of section 1815, G. C., supra, nor am I aware of any statutory provision elsewhere which would operate to modify or limit the provisions of said section.

The language of section 1815, G. C., supra, places beyond question the obligation of the state to maintain the inmates of the Ohio Soldiers' and Sailors' Home, in the absence of a contrary provision elsewhere to be found, except as to their clothing, traveling and incidental expenses.

It would therefore follow that without statutory authority therefor the officers of the home could not make lawful claim against an inmate or his estate for reimbursement of the state for the expense of maintaining an inmate in said home, beyond such expense as had been incurred for clothing, traveling or necessary incidentals.

I am therefore of opinion that claim against the estate of Robert McKissick for maintenance during the time he was an inmate of the Ohio Soldiers' and Sailors' Home, other than for expense of furnishing necessary and proper clothing, of traveling and of necessary incidentals, could not be maintained by the officers of the home or the state board of administration.

It is not deemed improper to suggest, however, that under the provisions of section 10714, G. C., the funeral expenses of the deceased, together with the costs of administration, are made first in the order of payment of the claims against the estates of deceased persons.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1217.

VILLAGE COUNCIL—FAILURE TO MAKE AN APPROPRIATION FOR SALARY OF ITS MEMBERS—SUCCEEDING COUNCIL CANNOT ACT.

If a village council refuses or neglects to make an appropriation for the salary of its members, or at least to pass a resolution authorizing the payment of such salary, none of the members of said council have an enforcible claim against the public funds of the village, and mandamus would not lie to require a succeeding council to appropriate therefor.

Unless a village council during its term by a resolution or appropriation authorizes the payment of the salary of its members at the rate of two dollars for each meeting, not to exceed twenty-four meetings in any one year, the members of such council have no claim, either legal or moral, against the village, and any succeeding council would be without power to make an appropriation therefor, and it would be the duty of the village clerk, if the succeeding council attempts to provide for such payment by appropriation, to refuse to draw his warrant therefor.

COLUMBUS, OHIO, January 29, 1916.

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

GENTLEMEN:—In your letter under date of December 21, 1915, you request my opinion upon the following questions:

1. "If a village council refuses or neglects to make appropriation for the salaries of its members, for an entire year, or any appropriation period, have the members, who attended at least twenty-four meetings in a fiscal year, an enforcible claim against the public funds of the village, and would mandamus action lie to require the succeeding council to appropriate for such back salaries?

2. "If you should hold that said salaries are not enforcible obligations against the revenues of the succeeding year, are they such moral obligations as an appropriating body may provide for in making the appropriations for the ensuing year, or half year, and may the village clerk, if council provides therefor by appropriation, refuse to draw his warrant under the authority vested in him by section 4285, General Code?"

Section 4219, G. C., relates to the powers of the council of a village and provides:

"Council shall fix the compensation and bonds of all officers, clerks and employes in the village government, except as otherwise provided by law. All bonds shall be made with sureties subject to the approval of the mayor. The compensation so fixed shall not be increased or diminished during the term for which any officer, clerk or employe may have been elected or appointed. Members of council may receive as compensation the sum of two dollars for each meeting, not to exceed twenty-four meetings in any one year."

While the foregoing section fixes definitely the amount of salary that may be drawn by a member of a village council, it leaves the question of whether or not council are to receive that salary optional with council. In other words, unless council authorizes the payment of a salary by resolution or appropriation, then the salary provided for in section 4219, G. C., may not be paid.

In the case of Walker et al., v. Dillonvale, 82 O. S., 137, the second branch of the syllabus reads as follows:

> "Section 197, Municipal Code, as amended in 1914 (97 O. L., 118), fixes the compensation of a member of council of a village at two dollars for each meeting, not to exceed twenty-four meetings in any one year, and it is not necessary that it should have been fixed by an ordinance, passed before the commencement of his term of office, but the council may authorize its payment by a resolution passed after the services have been renderd."

It will be noted that the court holds in this case that the statute itself fixes the amount of the salary for which council may authorize payment by resolution.

I am of the opinion, therefore, in answer to your first question, that if the village council refuses or neglects to make an appropriation for the salary of its members, or at least to pass a resolution authorizing the payment of such salary, none of the members of council have an enforcible claim against the public funds of the village, and mandamus would not lie to require a succeeding council to appropriate therefor.

I am further of the opinion in answer to your second question, that unless a village council, during its term by a resolution or appropriation, authorizes the payment of the salaries of its members at the rate of two dollars for each meeting, not to exceed twenty-four meetings in any one year, that the members of such council have no claim, either legal or moral, against the village, and that any succeeding council would be without power to make an appropriation therefor. Further, it would be the duty of the village clerk, if the succeeding council attempts to provide for such payment by appropriation, to refuse to draw his warrant therefor.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1218.

APROVAL OF CERTAIN LEASES OF CANAL LANDS AT CLEVELAND, DAYTON AND LOGAN, OHIO.

COLUMBUS, OHIO, January 31, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of January 26, 1916, transmitting to me for examination the following leases of canal lands:

The American Steel & Wire Co., Ohio canal lands near Cleveland, Ohio	$3,885.00
The Davis & Sherer Co., of Dayton, Ohio, lot in the city of Dayton, Ohio	3,333.33
Rachel L. Wolfe, Logan, Ohio, abandoned Hocking canal lands at Logan, Ohio	250.00
Minnie C. Wright, Logan, Ohio, abandoned Hocking canal lands at Logan, Ohio	166.66

I find these leases to be in regular form, and am therefore returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1219.

COUNTY COMMISSIONERS—MAY NOT BORROW MONEY TO PAY FIXED EXPENSES ANTICIPATING EXHAUSTION OF APPROPRIATION FOR GENERAL COUNTY FUND—SALARIES OF COUNTY SURVEYOR AND ASSISTANTS.

Money may not be borrowed by county commissioners to pay the fixed expenses of the county in anticipation of the exhaustion of the appropriation for the general county fund for the fiscal half year.

COLUMBUS, OHIO, January 31, 1916.

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

GENTLEMEN:—I acknowledge receipt of your letter enclosing a communication addressed to the bureau by the auditor of Ashland county, in which he presents the following question on which my advice is requested by you:

> "The salaries and compensation of the county surveyor and his assistants provided for by the highway code of 1915, and particularly by section 138 thereof (106 O. L., 612—therein designated as section 7181 of the General Code), and payable 'out of the county treasury in the same manner as the salaries of other county officials are paid,' imposed, upon the going into effect of said act, a burden upon the general county fund, from which by virtue of section 2989, of the General Code, the salaries of 'other county officials are paid,' not contemplated when the levy for such fund was made in the year 1914 (the proceeds of which constitute the existing fund) nor when the levy for such fund was made in the year 1915 (the proceeds of which will constitute said fund for the year beginning March 1, 1916). In some counties these additional expenditures, together with those anticipated and provided for, will cause the early exhaustion of the general county fund, unless such exhaustion can be avoided.
>
> "May money be borrowed under section 5656 of the General Code, in order to avoid this result?"

Section 138 of the Cass highway law, 7181, G. C., 106 O. L., 612, referred to in the letter submitted, fixes the salary of county surveyors and provides that:

> "Such salaries shall be paid out of the county treasury in the same manner as the salaries of other county officials are paid."

In the same section it is further provided that:

> "In the event the county highway superintendent cannot properly perform all the duties of his office, the county commissioners shall fix the aggregate compensation to be expended for assistants by the county highway superintendent during the year. Such compensation shall be paid out of the county treasury in the same manner as the salary of county officials is paid."

The manner of payment of the salary of county officials is prescribed by section 2989, G. C., as follows:

> "Each county officer herein named shall receive out of the general fund of the county the annual salary hereinafter provided, payable monthly upon warrant of the county auditor."

The payment of assistants of the county highway superintendent is required to be made from the same fund and in the same manner as the salary of the county surveyor, so that, for the purposes of the present consideration, the salary of the county surveyor only need be referred to.

By virtue of the statutory provisions above quoted, there was on and after September 6, 1915, at which time the Cass highway law became effective, created by operation of law a liquidated obligation of the county, payable monthly out of the general county fund on the warrant of the county auditor.

There is, however, imposed by law further conditions precedent to the auditor's drawing a warrant upon funds in the county treasury.

Section 5649-3d, G. C., provides as follows:

> "At the beginning of each fiscal half year the various boards mentioned in section 5649-3a of this act, shall make appropriations for each of the several objects for which money has to be provided, from the moneys known to be in the treasury from the collection of taxes and all other sources of revenue, and all expenditures within the following six months shall be made from and within such appropriations and balances thereof, but no appropriation shall be made for any purpose not set forth in the annual budget, nor for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of receipts and balances."

Among the various boards mentioned in section 5649-3a, as above referred to, is the board of county commissioners.

By the specific terms of section 5649-3d, all expenditures from the county treasury are limited to the purposes set forth in the budget, and the amount for each of said purposes fixed by the budget commissioners, exclusive of receipts and balances. The purposes referred to in section 5649, G. C., are, to my mind, identical with those purposes mentioned in section 5649-3a, wherein it is provided that:

> "Such annual budget shall specifically set forth:
>
> (1) "The amount to be raised for each and every purpose allowed by law for which it is desired to raise money for the incoming year."

The purposes here referred to are manifestly those purposes for which the taxing authorities mentioned in that section are authorized to levy taxes and create funds. That is to say, such purposes as the county fund, the poor fund, the blind relief fund, the soldiers' relief fund, the judicial fund, the bridge fund, the interest and sinking fund, and perhaps others which might be mentioned. The commissioners are then not required to set forth in the county budget the amount to be raised for each and every purpose, more in detail than to state the aggregate amounts desired to be raised for each of the several funds for which they are authorized by law to levy a tax.

Applying this conclusion then to the provisions of section 5649-3d, G. C., supra, the semi-annual appropriations are thereby limited only to the aggregate amount to be raised for each particular fund for which a levy is lawfully made. From this it follows that the only limit upon appropriations from the general county fund is the aggregate of that fund that is fixed by the budget commissioners, exclusive of receipts and balances, and it matters not that the commissioners have chosen to subdivide such aggregate in the preparation of the budget. Such aggregate sum

when so appropriated, or so much thereof as is in the aggregate appropriated, is available for the payment of any expenditure authorized to be paid out of the fund from which the appropriation is made. That is to say, the county commissioners are not limited in their expenditures from appropriations of general county funds, by reason of the enumeration of subdivisions of that fund in the preparation of the county budget.

It was their duty to make, and it is assumed that at the beginning of the fiscal half year at the regular meeting of the county commissioners in September, 1915, the board made an appropriation from the general county fund for the payment of those anticipated expenditures lawfully paid out of said fund for the current fiscal half year. That appropriation then became available for the payment of all such expenditures, and particularly for the payment of those fixed expenses such as officers' salaries and all those other county obligations which arise and become liquidated by operation of law. It was the duty of the county commissioners, in making such appropriation, to provide for all such fixed expenses, and it is now their further duty to so limit the miscellaneous or contingent contract expenditures of a county from such fund as to retain sufficient of such appropriation to discharge all fixed expenditures imposed by law.

In other words, the appropriation made in September for general county purposes, was then available for the payment of the salary of the county surveyor as well as that of other county officers, notwithstanding the commissioners had not specifically mentioned the county surveyor in the budget submitted in June, 1914, and notwithstanding the county surveyor was not specifically mentioned in such appropriation, and it is the duty of the commissioners and county auditor to so limit other expenditures out of that appropriation during the current fiscal half year as to leave a sufficient amount thereof to pay the salary of the surveyor as well as all other fixed expenses.

It therefore follows that until the total appropriation for county purposes for the fiscal half year is exhausted, the county auditor should draw his warrant upon the county treasurer monthly for the salary of the county surveyor. Occasion for borrowing money for this purpose could not arise at least until the appropriation for county purposes for the fiscal half year has been totally exhausted.

While it is manifestly the purpose of section 5649-3d, G. C., supra, to keep within the limits of taxation the current expense of political subdivisions, it is as clearly not its purpose to delay or to in any way interfere with the payment of the obligations, which become liquidated claims with the lapse of time, by operation of law. The force and effect of its operation is, then, to place a limit upon the incidental or miscellaneous contract expenditures for the fiscal half year, as well as to make imperative the duty of disbursing officers to reserve such portion of the appropriation as will be necessary to discharge all fixed expenses for the fiscal half year when the same shall become due.

It is not anticipated that county commissioners will so disregard their duty in this matter as to allow the appropriation for general county purposes to be so depleted as to be insufficient to discharge the fixed expenses payable from that fund.

I am, therefore, of opinion that money may not be borrowed under section 5656, G. C., to pay the salary of the county surveyor and assistants of the highway superintendent, provided in section 7181, G. C., 106 O. L., 612, under the facts stated in the above inquiry.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1220.

APPROVAL OF TRANSCRIPT OF BOND ISSUE, CITY SCHOOL DISTRICT, ZANESVILLE, OHIO.

COLUMBUS, OHIO, January 31, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—RE: Refunding bonds of the city school district of Zanesville, Ohio, in the amount of $30,000.00, being sixty bonds of $500.00 each, dated February 5, 1916, bearing interest at rate of five percentum per annum, and falling due six each year beginning February 5, 1922.

I have examined the transcript of the proceedings of the board of education and other officers of the said city school district of Zanesville, Ohio, relative to the issuance of the above bonds, and I find the same regular and in conformity with the provisions of the General Code.

I am, therefore, of the opinion that said bonds, when prepared in accordance with the resolutions authorizing their issuance and properly executed and delivered, will constitute valid and binding obligations of the said city school district of Zanesville, Ohio.

As no copy of the bond and coupon form which the board of education proposes to use is attached to the transcript, I suggest that when said bonds are presented for delivery you submit them to me for approval as to form and execution.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1221.

APPROVAL OF TRANSCRIPT OF BOND ISSUE OF EDISON VILLAGE SCHOOL DISTRICT, MORROW COUNTY, OHIO.

COLUMBUS, OHIO, January 31, 1916.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—RE: Bonds of Edison village school district, Morrow county, Ohio, in the sum of $18,000.00, to secure funds to pay the cost of constructing an addition to the school building, being thirty-six bonds of $500.00 each, dated September 1, 1915, falling due as follows: Bond No. 1, September 1, 1917; bond No. 2, September 1, 1918, and thereafter one bond on the first days of March and September of each year until September 1, 1935.

I have examined the transcript of the proceedings of the board of education of the Edison village school district relative to the issuance of the above described bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the provisions of the General Code.

I am, therefore, of the opinion that said bonds drawn in accordance with the form presented, when properly executed and delivered, will constitute valid and binding obligations of said village of Edison. Respectfully,

EDWARD C. TURNER,
Attorney-General.

1222.

MUNICIPAL CORPORATION—WHEN CONTRACTOR ACCEPTS PAYMENT IN FULL ON FINAL ESTIMATE—CANNOT LATER CLAIM INTEREST FROM TIME PAYMENT SHOULD HAVE BEEN MADE AND WAS MADE.

If contractor accepted payment in full on final estimate on work done for city after period for payment therefor under contract had expired, he is not thereafter entitled to claim interest from period between time payment should have been made and was made, unless contract so specified.

COLUMBUS, OHIO, January 31, 1916.

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

GENTLEMEN:—Under date of December 21, 1915, you submitted to me the following inquiry:

> "On the 16th day of May, 1911, the city of Akron, Ohio, entered into contract with E. McShaffrey & Son, to grade and pave Cuyahoga Falls avenue in said city. The work was completed on June 28, 1912, and was accepted within thirty days thereafter. The final estimate was paid to McShaffrey & Son, on January 15, 1914, which said McShaffrey & Son accepted without any claim being made for interest on the amount of said final estimate.
>
> "*Question.* Is said contractor at this time entitled to interest on the amount withheld from him through delay of the city officials in issuing said final estimate?"

The general principle of law relative to the recovery of interest on contract is stated in 22 Cyc., page 1570, as follows:

> "While in a number of cases interest is stated generally to be an incident of the debt, apparently without regard to the distinction between interest as damages and contractual interest, the proper distinction is that where interest is payable by virtue of a contract, it is an integral part of the debt, as much so as the principal debt itself; but where it is recoverable as damages it is merely an incident to the principal debt, and follows the principal as such incident, until it is separated and set apart in some manner as a particular debt."

And as corollary thereto it is stated at page 1572 of the same volume of Cyc.:

> "Where interest is provided for by contract the payment of the principal debt will not defeat the right to recover accrued interest by a subsequent suit. But where interest is recoverable only as damages, and payment of the principal as such is made and accepted, no interest can be recovered, the payment of the debt extinguishing the right to recover interest thereon."

Under such heading the author of the article cites the case of Graveson v. Odd Fellows' Temple Co., 4 O. N. P., 112, the syllabus of which is as follows:

1. "Interest is of two kinds: (1) That which is given by reason of the contract providing for the same. It is a substantive part of the debt, as much so as the principal, for both were contracted for. (2) That which is given by way of damages and is incidental to the debt.

2. "Where the interest is contractual, the acceptance of the principal by the creditor does not bar the right to recover the interest; but where the interest is given by way of damages, the acceptance of the principal is a waiver of the right to recover interest.

3. "The above principles are not affected by our statutes relating to interest which in the main are intended to fix the rate of interest."

In the above cited case the facts were very similar to the facts in the case submitted by you. We can assume without any hesitation the fact to be that there was no provision in the contract that the final estimate was to draw interest after the same was due, at a particular rate.

The case of Electric Co. v. Toledo, 13 O. D., (N. P.) 137, recognizes the principle above stated, but differentiates the facts on the ground that the payment of the contract price for the lights, at stated times, was made in partial payments, and that, therefore, interest was to attach on failure to pay the amount at the stated time, and payments as made could be applied as payments of interest and partial payments on principal.

See also Stewart v. Barnes, 153 U. S., 456, and note found under such case in 38 L. Ed., 791.

But in the case submitted by you I understand the fact to be that the final estimate was paid in full at a particular time, without mention being made of interest, and was received as full payment of the final estimate.

Such being the case, the payment so made was made solely on the principal, and the debt being extinguished there would be no claim for damages by way of interest.

Answering your question, therefore, I am of the opinion that the contractor, having received the final estimate in full, is not at this time entitled to claim interest on the amount between the time that the final estimate should have been paid and the time when it was paid.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1223.

MUNICIPAL CORPORATION—CONTRACTOR IS ENTITLED TO INTEREST ACCRUING ON GUARANTY FUND, IF IT IS SO STIPULATED IN CONTRACT.

Contractor is entitled to interest accruing on guaranty fund, if it is so stipulated in the contract.

COLUMBUS, OHIO, January 31, 1916.

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

GENTLEMEN:—Under date of December 21, 1915, you submitted the following inquiry:

"Stanton avenue, of the city of Akron, Ohio, several years ago was improved under a contract which contained sections 28 and 85, quoted in the letter of Mr. Scott Kenfield, assistant city solicitor, of Akron, submitted herewith. The three per cent. (3%) guarantee retained by the city for two years under said contract, is now more than a year over due.

"*Question* 1. If no demand has been made by the contractor, should the city auditor issue his warrant for interest accruing on and after the expiration of the two years when said guarantee fund was, under the conditions of the contract, to be paid to said contractor?

"*Question* 2. Would the fact that the director of service, through the engineering department, has not certified to the city auditor, after the expiration of the two-year period, that said improvement was in good condition, and that the contractor was entitled to the 3 per cent. guarantee fund retained, prevent the recovery of interest accruing after the expiration of the two-year period?"

The sections of the contract to which you refer, to wit: Sections 28 and 85, are as follows:

"Section 28. There will be retained by the city from the amount due upon the contract, a sum of money as a deferred payment, equal to three per cent. of the cost of the improvement, which amount will be retained as a guaranty upon the part of the contractor that the workmanship and materials furnished under these specifications are in all respects first class, as herein provided, and that the improvement will remain in good and sound condition for and during the entire period of two years from and after its completion and acceptance as indicated by the engineer, in writing, on the final estimate, and in the case of special repair work to the end of the term of the guaranty.

"In case the contractor shall make all the repairs, renewals and special repairs which may become necessary under and by virtue of this contract and guaranty, and shall leave said improvement in good and sound condition at the expiration of said guaranty as required by said director of public service and to his acceptance, or if the said pavement, curbing, gutters, sidewalks or catchbasins shall remain in good and sound condition to the acceptance of said director, and for the full time of said guaranty, without such repairs being necessary thereon, *then at the expiration of said term of guaranty, said amount together with all accrued interest and dividends thereon, if not withdrawn, less any expense which the city may have incurred necessarily in connection therewith, shall be returned to said contractor as full payment for any balance due on said contract and improvement, as herein provided.*"

"Section 85. Payment for the work herein specified to be done will be made in the following manner and upon the following conditions:

"The director of public service will cause approximate estimates to be made monthly by the city engineer, of the amount, in his opinion, of the work done, or acceptable materials delivered on the ground, as specified under the contract. Ninety (90) per cent. of the contract price of said work, after deducting former payments from said ninety (90) per cent., will be paid in cash within five days after said estimate has been duly approved by the director of public service and filed with the city auditor, but the making of any such estimates, or any payment made thereon, shall not be taken or construed as an acceptance by the city of any work so

estimated. The ten (10) per cent. of the amount of the monthly estimates remaining unpaid, will be retained by the city as a guarantee that the contractor will faithfully and completely fulfill all obligations and conditions imposed by the contract and specifications, and any damages caused to the city by reason of any failure on the part of the contractor to fulfill all the conditions and obligations herein contained. Within thirty days after the completion of the work as above specified, and its acceptance by the director of public service, the director of public service will cause the city civil engineer to make a final estimate of all the work done, and the full amount of said final estimate will be paid, less any amounts paid on monthly estimates, less amount retained to complete work according to the provisions of these specifications, and any or all damages or moneys paid by the city by reason of said contractor having failed to carry out faithfully and completely all the obligations and requirements herein contained."

It is fully apparent from the provisions of section 28 of the contract, that it was in contemplation of the parties that the money was the property of the contractor after the final acceptance of the work, and was simply retained by the city during the period of two years as a guaranty fund.

Such being the case, it should not profit at all by the retention of said fund, but all moneys earned on said fund while the same is in the hands of the city belong to the contractor, less the expense which the city may have incurred during the time that it retained said fund.

Answering your first question, therefore, I am of the opinion that should the city auditor determine that the guaranty fund has been increased by way of accrued interest and dividends while the same was in his hands, he should turn the same over to the contractor, whether demand has been made or not, less any expense which the city may have incurred necessarily in connection with the improvement and the retention of the fund.

The above answer to your first question applies as well to your second question. If the city auditor has paid over the principal amount of the guaranty fund, but has failed to turn over the accrued interest thereon he still has in his hands money belonging to the contractor.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1224.

APPROVAL OF ORDER, STATE BOARD OF HEALTH, RELATIVE TO WATER SUPPLY, SEBRING, OHIO.

COLUMBUS, OHIO, February 1, 1916.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Enclosed you will find an order of the state board of health to the City Water Works Company, of Pittsburg, Pa., in regard to the water supply of Sebring, Ohio, said order to become effective when you have approved the same.

This order is identical with the order of the state board of health issued August 24, 1914, and concerning which a hearing was had in your office on

November 18, 1915, except that the time within which the water purification plant is to be completed has been changed to eighteen months from the date upon which this order is signed by the governor and attorney-general.

I have approved the same and, under the provisions of section 1252, of the General Code, the same is now transmitted for your approval.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1225.

APPROVAL OF ORDER, STATE BOARD OF HEALTH, POLLUTION OF MUD RUN BY SEWAGE FROM VILLAGE OF HUBBARD, OHIO.

COLUMBUS, OHIO, February 1, 1916.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Enclosed you will find an order of the state board of health relating to the pollution of Mud Run by sewage from the village of Hubbard, Ohio, said order to become effective when you have signed the same.

I have conferred with the state board of health, and learn that said order is identical with the order submitted to the council of sail village of Hubbard, and declared by said council to be satisfactory, and one with which the village could reasonably comply, and concerning which further hearing was waived by said council.

I have approved the same under the provisions of section 1251 of the General Code, and the same is now transmitted for your approval.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1226.

MUNICIPAL COURT OF COLUMBUS—JUDGES NOT AUTHORIZED TO RETAIN FEES FOR SOLEMNIZING MARRIAGES—PAID INTO CITY TREASURY.

Judges of the municipal court of the city of Columbus are not authorized to retain the legal fee of $2.00 collected by them for solemnizing marriages. Such fee should be collected by the clerk of the municipal court and paid into the city treasury as other fees and costs collected by him.

COLUMBUS, OHIO, February 1, 1916.

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

GENTLEMEN:—I have your letter of January 21, 1916, in which you request my opinion as follows:

"We would respectfully request your written opinion upon the following question:

"May judges of the municipal court of the city of Columbus, Ohio, retain the legal fee of $2.00 for solemnizing marriages, or would they be required to pay the same into the city treasury?"

Section 1746 of the General Code, provides that a justice of the peace may receive a fee of $2.00 for "marrying and making return."

Section 1558-51 of the General Code (106 O. L., 366), prescribing the original jurisdiction of the municipal court of Columbus, Ohio, provides in part as follows:

"The municipal court shall have and exercise original jurisdiction within the limits of the city of Columbus as follows: * * *

"9. The right to perform marriage ceremonies * * * and perform any other duties now given or that may be conferred upon justices of the peace. * * *"

It is to be noted from the language just quoted that the right to perform the marriage ceremony is made an official act of the municipal court rather than the prerogative of the several individuals constituting that court.

Under section 1558-85 of the General Code, (106 O. L., 378) the municipal court of Columbus is, by reference, given authority to tax the same fees and costs as are justices of the peace for like services. Therefore, the proper fee for performing a marriage ceremony by the municipal court of Columbus is $2.00, as stated in your letter.

Section 1558-48 of the General Code, (106 O. L., 366) fixes an annual salary for the judges of such municipal court, and it must be concluded that this salary is intended as compensation for all official acts or for all services performed under the command or authority of the municipal court act.

Section 1558-79 of the General Code, (106 O. L., 375) prescribing the duties of the clerk of such municipal court is, in part, as follows:

"* * * He shall pay over to the proper parties all money received by him as clerk; he shall receive and collect all costs, *fees,* fines and penalties, and shall pay the same monthly into the treasury of the city of Columbus, and take a receipt therefor, except as otherwise provided by law; * * *"

As above stated the right to perform the marriage ceremony is a part of the section conferring original jurisdiction upon the court. For such services a fee of $2.00 is authorized, and no distinction should be made or different rule should apply in the collection and disposition of the fees for performing the marriage ceremony than is made and applied in the collection and disposition of fees and costs charged and collected for any other official act.

I am, therefore, of the opinion that the judges of the municipal court of the city of Columbus, Ohio, are not authorized to retain the legal fee of $2.00 for solemnizing marriages, but that the same should be collected by the clerk of said court and paid into the city treasury as other costs and fees.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1227.

OHIO SOLDIERS AND SAILORS HOME—PROBATE COURT OF ERIE COUNTY, OHIO, HAS JURISDICTION TO APPOINT ADMINISTRATOR OR GUARDIAN OF ESTATE OF DECEASED INMATE OF SUCH HOME.

Jurisdiction to appoint an administrator of the estate of a deceased inmate of the Ohio Soldiers' and Sailors' Home who entered said home with the intention of making same his permanent place of abode, and who dies while in said home, is vested in the probate court of Erie county, Ohio, and no other court in the state has such jurisdiction.

Jurisdiction to appoint a guardian of such an inmate of the Ohio Soldiers' and Sailors' Home at Sandusky, Ohio, under section 11011, *G. C., providing for the appointment of a guardian of a person incapable of taking proper care of himself by reason of intemperance, improvidence or habitual drunkenness, and section* 10989, *G. C., which provides for the appointment of a guardian for an insane person or imbecile, is likewise vested in the probate court of Erie county, Ohio.*

The above rules are general and subject to change upon consideration of specific facts in a particular case.

COLUMBUS, OHIO, February 1, 1916.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—On December 15, 1915, you requested my opinion as follows:

> "Herewith is respectfully submitted the request for an opinion on certain legal points which frequently appear in the performance of the duties of the treasurer of the Ohio Soldiers' and Sailors' Home, Sandusky, Ohio.
>
> "This request for the opinion was forwarded to this board at the suggestion of General Burnett, commandant of the Ohio Soldiers' and Sailors' Home, and is respectfully referred to your department."

Enclosed with your communication is a letter directed to your board by Hon. A. A. Pomeroy, of the Ohio Soldiers' and Sailors' Home Hospital, Sandusky, Ohio, in which he states that, as a matter of administrative convenience and expediency, a department has been created at said Soldiers' and Sailors' Home Hospital, with the approval of the board of administration, to take charge of certain financial interests of the inmates of said hospital, in the way of assisting disabled patients in properly signing pension checks and depositing the same to their credit in bank, etc.; and that at the death of said inmates the treasurer pays legitimate funeral expenses from any balance to the credit of such deceased inmate, or the expense of embalming, etc., in case the remains are to be shipped to a former place of residence for interment, and distributes the balance remaining to the legal heirs.

This department is designated, in the communication, as the "Treasury of the State Soldiers' and Sailors Home Hospital," and it is stated that Mr. A. A. Pomeroy is acting as the treasurer, having given bond in the sum of $10,000.00.

It is further stated that confusion arises from "the appointment of administrators and guardians by probate courts of other counties in the state of Ohio, who apparently believe they have jurisdiction over the estate of a resident or citizen of the Soldiers' and Sailors' Home, in Erie county, said citizen having lived twelve or more consecutive months in said county and having died in said county.

This petition is based upon section 1, Soldiers' and Sailors' Home, 4867, Page and Adams Annotated Code. * * *

1. Is Erie county, in which such asylum is located, the lawful place of residence of such disabled soldiers and sailors, all of whom were national soldiers?

2. If so, have probate courts in all other counties in the state of Ohio the jurisdiction which qualifies them to issue letter of administration over the estates of such citizens who die in Erie county?

3. Have probate courts of all other counties than Erie, in which said asylum is located, lawful right to issue letters of guardianship over a resident of Erie county, such resident being physically unable to appear before the court in another county which is asked to grant said letters of guardianship?

4. In order to legally qualify, is it possible or advisable to have a state law enacted giving the board of administration authority (without expense to the heirs) to name the treasurer of the Ohio Soldiers' and Sailors' Home Hospital a temporary or public administrator of the funds in his custody only, to enable him to settle the debts of those who leave legal heirs, paying the funeral expenses, such as embalming the remains for shipment to the place of interment, and proper division of any remainder to the legal heirs?"

I observe from the statement of Mr. Pomeroy that balances in the hands of the treasurer of the home hospital to the credit of deceased inmates at the time of their death, are disbursed by the treasurer in the payment of funeral expenses or expenses of embalming, etc., and the residue distributed to legal heirs. While no question is asked in regard to this, I beg to suggest, in this connection, that the statutes clearly contemplate the appointment of administrators for the settlement of estates of persons dying intestate and fail to provide any lawful way of settling such estates or making distribution to beneficiaries otherwise than through the executor or administrator, and there is no provision of law, when the identity of the deceased is known, authorizing the payment of funeral expenses or expenses of embalming, or any other distribution of funds, except by the executor or administrator of such estate, and any such payments made by the treasurer are made at his own risk and subject him to liability to account for the money so paid out, to any person able to show better title thereto. With this observation, which is made for your consideration and the consideration of Mr. Pomeroy, I will proceed to answer the questions asked.

Section 4867, of the General Code, to which Mr. Pomeroy refers, is only applicable to homes or asylums under the control of the federal government and, therefore, has no application to the home at Sandusky.

The appointment of administrators of the estates of deceased persons is provided for in section 10604, G. C., which is as follows:

> "Upon the death of an inhabitant of this state, letters testamentary, or letters of administration on his estate, shall be granted by the probate court of the county in which he was an inhabitant or resident at the time he died. When a person dies intestate in any other state or country, leaving an estate to be administered within this state, administration thereof shall be granted by the probate court of a county in which there is any estate to be administered. The administration first lawfully granted, in the last mentioned case, shall extend to all the estate of the deceased, within the state; and exclude the jurisdiction of any other court."

Especial attention is called to the use of the word "resident" in this section. Not only is there no limitation of time, but the word is used interchangeably with the word "inhabitant." The only question to be determined, therefore, in the

application of the foregoing section is whether or not the deceased at the time he came into the county did so with the intention of making it his permanent place of abode and, if so, such residence for any length of time, however short, would give the probate court of that county jurisdiction to appoint an administrator of his estate.

It must be remembered, however, that section 10617, G. C., gives the right of administration to residents of this state in the following order:

"1. To the husband or widow of the deceased;
"2. To one or more of the next of kin of the deceased;"

and in the absence of any voluntary action by such persons to accept or decline said administration, they must be cited before the court for that purpose. If such persons decline or are incompetent and unsuitable to discharge the trust, or if without sufficient cause they neglect to take such administration, then one or more of the principal creditors of the deceased, if such there be, are entitled to administer the estate. If there be no such creditors and the estate exceeds the value of one hundred dollars, the court may appoint any person it deems fit to administer the estate. Your attention is directed to these provisions of the law that you may understand that the right to appoint an administrator in Erie county does not necessarily give the administration of the estate to a resident of said county.

Section 11011 of the General Code, provides in part as follows:

> "Upon satisfactory proof that any person, resident of the county wherein the application is made, is incapable of taking proper care of himself or herself, or of his or her property, or neglects or fails to provide for his family, or for other persons whom he is charged by law to provide for, by reason of intemperance, improvidence or habitual drunkenness, the probate court forthwith shall appoint a guardian * * *."

The word "resident" in this section is also used without any express limitation of time, and its meaning is the same as in section 10604, G. C., supra.

The appointment of a guardian for an insane person or an imbecile is provided by section 10,989, G. C., which requires that such person shall be a resident of the county, or have a legal settlement in some township thereof. Insofar as these provisions may apply to inmates of your institution they must, in my opinion, be limited to the provision requiring residence, and not to that requiring a legal settlement. This is so because of the peculiar circumstances under which they live at your institution. In view of these circumstances they could not establish a legal settlement in any township in Erie county, unless such settlement was established before they entered your institution. Therefore, the requirements of residence may be considered to be the same under the law providing for the appointment of guardians of insane persons or imbeciles, as they are under the section providing for the appointment of guardians of improvident persons, insofar as said laws may apply to the appointment of guardians of inmates of your home.

It follows, from the foregoing observations, and you are so advised, that jurisdiction to appoint administrators of the estates of deceased inmates of your home is vested in the probate court of Erie county, if said inmate is an inhabitant or resident of said county, as herein explained, at the time he dies; and that jurisdiction to appoint guardians for improvident or insane inmates of your home is vested in the probate court of Erie county, if such persons have established a residence at said home, as herein explained.

The rules above laid down are general, and are subject to change by the facts in a particular case. For this reason care must be used in the application thereof, and if any question is raised or doubt exists, the specific facts should be submitted for further advice.

Admission to the Ohio Soldiers' and Sailors' Home is regulated by section 1909 of the General Code, which is as follows:

> "All honorable discharged soldiers, sailors and marines who served the United States government in any of its wars, and have been citizens of Ohio one year or more at the date of making application for admission, who are unable to support themselves, and not entitled to admission to the national military homes, or cannot gain admission thereto, and all soldiers of the National Guard of Ohio who heretofore have lost, or hereafter may lose an arm or leg, or his sight, or may become permanently disabled from any cause, while in the line and discharge of duty, and are not able to support themselves, may be admitted to the home under such rules and regulations as its board of trustees adopt."

One of the conditions of admission to the Ohio Soldiers' and Sailors' Home, prescribed by section 1909, supra, is the inability of the applicant to support himself, which, in itself, is only consistent with a purpose to adopt such home as his permanent place of residence.

Mr. Pomeroy's inquiry pertains particularly to cases of soldiers or sailors who die at the home after a residence there for twelve or more consecutive months, and it may be said in all such cases, and in fact as a general rule, in view of the conditions for admission to the home, that in the absence of an affirmative showing of an intention to remain at the home only temporarily, with a purpose to return to a former home after such temporary residence, the residence of the inmates of such Soldiers' and Sailors' Home is to be regarded as Erie county, and, therefore, the jurisdiction in the matter of appointment of administrators of the estates of such deceased inmates, and in the appointment of guardians of any such living, as provided in section 11011, supra, is in the probate court of Erie county.

Answering your several inquiries specifically, therefore, I advise:

As to your first inquiry, that Erie county is to be regarded as the county of the residence of inmates of the Soldiers' and Sailors' home, at Sandusky, in the absence of an affirmative showing of mere temporary residence at the home with an intention of returning to a former place of residence;

As to your second and third inquiries, that probate courts of other counties of the state have no jurisdiction to issue letters testamentary, or letters of administration, upon the estates of deceased inmates of the Sandusky home, who have established their residence at said home, nor to appoint guardians of such inmates, whose residence at such home is established;

As to your fourth inquiry, suggesting legislation empowering the board of administration to name the treasurer of the Soldiers' and Sailors' Home Hospital a temporary or public administrator of the funds of deceased inmates, remaining in his custody at the time of their death, I would say that, aside from difficulties in making such a provision conformable to constitutional requirements, it seems to me that it would impose obligations upon the officer not essential to the accomplishment of the paramount purpose of the legislation under which the home is maintained, which might be found burdensome, and that perhaps a more adequate and expeditious method of adjusting the rights and claims of all persons against such assets in the hands of the treasurer would be by having recourse to the provisions

of the law for the appointment of an administrator, who, in proper cases, may be the treasurer of the home hospital, if such course is found expedient by the probate court.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1228.

COUNTY COMMISSIONERS—FUND CREATED PRIOR TO GOING INTO EFFECT OF CASS HIGHWAY LAW FOR "PIKE REPAIR"—MAY BE USED FOR REPAIR OF COUNTY ROADS OR INTERCOUNTY HIGHWAY IMPROVEMENT.

A fund created by the county commissioners prior to the going into effect of the Cass highway law for "pike repair" purposes may now be used either for the repair of county roads or for meeting the county's proportion of the cost of an intercounty highway improvement carried forward under the supervision of the state highway department.

COLUMBUS, OHIO, February 1, 1916.

HON. HUGH F. NEUHART, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR SIR:—On January 10, 1916, you forwarded to me a copy of a resolution passed by the county commissioners of Noble county December 23, 1907. This resolution recited the fact that at the time the law establishing the state highway department was enacted, there had been constructed in Noble county permanent highways of standard width as therein provided, said highways consisting of sixty miles of macadam construction. The resolution contained an agreement on the part of the commissioners to levy on the first day of June, 1908, on the county duplicate, a tax of nine mills for the repair of the improved roads in said county, and to use the proceeds of said levy, together with the state aid apportionment to said county, for the repair of the improved roads of the county, as provided in the then existing law relating to the state highway department. The resolution further directed the county auditor to make formal application to the state highway department for the amount of state aid apportioned to the county for the year 1908. You stated in your communication of January 10, 1916, that the fund derived from the levy referred to in the resolution in question was denominated the "pike repair fund" and that every year since that time a levy has been made and the proceeds thereof credited to such fund and that there is at the present time something like $4,000.00 to the credit of this fund. Further information contained in your communication of January 10th is that the commissioners have designated the roads mentioned in said resolution as county roads, that demands are now being made that the money in the fund be used on the roads mentioned in the resolution and that it be used for intercounty highway construction; that the macadam roads mentioned in said resolution are still in existence and the commissioners have no other road fund except a fund for compensation and damages in the establishment of roads. You inquire in your original communication to me whether any of this fund may be used in conjunction with state aid for the construction of intercounty highways. Replying to my request for further information, you advised me under date of January 28th, that the journal of the county commissioners of Noble county shows the following levies for the "pike repair fund," which fund now contains about $4,000, and in the proper disposition of which you are interested:

"June 2, 1908—Under section 31, act passed May 9, 1908, state and county improvement fund, nine-tenths mills (.9).
"June 9, 1909—State aid or pike repair, nine-tenths mill.
"June 7, 1910—Pike repair, nine-tenths of one mill.
"June 12, 1911—Under section 1224 pike repair, .33.
"June 5, 1912—Pike repair fund, .33.
"June 3, 1913—Pike repair, .30.
"June 1, 1914—Pike repair, .30.
"June 7, 1915—Pike repair, .15."

The levy made in 1908 was made under section 31 of the then existing law relating to the state highway department. The levy made in 1909 contains a reference to state aid and also a reference to pike repair. The levy made in 1910 was made for pike repair purposes and the levy made in 1911 is the only other levy containing any reference to the law relating to the state highway department. The 1911 levy was made under the section authorizing a levy for the creation of the state and county road improvement fund and the only purpose specified in that section and for which the proceeds of a levy made thereunder might be used was the improvement of state and county roads. Since 1911 the levies have been made for pike repair purposes and it is impossible to determine the section of the General Code under which the levies were made, as there were in existence during this period several sections of the General Code under which it may have been intended to make the levy.

You express the view that it may have been the intention of the county commissioners to follow the sections of the Code relative to state aid improvements through their various amendments, repeals and re-enactments. While this may be true, there is nothing on the commissioners' journal in connection with the levies made in 1912 and subsequent years, from which such intention might be gathered.

In addition to the inquiry contained in your first communication as to the right to use the fund in question in conjunction with state aid for the construction of intercounty highways, you inquire in your second communication as to the right to use this fund for the repair of pikes in the county that do not conform to the requirements of the state highway department for state highways and for the purchase of equipment to be used in connection with such repair. You state that the pikes enumerated in the resolution of the county commissioners first herein referred to do not conform to the standard required by the state highway department but that they are county roads and are in a condition requiring immediate attention in the way of repairs. You also desire to know whether the fund in question may be transferred or whether it is a special levy that cannot be transferred in case it be determined that the same cannot be used for the repair of county roads.

In view of the fact that beginning in 1912 the fund in question has been sustained and replenished by levies made for pike repair purposes and of the further fact that during these years the commissioners in making the levy in question made no reference to the state highway department or its activities, I am of the opinion that there can be no doubt as to the right of the county commissioners to use this fund for the repair of any county roads within the county.

I desire to call your attention to the provision of section 205 of the Cass highway law, section 1212, G. C., being one of the sections relating to road work carried forward by the state highway department, to the effect that the proportion of the cost and expense of construction, improvement, maintenance or repair payable by the county, township and property owners, shall be paid from any funds in the county treasury available for the construction, improvement, maintenance or repair of roads, bridges and culverts within the county and not otherwise specifically ap-

propriated. While the Cass highway law provides a specific levy for the purpose of providing a fund for the payment of the county's proportion of work carried forward by the state highway department, yet it seems clear that under the provision of section 1212, G. C., such payment may be made not only from the fund produced by the specific levy provided by section 1222, G. C., but may also be made from any fund in the county treasury available for road construction, improvement, maintenance or repair not otherwise specifically appropriated. In this respect the Cass highway law is not different from the statutes relating to the activities of the state highway department in force prior to September 6, 1915.

I therefore conclude, in answer to your specific questions, that the fund referred to by you may be used for the purpose of repairing either the county roads referred to in the resolution of the county commissioners, adopted December 23, 1907, or any other county roads within the county, and for purchasing material and equipment for use in such repair work should the county commissioners determine to proceed by force account; or the fund in question may, at the option of the county commissioners, be used in meeting the county's proportion of the cost of an intercounty highway improvement carried forward under the supervision of the state highway department.

This conclusion renders it unnecessary to discuss the further question of a transfer of funds suggested by you. Respectfully,

EDWARD C. TURNER,
Attorney-General.

1229.

MUNICIPAL CIVIL SERVICE COMMISSION—CONTROLS CITY SCHOOL DISTRICT—JANITORS OF SCHOOL BUILDINGS IN CLASSIFIED SERVICE—CLERKS OF BOARDS OF EDUCATION IN UNCLASSIFIED SERVICE.

The civil service commission of a city has control and supervision of the city school district in which said city is located.

Janitors of school buildings are in the classified service under the provisions of section 486-8, *subdivision b, G. C., as amended* 106 *O. L.*, 418.

State ex rel. v. Witt, 3 *O. App.*, 419, *and may be appointed only as provided by the law relating to appointments in such service.*

Clerks of boards of education are in the unclassified service by virtue of the provisions of paragraph 8 *of section* 486-8, *G. C., as amended* 106 *O. L.*, 404.

COLUMBUS, OHIO, February 1, 1916.

HON. DON. C. PORTER, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—I have your letter of January 8, 1916, submitting the following inquiries:

> "1. The city school district embraces quite a large amount of territory outside of the limits of the boundary of the city of Coshocton, Ohio. Therefore, is the board of education under the control of the city civil service commission or the state civil service commission?
>
> "2. The city board of education having by resolution on the first day of the school year, 1915, employed its janitors for the term of one year at a salary to be paid to each of them monthly, can the board of education after January 1, 1916, issue their orders for the payment of said janitors

under their contract without the janitors first taking a civil service examination?

"3. Is the clerk of the board of education under the classified or the unclassified list of employes?"

It is provided in section 486-19, G. C., as amended 106 O. L., 413, that the mayor or other chief appointing authority of each city shall appoint three persons who shall constitute the municipal civil service commission of such city *and of the city school district in which such city is located.* It is further provided in said section that such municipal commission shall prescribe, amend and enforce rules not inconsistent with the provisions of this act for the classification of positions in the civil service of such city and city school district. It is also provided in said section that said municipal commission shall have and exercise all other powers and perform all other duties with respect to the civil service of such city and city school district, as is prescribed and conferred upon the state civil service commission with respect to the civil service of the state in the civil service law of which said section is a part.

By reason of the foregoing provisions of said law the municipal civil service commission of the city of Coshocton, Ohio, has control and supervision of all positions in the civil service in the city school district named in your first inquiry.

Referring now to your second question, the positions of the janitors named therein, not being specifically included in the unclassified service, are included in the provisions of section 486-8, subdivision (b), G. C., as amended 106 O. L., 418. This classification is in harmony with the opinion of the court in the case of State ex rel. v. Witt, 3 O. App., 419. It follows, therefore, that said janitors may be appointed only as provided by the law relating to appointments in the competitive class. If, however, no eligible list exists they may be provisionally appointed as provided by section 486-14, G. C., as amended 106 O. L., 409. If they are so appointed as provisionals the board of education may issue its orders for the payment of their salary as provided by their contracts; otherwise they may not legally be paid.

In answer to your third question I must advise that clerks of boards of education are in the unclassified service by virtue of the provisions of paragraph 8 of section 486-8, G. C., as amended 106 O. L., 404.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1230.

NOTICE OF SALE OF SALOON LICENSE AS A WHOLE UPON ORDER OF PROBATE COURT—PUBLICATION ACCORDING TO SECTION 10700, G. C.

Notice of the sale of a saloon license as a whole upon the order of the probate court, under section 1261-52, *G. C.,* 103 *O. L.,* 231, *is required to be given by publication according to the provisions of section* 10700, *G. C.*

COLUMBUS, OHIO, February 2, 1916.

HON. JOHN V. CAMPBELL, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—I am in receipt of a request for an opinion addressed to me by Mr. Henry G. Hauck, assistant prosecuting attorney of your office, which is as follows:

"We are writing requesting your opinion as to the meaning of section 37 of the Ohio liquor license code, which provides 'that if a license or interest therein shall pass by descent or otherwise to one who cannot qualify, or if a survivor or relict or child or children shall not in the time prescribed elect to assume decedent's interest in the license or if said survivor or relict, etc., as the case may be, does not comply with the terms fixed by the court, the probate court shall order the license as a whole sold, without delay but after proper notice given by publication, and shall order the proceeds distributed,' etc.

"Our inquiry relates to the meaning of the phrase 'without delay but after proper notice given by publication.'

"Does the publication referred to in section 37 of the act mean 'the fifteen days' notice by publication of some newspaper in general circulation throughout the county, as prescribed in section 10700 of the General Code, which prescribed the terms and manner under which executors and administrators are authorized to sell personal property of decedents?' If section 10700 of the General Code governs, then every saloon or retail liquor license belonging to decedents must be sold at public auction as prescribed by section 10700 aforesaid.

"If the publication referred to in section 37 is not the publication mentioned in section 10700, kindly give us your opinion as to what publication is meant.

"The probate court is called upon almost daily to act in the matter of transferring or ordering the transfer of licenses and is frequently called upon to sanction transfers of private sales thereof and we should therefore respectfully urge you to hasten your opinion in the matter."

That part of section 37 of the license law, section 1261-52, G. C., 103 O. L., 231, first to be considered in answering your inquiry, is as follows:

"Upon the death of a licensee or of any person who has an interest in a license, such as a partner or member of an association of persons or otherwise, the interest of the decedent shall be disposed of by the administrator or the executor under the direction of the probate court without delay. The surviving member or partner, members or partners (or if there be no survivors in interest then the relict of the deceased, or if there be no relict then the child or children), paying to the said administrator or executor such an amount and upon such terms as the court may direct, shall have the right to assume the interest of said decedent providing that notice is given of such intention to the probate court within thirty days after the death of the decedent. If a license or an interest therein shall pass by descent or otherwise to one who cannot qualify under the law as licensee, or if the survivor or relict or child or children, as the case may be, shall not in the time prescribed elect to assume said decedent's interest in the license, or if said survivor or relict or child or children, as the case may be, does not comply with the terms fixed by the court, the probate court shall order the license as a whole sold, without delay but after proper notice given by publication, and shall order the proceeds distributed to the survivors in the ownership of the license, if there be such and the executor or administrator of the decedent, according as their interest may appear, providing, however, that the purchaser of the license shall be duly qualified under the law, and provided further that the said purchaser shall have filed the application required by law of an original applicant for a license.

"If all the conditions have been complied with, and if the applicant is qualified by law, the county licensing board shall, upon proper certificate from the probate court and without fee, transfer the license to the purchaser thereof for the remainder of the license year. The said purchaser shall have all the rights and obligations of the original licensee under said license."

It will be observed that the provisions of said section 1261-52, G. C., supra, above quoted, relate only to licenses and interests therein and in no way are applicable to other property or rights of the decedent, either real or personal. That is to say, the provisions of this section do not apply to the saloon itself, the fixtures, stock in trade or other property of the decedent, whether personal or real or otherwise, and all such other property of the decedent must be disposed of and distributed according to the general statutory provisions governing the administration and disposition of the estates of deceased persons.

The inquiry submitted assumes the existence of all the conditions precedent, necessary to the authority of the probate court to order the license to be sold as a whole and inquiry is made as to what constitutes "proper notice given by publication" as required in that part of section 1261-52, G. C., above quoted.

There is not to be found in the license law specific provision as to the time and manner of such publication. It is further provided by said section 1261-52, 103 O. L., 232, however, that:

"In all cases the court shall, before ordering a sale or an assumption of a license, appoint three appraisers to appraise said license and the interest of the licensee therein, which said appraisers shall be sworn to appraise said interest according to its true value. Any creditor of the deceased or of the owner of the license shall have all rights with reference to the appraisement or sale and the distribution of the assets as any creditor has with reference to any personal property left by any decedent. No license shall be sold or assumed for a sum less than two-thirds of the appraisement. When the articles of partnership in force at the death of a partner, or when the will of a deceased licensee or co-licensee provides for a different mode of settlement of the deceased person's interest from that provided for herein or dispenses with appraisement and sale, or either, then the interest of the deceased shall be settled in accordance with said articles of said will, and appraisement or sale may be dispensed with providing the disposition is otherwise in accordance with law.

"So far as applicable, and so far as is not inconsistent herewith, the laws of Ohio concerning the disposition of the personal estate of a deceased person shall be applied."

Since it is not otherwise specifically provided as to the manner of publication of the notice of sale of a saloon license, I see no inconsistency as between the provisions of the statutes for such sale here under consideration and the laws concerning the disposition of the personal estate of deceased persons. The statute governing the sale of personal property of deceased persons is found, as pointed out in the inquiry submitted, in section 10700, G. C., which provides in part as follows:

"The sale of personal property shall be made at public auction after at least fifteen days' notice has been given in some newspaper in general circulation throughout the county, or by advertisement set up in at least

five public places in the county where such sale is to take place, though for good cause the court may extend the time for sale."

It will be noted that the notice required to be given in the matter under consideration is limited by section 1261-52, G. C., supra, to notice by publication.

I am, therefore, of the opinion that where a saloon license is ordered to be sold as a whole by the probate court, notice of such sale should be made by publication according to the provisions of section 10700, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1231.

APPROVAL OF TRANSCRIPT, BOND ISSUE BY CITY OF MIDDLETOWN, OHIO.

COLUMBUS, OHIO, February 2, 1916.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—*RE*: Bonds of the city of Middletown, Ohio, in the sum of $9,703.10, issued in anticipation of the collection of special assessments for the improvement of both sides of Sycamore street from Armco avenue to the south corporation line of Middletown, both sides of Michigan avenue from Walnut street to Yankee road, both sides of Bellemonte avenue from Third street to North street, and the south side of Armco avenue from Garfield avenue to Walnut street, by the construction of cement sidewalks, curbs and gutters, being twenty bonds,—ten of which are in the denomination of $500 each, and ten in the denomination of $413.70 each, bearing interest at the rate of five percentum per annum, and falling due two each year beginning January 1, 1917, and ending January 1, 1926.

I have examined the transcript of the proceedings of the commissioners and other officers of the city of Middletown relative to the issuance of said bonds; also the bond and coupon form attached thereto, and I find the same regular and in conformity with the provisions of the city charter of Middletown and with the provisions of the General Code of Ohio.

I am, therefore, of the opinion that said bonds drawn in accordance with the form submitted, when properly executed and delivered, will constitute valid and binding obligations of said city of Middletown.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1232.

STATE BOARD OF EMBALMING EXAMINERS—FAILURE TO PAY RENEWAL FEE IN SPECIFIED TIME—SECTION 1343, G. C., CONSTRUED.

Upon receipt of proper fee therefor, after the date fixed by the Ohio State Board of Embalming Examiners for the payment of same, said board should issue a renewal of license, unless the failure to pay said fee within the prescribed time was due to a wilful intent to violate the law.

COLUMBUS, OHIO, February 2, 1916.

The Ohio State Board of Embalming Examiners, Columbus, Ohio.

GENTLEMEN:—Your letter of January 13, 1916, asking my opinion received and is as follows:

"It has been the custom of the state board of embalming examiners to require renewals of embalmers' licenses on or before January 1st of each year, and each and every year there are several of the embalmers who fail to renew by the payment of the $1.00 fee provided by statute within the time specified, and the question arises as to whether or not our board may after January 1st, accept the $1.00 fee and thus renew the license for the current year.

"On March 4, 1909, Hon. U. G. Denman rendered an opinion (see attorney-general's report for that year, page 404), wherein he construed section 1343, and held that upon failure of a license embalmer to pay the sum of $1.00 annually for the renewal of his license on or before the date fixed by the board, it is not within the power of the board to restore the license after such failure except by examination.

"On August 12, 1911, Hon. Timothy S. Hogan, then attorney-general, affirmed the opinion of Mr. Denman (see attorney-general's report for 1911, page 902).

"On March 21, 1912, in a letter to the then secretary of our board, Mr. Hogan reached the conclusion in regard to certain parties, that our board would be fully authorized to issue a renewal of license in the cases mentioned without examination, since there was no attempt on the part of any of the parties to wilfully violate the laws or the rules as established by the board.

"It is because of the said letter that I ask your opinion."

Also your letter of January 25, 1916, enclosing a copy of a renewal card issued by your board for the year 1916, and which you state is a replica of the cards used by the board for a number of years. Said card is in the following form:

"No. Class.

"---------- ----------

"The Ohio State Board
Embalming Examiners.

"This certifies that----------
---
paid one dollar for the RENEWAL OF----------
EMBALMER'S LICENSE for the year ending Dec. 31, 1916.

"ATTEST: H. H. Shaw,
"Columbus, Ohio, Jan. 1, 1916. Secretary."

Section 1343, G. C., provides as follows:

> "If the state board of embalming examiners finds that the applicant possesses a good moral character, and has passed a satisfactory examination in such subjects, it shall register such applicant as a duly licensed embalmer. The license shall be signed by the president and secretary of the board and attested by its seal. The person to whom a license is issued shall register it with the board of health of the city, village or township in which he proposes to practice. He shall also display such license in a conspicuous place in his office, and annually thereafter on or before the date fixed by the state board, pay to the secretary thereon one dollar for its renewal."

An examination of the records of your board shows that at the first meeting of the state board of embalming examiners held July 7, 1902, the following resolution was adopted:

> "It was moved by W. M. Bateman that all licenses issued herein upon affidavit or by examination, do expire on the 31st day of December of each ensuing year after 1902. Adopted."

As stated by you, Hon. U. G. Denman, then attorney-general, construed the provisions of section 1343 supra, in an opinion dated March 4, 1909, and held the same mandatory, and that the board had no authority to renew a license after the date fixed by the board therefor. Said opinion was concurred in by my predecessor, Hon. T. S. Hogan, in an opinion dated August 12, 1911, cited by you in your letter.

The above opinions, however, were modified by Mr. Hogan in a letter to the secretary of your board, dated March 21, 1912, to which you call attention, in which Mr. Hogan considered certain specific cases submitted by your board, in which renewals had not been consummated in the specified time.. The following is quoted from the letter:

> "Feeling as I do that the granting of a renewal of license to the above named parties would not in any way be detrimental to public interest or harm any one in so doing, and feeling further that the rule as laid down by my predecessor, Mr. Denman, is somewhat drastic, in its operation, I desire to say that in my opinion your board would be fully authorized to issue a renewal of license in the above mentioned cases as it would appear from an examination of the facts, that there is no attempt on the part of either of the parties to wilfully violate the laws or the rules as established by your board."

While section 1343, supra, authorizes the board to fix the date for renewals, which authority has been exercised by the board, as above set out, and while such fact has been conveyed to the licensees by the renewal cards issued to them each year, as above set out, said cards stating that the licenses will expire on the 31st of the following December, yet in view of the fact that the legislature has seen fit to place in the board some discretion in determining the date for renewals, I am of the opinion that the language used by Mr. Hogan in the letter above quoted, is properly applicable to the general question submitted by you, and that it was not the intention of the legislature that another examination should be required where the renewal fee was not paid at the time fixed by the board in cases which came within the rule there laid down.

Specifically answering your question, therefore, I am of the opinion that your board should issue a renewal of license upon receipt of the fee therefor after the date fixed by the board, unless the board finds as a matter of fact that the failure to pay the fee within the prescribed time was due to a wilful intent to violate the law.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1233.

MUNICIPAL CORPORATION—OFFICIAL BONDS OF MUNICIPAL OFFICERS MADE PAYABLE TO MUNICIPALITY ARE NOT INVALID—MAY BE MADE PAYABLE TO STATE OF OHIO.

Official bonds of municipal officers made payable to the municipality are not thereby rendered invalid, either as to the claim of the public or of a private person injured by reason of a breach thereof by the officer giving the same.

COLUMBUS, OHIO, February 3, 1916.

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

GENTLEMEN:—Sometime ago I received from you the communication hereinafter set forth, which has not been answered sooner because of my inability to get any authoritative report of the case to which you refer. It was not until very recently that I secured the transcript hereinafter mentioned. Your communication is as follows:

> "Several years ago a damage suit was filed against the marshal of the village of Convoy, Van Wert county, Ohio. The common pleas court of said county held that all bonds of municipal officers should be *made to the state of Ohio*, as provided in section 6 of the General Code, and that the sureties on the bond of said marshal were not liable on said bond, for the reason that it was made payable to the village of Convoy. We find no provision in the municipal code that specifically provides that bonds of municipal officials shall be made payable to the city, or the village, as the case may be, but Ellis' Municipal Code, and other municipal authorities, in their form of official bonds, state that the same is payable to the city or the village.
>
> "If the decision of the common pleas court of Van Wert county is the law in the case, it is vastly important that the prevailing practice be corrected. Therefore, we ask your written opinion as to whether such bonds should be made payable to the state of Ohio for the use of the city or village, or is it sufficient that the same be made payable to the city of ----------, or village of----------? In other words, do you concur in the opinion of the common pleas court of Van Wert county?"

The case to which you refer is the unreported case of John Kienzel v. Charles Ingmire, as marshal, etc., et al., heard in the common pleas court of Van Wert county sometime during the year 1904. I have only been able to secure from the

stenographer, who was present at the trial thereof, a partial transcript of the opinion of the court and of the further proceedings in the case which are, of course, subject to the infirmity of not being officially approved as the judge who heard the case died several years ago.

It appears from the transcript that a suit was instituted by the plaintiff against the defendants upon the official bond of the defendant Ingmire, as marshal of the village of Convoy, for an alleged malicious prosecution and false imprisonment. It appears further from the transcript that the official bond, upon which said action was predicated, when offered was not admitted in evidence by the court. It does not appear clearly from the opinion of the court in this connection upon what ground said bond was excluded. The court in said transcript is quoted as saying:

> "I think it has always been the law of Ohio that where an official bond is required, and the statute is silent as to the payee of the bond, the bond must be given to the state of Ohio, and when the state is thus made payee all persons within the state may avail themselves of its benefits if there is a breach of its condition."

But again in ruling upon the competency of said bond the court is quoted as saying:

> "It does not appear that any ordinance was ever enacted in that village prescribing the amount of the bond to be given by the marshal of that village, and until they do that and until the mayor accepts the bond, then there is no bond. It is possible the omission to accept it might not invalidate the bond, but a failure to pass an ordinance prescribing the amount of the bond would surely not permit a bond to be given in the absence of such ordinance and bind the obligors of the bond. So I think before the bond is admissible it must first be made to appear that the village passed such an ordinance, and that the bond complied with that ordinance."

While it appears that the bond in this case was made payable to the village of Convoy, in view of the foregoing remarks of the court, I am not satisfied to accept as official the claim made that the sureties on said bond were released because it was made payable to the municipality. Upon the refusal of the court to admit the bond in evidence there was nothing before the court upon which the action could proceed against the sureties. Their dismissal then was the inevitable result of the ruling out of the bond. If, however, the fact that this bond named said municipality as the obligee contributed to the conclusion the court reached in holding the bond was not operative, I am not willing to accept said conclusion as the law. If this fact induced the court to hold that the bond was not valid and binding against the sureties, such result must have been reached by reason of the provisions of section 6 of the General Code, which are as follows:

> "A bond payable to the state of Ohio, or other payee as may be directed by law reciting the election or appointment of a person to an office or public trust under or in pursuance of the constitution or laws, and conditioned for the faithful performance, by such person, of the duties of the office or trust, shall be sufficient, notwithstanding any special provision made by law for the condition of such bond."

This section may have been construed as exclusive in that it provides that a bond payable to the state of Ohio, when no other payee is directed by law, and

which recites the election or appointment of a person to an office of public trust, shall be sufficient. I cannot construe this section as having that effect. I do not think that it goes to the extent of invalidating official bonds not payable to the state of Ohio when no other payee is directed by law. While it is true that the statutes do not direct the official bonds of municipal officers to be made payable either to the municipality or to the state of Ohio, and that therefore they may properly be made payable to the state under the foregoing provisions of said section, yet I am not ready to admit that in the event they are made payable to the municipality they are thereby rendered invalid.

In the case of Barret v. Reed, 2 O., 409, the validity of an official bond of a constable who was defendant in an action for false imprisonment was under consideration by the court. In that case the defendant was seeking to justify his acts as an officer, and to show that he had duly qualified for such official position. The sufficiency of his bond was questioned because it was made payable to the trustees of the township in which he was elected, whereas the statute at that time required said bond to be made payable to the township treasurer and not to the trustees. In commenting upon this question the court said:

> "Why is such bond void? Can any other reason be assigned than that it is not according to the letter of the statute? There is nothing upon the face of it which is illegal. * * * The sole object is to secure, on the part of one of the obligors, the performance of duties, which, if no bond had been required, he would have been bound to perform. Suppose there had been no bond required by law, would this bond have been void? I apprehend not, and it appears to me that the single circumstance that it is required by the statute, that a bond should be made payable to a different obligee, is not sufficient to destroy the obligatory effects. Upon the whole, I come to the conclusion that the bond, if not good under the statute, is good at common law, and that any person who should be injured in consequence of the neglect of the officer to discharge any duty appertaining to his official station, might obtain redress by suit upon it."

The general rule is well stated in Ramsey v. People, 90 Am. St., 197, note I, as follows:

> "A mistake in the name of the obligee in an official bond does not vitiate it. For example, a bond given to the state instead of to the county as required by statute, or to the county commissioners instead of to the state, or to the township trustees instead of to the township treasurer, or to the selectment of the town instead of to the town, will be upheld as a common law undertaking, if not as a statutory bond."

Many authorities are cited in support of the foregoing rule, including the Ohio case of Barret v. Reed, supra.

The modern tendency of judicial opinion seems to lean to the theory that in all official bonds and bonds affecting the public generally, the obligee named is a trustee who stands for any and all persons who may be affected by a breach of the conditions of said bond, and when an injury results from a breach of a bond the party injured may maintain an action upon the bond to redress his wrongs. Such proceedings are covered by statutes in many states. In this state we have section 11242, G. C., which provides:

> "When a person forfeits his bond, or renders his sureties liable thereon, a person injured thereby, or who is entitled to the benefit of the se-

curity, may bring an action thereon, in his own name, against the person and his sureties, to recover the amount to which he is entitled by reason of the delinquency, which action may be prosecuted on a certified copy of the bond; and a judgment for one delinquency shall not preclude the same or another person from bringing an action on the instrument for another delinquency."

Under the provisions of this section an action may be predicated upon an official bond in behalf of any individual injured by reason of any breach of the conditions of said bond committed by the principal thereof.

I am therefore of the opinion that official bonds of municipal officers made payable to the municipality, are not invalid, either as to any claim the public may have thereon or as to any claim of private persons who may be injured by reason of a breach thereof by the officer giving the same.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1234.

SALE OF CANAL LANDS—PURCHASER REQUIRED TO MAKE CERTAIN CHANGES IN ADJOINING LAND RETAINED BY STATE—NOTICE SHOULD CONTAIN CONDITIONS.

Where lands are to be sold under section 13971, *appendix to General Code, and the purchaser is to be required to make certain changes in the adjoining land retained by the state, notice of such conditions should be included in the notice of sale required to be published.*

COLUMBUS, OHIO, February 4, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of February 2, 1916, which reads as follows:

"On December 20, 1915, you rendered to me an opinion No. 1113, in which you advised me that a sale of Ohio canal lands in the vicinity of The B. F. Goodrich Company's plant at Akron, should not be made without reserving a 75-foot strip of land for the state. The B. F. Goodrich Company is desirous of being given an opportunity to bid at public sale on so much of the land at that point, as may properly be sold under your ruling referred to above. The land in question which this company desires to purchase, is worth more than $500, and must, therefore, be sold at public sale. This land cannot be leased so as to yield 6% on the valuation thereof, and is not required in any way for the use, maintenance and operation of the canal.

"I am of the opinion that the same should be offered for sale, and The B. F. Goodrich Company is willing, in case it is the successful bidder, to do all dredging and other work required in making necessary changes in the canal embankment, and is also willing to construct cement retaining walls on both sides of the canal where the same are not already in existence. The company is willing to do this work in addition to paying the state the amount of its bid. Inasmuch as all bidders should be placed upon

the same terms, I desire to inquire whether notice of these conditions should be embodied in the legal advertisement of the sale, and if so, would suggest that you suggest the proper language to be used in setting forth such conditions."

In the opinion referred to by you, my conclusion upon the matter therein discussed was expressed in the following language:

> "You are authorized by the provisions of section 412, G. C., to narrow the towing path embankment between Cedar street and Bartges street by the use of concrete retaining walls, and to eliminate, by the construction of a new berme bank, so much of the basin to the west of the plant of The B. F. Goodrich Company as is not needed for canal purposes, and that when this narrowing process is completed a part of the land not occupied by the canal and its embankments may, under certain conditions, be sold, but that in making such sale of land you should, under no circumstances, reduce the width of the state's property below its narrowest width at any adjacent point. In other words, in making a sale of any lands not occupied by the canal or its embankments, after such embankments have been reconstructed and narrowed, you should reserve for the state a strip of land between Cedar street and Bartges street, not less than 75 feet in width, that being the approximate width of the state's property at Bartges street at the present time."

It is now proposed to sell the land which may properly be sold and to require the purchaser, as a part of the consideration paid by him to make the changes which you would be authorized to make under section 412, G. C. I see no objection to this procedure, but it can properly be carried forward only by including in the legal advertisement made under section 13971 of the appendix to the General Code of Ohio, a full and complete statement of the conditions under which the land is offered for sale. I understand that these conditions are that the purchaser shall, at his own expense, do all dredging and other work required in making necessary changes in the embankments, and that this work shall be so done as to leave a channel not less than 40 feet wide at the top water line, and 6 feet deep below the water line. A further condition is that the purchaser shall construct at his own expense a concrete retaining wall on the east side of the canal from the end of the existing retaining wall to the north line of Bartges street, and a concrete retaining wall along the entire west water line of the canal. All of the work referred to above is to be done under your supervision and in accordance with plans and specifications either prescribed or approved by you.

I therefore suggest that the following language be incorporated in the legal advertisement:

> The purchaser of said parcel of real estate, in addition to paying to the state of Ohio the purchase price thereof, will be required to do, at his cost and expense, all dredging and other work required in making such changes in the location of the embankments of the Ohio canal between the southerly line produced of Cedar street and the northerly line of Bartges street, as may in the judgment of the superintendent of public works be rendered necessary by the sale of the lands herein described. Said dredging and other work shall be done under the supervision, control and inspection of the superintendent of public works of Ohio, and at such time and along and upon such line as he shall direct, and shall be so done

as to produce upon the state's property between said lines a channel not less than forty feet wide at the top water line and not less than six feet deep below the water line. The purchaser of said parcel of real estate will also be required to construct, at his cost and expense, within such time as may be directed by the superintendent of public works of Ohio, on such line and in accordance with such plans and specifications as may be prescribed or approved by said superintendent, and under the supervision, control and inspection of said superintendent, a suitable concrete retaining wall from the southerly end of the existing concrete retaining wall on the east water line of the Ohio canal at lock one thereof, to the north line of Bartges street, and also under the same conditions a suitable concrete retaining wall along the entire west water line of said Ohio canal between the southerly line produced of Cedar street and the northerly line of Bartges street. The above conditions will be incorporated in the deed to the purchaser.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1235.

COUNTY AUDITOR—CERTIFICATE AS TO CERTAIN SPECIAL ASSESSMENTS—ASSESSMENT COLLECTIBLE WITHOUT INTEREST.

Under the facts as submitted, a certificate to the county auditor of Medina county as to certain special assessments is sufficient, but no effort should be made to collect interest on the assessments in question.

COLUMBUS, OHIO, February 4, 1916.

HON. A. B. UNDERWOOD, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR:—On December 21, 1915, you addressed to me the following communication:

"I enclose herewith a certification, made under sections 1178-1231, G. C., inclusive, and sent by township trustees to the county auditor.

"The road upon which these assessments were made was built in the latter part of 1914, and the assessments were made prior to the passage of the Cass highway bill. Through negligence or mistake, no effort was made to collect said assessments until recently. I now understand that the other abutting owners have voluntarily paid their shares to the township trustees, leaving only two delinquents, as in said certification named. I also understand that the state highway department has ruled that it is not yet too late to collect these assessments in the manner provided by law.

"I wish to ask, therefore, first, whether or not in your opinion, the enclosed certification is sufficient under the law, and secondly, whether or not interest may be charged against these delinquents."

The instrument referred to by you as a certification reads as follows:

"CERTIFICATION

"To the Auditor of Medina County, Ohio:—

"In the matter of assessing the abutting property owners for benefits accruing to their respective lands, by virtue of the improvement of the

Medina county state highway 'D' and 'E,' known as the Wadsworth-Wooster road, in Wadsworth township, under petition No. 548. We, the duly appointed, elected, qualified and acting trustees of Wadsworth township, Medina county, Ohio, acting under authority of the laws of Ohio, and sections 1178 to 1231 inclusive, of the General Code of Ohio, do hereby certify that, Seth J. Swain has been assessed three hundred and ten and 1-100 dollars ($310.01) for 2126.2 feet frontage of 200 acres of land owned by him on said improvement in tract 8, lots 4 and 5 of Wadsworth township, and that Jacob Stall has been assessed three hundred and seventy-eight dollars and ninety-five cents ($378.95) for 2476.8 feet frontage of 130 acres of land owned by him on said improvement in tract 9, lots 8, 15 and 28 of Wadsworth township. We, as township trustees, hereby advising that said sums, together with interest on each sum respectively from October 5, 1914, be placed on the tax duplicate against said lands in 4 semi-annual payments.

"(Signed) THE BOARD OF TOWNSHIP TRUSTEES, WADSWORTH TOWNSHIP, MEDINA COUNTY, OHIO.
"J. S. Lucas,
"R. A. Auble,
"A. M. Baughman.

"Attest: J. B. Hilliard, Clerk."

In response to my request for additional information, you advised me under date of January 13, 1916, as follows:

"I am forwarding herewith additional information, requested by you, in re. certification of special assessments on the Medina county state highway 'D' and 'E,' known as the Wadsworth-Wooster road. I will take your questions up in order.

"1. Was the cost of the inter-county highway improvement in question chargeable against the county, township and abutting property owners met from the proceeds of a bond issue, or was the same paid from the current levies of the county and township?

"Ans. In the county, it was met from the current levies. In the township, it was met from the proceeds of two bond issues. The township issued its voucher in favor of the county auditor, on October 5, 1914, for one-fourth of the cost and expense of such improvement. The township's share thereof, viz. 15%, had been raised by the sale of $6,000.00 worth of bonds in January, 1913. The abutting property owners' share, viz. 10%, not yet having been paid in, was taken from a fund for general road purposes raised in 1909, by the sale of $35,000.00 worth of bonds. A short time after October 5, 1914, the abutting property owners paid their assessments into the township, leaving but two delinquents, viz., Seth J. Swain and Jacob Stall, as in said certification named, and it is against these two men that interest is sought to be charged from October 5, 1914, that being the date when the township paid the abutting property owners' share.

"2. Was any item of interest included in the aggregate cost of the improvement as originally computed, or, in other words, is any item of interest included in the amounts assessed and, if so, what was the nature of that item?

"Ans. The state highway commissioner computes the aggregate cost and apportions same to state, county, township and abutting owners, as

per inclosed sheet marked exhibit 1. I am of the opinion, as are also the county and township officials, that no item of interest is included in the amounts assessed against the different political divisions. I think perhaps that the state highway commissioner could better answer this question. I can say this much, that no item of interest was included in the township's apportionment against the abutting land owners of said improvement.

"3. Are the descriptions of the two tracts of land as found in the certification the same descriptions appearing on the tax duplicate and, if not, how are the two tracts described on the tax duplicate?

"Ans. The descriptions are in main part identical with the exception, perhaps, that the lots are more *particularly* described on the tax duplicate. The entry there is about as follows:

"Name	Tract	Lot	Part	Acres	"The Valuation Land	Bldgs.
"Stall, Jacob	9	8	S. W. Part	10	920	1620
	9	15	Whole	50	3770	----
	9	28	Whole	42	3180	----
"Swain, Seth J.	8	4	Whole	166.70	12970	2500
	8	4	Mid W. Side	4	310	----
	8	5	N. E. Part	13.82	1070	----"

Sections 1208 and 1210 of the General Code, now repealed, contained the only statutory provisions relating to the assessments now under discussion. The right to make the assessments under the repealed sections is preserved by the saving provisions of the Cass highway law. Section 1208, G. C., contained the following provision:

> "The township trustees shall apportion the amount to be paid by the owners of the abutting property according to the benefits accruing to the owners of land so located. At least ten days' notice of the time and place of making such apportionment shall be given to the persons affected thereby, and an opportunity given them to be heard in the manner provided by law for the assessment of the cost and expense of establishing township ditches. If the improvement lies in two or more townships, the amount to be paid by each shall be apportioned according to the number of lineal feet of the improvement lying in each township."

Section 1210, G. C., contains the following provision:

> "The township trustees shall certify the assessment to the county auditor, who shall place it upon the tax duplicate against the property benefited. The county treasurer shall collect such assessments in the manner as other taxes are collected, and in such payments as may be approved by the county auditor."

It appears from your second communication that Swain is the owner of 184.52 acres, and Stall the owner of 102 acres, while the certificate refers to Swain as the owner of 200 acres, and Stall as the owner of 130 acres. I do not regard this as material, however, if as appears from your communication, the description contained in the certificate is such as to enable the county auditor to identify with certainty the lands sought to be charged, for the reason that the assessments are based on benefits and not on acreage. For the same reason I do not regard it as material that the certificate refers to Swain as owning 2126.2 feet frontage, while

if the statement from the state highway department attached to your second communication is correct, he owns but 2026.2 feet. Assuming that the descriptions of the real estate contained in the certificate are such that the auditor can identify with certainty the lands sought to be charged, I advise you that the certificate submitted by you is sufficient.

In connection with the second branch of your inquiry, it should first be observed that the statute does not expressly confer any authority on the trustees or auditor in reference to the inclusion of interest. Your communication also discloses an irregularity in the proceedings which, while in no way affecting the validity of the assessments, has a substantial bearing on the matter now under discussion. The law under which this road was improved provided that where it was necessary to issue bonds in anticipation of special assessments, the same should be issued by the county commissioners. See section 1223, G. C., as that section stood prior to the going into effect of the Cass highway law. In the case now under discussion, instead of resorting to a bond issue under the proper section, the amount to be specially assessed was paid in the first instance from a fund created by a township bond issue, the bonds being issued several years before the improvement in question was constructed. In view of the foregoing, I am of the opinion that no effort should be made to collect interest upon the assessments in question, and that the auditor should disregard the request in the certificate that interest be colleced.

The assessment resolution and other proceedings of the township trustees are not before me and no opinion is, therefore, expressed as to their regularity.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1236.

CIVIL SERVICE—INTERPRETATION PARAGRAPH 8, SECTION 486-8, G. C.—PERSONS WHO CLAIM EXEMPTIONS AS "ASSISTANTS"—WHERE THERE IS NO MUNICIPAL CIVIL SERVICE COMMISSION—FAILURE OF MAYOR TO APPOINT SUCH COMMISSION IN SIXTY DAYS—STATE COMMISSION MAY APPOINT—FOR PERMANENT APPOINTMENTS, ELIGIBLE LIST MUST CONTAIN THREE NAMES.

1. *The term "assistant" as used in paragraph* 8 *of section* 486-8, *G. C., as amended* 106 *O. L.,* 405, *may include any officer or employe, regardless of his title, who aids and assists his principal in the discharge and performance of duties which are of a confidential and fiduciary character, and which involve the responsibility of said principal.*

2. *When prior to January* 1, 1916, *no municipal civil service commission has been appointed by the mayor or the state civil service commission, the mayor whose term begins on said date may have sixty days from said date within which to appoint said commission. Should said last named mayor fail to appoint a municipal commission within said sixty days the state civil service commission may make such appointment as provided in paragraph* 2 *of section* 486-19, *G. C., as amended* 106 *O. L.,* 414. *When the appointment of said municipal civil service commission has been made by said mayor or by the state civil service commission, the mayor who has been suspended the chief of police since said first day of January,* 1916, *shall certify such fact together with the cause of suspension to said municipal civil service commission so appointed. Until said commission is appointed and such certification made, said chief of police so suspended is without any remedy. The provisions of the law as to the time within which such certification must be made, and said charges heard by said municipal civil service commission, do not become operative until such commission is appointed.*

3. *Permanent appointments in the competitive class under the civil service law may not be made from an eligible list of fewer than three names. If an appointment is made from an eligible list containing less than three names, a full list of three names should be furnished the appointing authority from which another appointment may be made.*

COLUMBUS, OHIO, February 4, 1916.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—I have your letter of January 7, 1916, as follows:

> "We have had requests from various departments and county officials for the exemption of persons under paragraph 8 of section 486-8 of the civil service law. Such exemptions are being claimed as 'assistants.' Persons so claimed exempt appear under various titles on the pay roll. In one instance, a probation officer has been claimed exempt from the classified service as an 'assistant.' Will you kindly render us an opinion as to the meaning and the proper application of the word 'assistants,' appearing in paragraph 8 of section 486-8 of the new law? Can a position of any title be exempted under this head?
>
> "Our attention has been called to the case of the dismissal of the chief of police of the city of Defiance, who has been discharged by the incoming mayor. It appears that he was appointed from an eligible list in 1903, and has served continuously until January 1, 1916. The former mayor, whose

term expired on January 1st, failed to appoint a civil service commission as provided by the civil service law. In the meantime, the discharged chief of police has no civil service commission to which he may appeal his case. Under such circumstances, what should be the attitude of the state civil service commission? Should this commission appoint a municipal civil service commission at once, or should it allow the new mayor sixty days within which to make such appointment? During this time, what action should the chief of police take in regard to the appeal of his case? Can he appeal to the common pleas court, or is it the duty of the state commission to appoint a municipal commission at once, with which he may file his appeal?

"A question has also arisen in regard to certification made to positions formerly occupied by non-competitives. This commission has, in one or two cases where we had only one eligible in a district, certified to the industrial commission the name of one person from an eligible list along with the name of the non-competitive incumbent of the position. In one case the non-competitive incumbent has been permanently appointed after such certification. Is an appointment made in this way valid?

"In the case of certification made in response to an ordinary request, can appointments be legally made from a list of less than three persons certified?"

Paragraph 8 of section 486-8, G. C., 106 O. L., 405, under which your first inquiry is submitted, provides:

"Three secretaries, assistants or clerks, and one personal stenographer for each of the elective state officers; and two secretaries, assistant or clerks, and one personal stenographer for other elective officers and each of the principal appointive executive officers, boards or commissions, except civil service commissions, authorized by law to appoint such secretary, assistant or clerk and stenographer."

It must be observed in the first place that the term "assistant," as used in this statute, cannot be limited to those persons who are so named and denominated by statutory law because such persons are practically all excepted under other provisions of said section 486-8. Obviously, therefore, the legislature intended it to apply in a more general way, but to give you a definition that would furnish a test in every instance would be an impossibility. This is so because in a certain sense and to some extent all subordinate officers are assistants of their principals. As is very pertinently observed in the case of State v. Longfellow, 69 S. W., 596:

"The word assistant is susceptible of a considerable variety of meanings to be made definite in each case by the aid of the context, the circumstances and other recognized materials of interpretation."

In view of these considerations I am of the opinion that the term as used in this statute must be interpreted so as to harmonize with the general spirit and purpose of the civil service law as well as the general character of those positions which, by other provisions of the law, are exempted and excepted from the classified service. If we so construe this term it then must be held to mean something more than a person who aids or assists his principal. It must be one who not only aids and assists his principal, but whose relation to his principal, because of the duties of his position, is one of a confidential or fiduciary character. In

other words, the position of assistant as here contemplated means a position of trust and confidence, the duties of which involve, to some extent at least, the responsibility of the principal. When these qualifications are added to the ordinary acceptation of the term it brings it, in my judgment, in harmony with the other provisions of the law relating to exempted positions, and is consistent with the general purpose of the civil service law.

Therefore, adopting this view of the matter, I must advise that the term "assistant," as used in said section, may include any officer, regardless of his title, who aids and assists his principal in the discharge and performance of duties which involve the responsibility of the principal, and are of a confidential and fiduciary character.

This being so I am of the opinion that a probation officer holds such relation to the court which appoints him as to warrant his exemption as an assistant under said provision of the law.

Referring now to your second inquiry, it is provided in part in section 486-19, G. C., 106 O. L., 413, that:

> "The mayor or other chief appointing authority of each city in the state shall appoint three persons, one for a term of two years, one for four years, and one for six years, who shall constitute the municipal civil service commission of such city, and of the city school district in which such city is located; provided, however, that members of existing municipal commissions shall continue in office for the terms for which they have been appointed, and until their successors are appointed and have qualified. Each alternate year thereafter the mayor or other chief appointing authority shall appoint one person as successor of the member whose term expires, to serve six years and until his successor is appointed and qualified. * * *
>
> "If the appointing authority of any such city fails to appoint a civil service commission or commissioner, as provided by law, within sixty days after he has the power to so appoint, or after a vacancy exists, the state commission shall make the appointment, and such appointee shall hold office until the expiration of the term of the appointing authority of such city and until the successor of such appointee is appointed and qualified."

Under the provisions of the law quoted your commission was authorized to appoint a civil service commission in the city of Defiance at any time prior to the taking of office by the present mayor. However, by reason of the peculiar language used in the latter part of the section quoted, viz., "within sixty days after he has the power to so appoint," I incline to the opinion that the present mayor is now entitled to the period of sixty days named within which to make said appointments, and that until the expiration of said period, your commission may not appoint a municipal civil service commission for said city.

Should the present mayor fail to act within the time specified then, at the expiration of said period, your commission should appoint a municipal civil service commission for said city to which the discharged chief of police named in your inquiry may then appeal his case. Should such commission be appointed by the mayor, said chief of police may appeal to that commission, but until there is a commission appointed to which his appeal may be made, I am of the opinion that he is without any remedy and must reserve any action until a civil service commission for said city is appointed. The provisions of the statute as to the time within which such appeal may be heard do not become operative until a commission is appointed.

Your third inquiry in reference to the certification of an eligible list of fewer than three persons is answered fully by the statutory provisions pertaining thereto. It is provided in section 486-12, G. C., 106 O. L., 408, that from the returns of the examinations the commission shall prepare an eligible list of the persons whose general average standing upon examination is not less than the minimum fixed by the rules of the commission and who are otherwise eligible. In the succeeding section it is provided that when an appointing authority shall notify the commission of the fact that an appointment is to be made in the classified service, said commission shall certify to said appointing authority the names and addresses of the three candidates standing highest on the eligible list for the class or grade to which such position belongs. It is further provided that in the event the eligible list to which said position belongs has become exhausted, through inadvertance or otherwise, or when no eligible list for such position exists, names may be certified from other eligible lists most appropriate for the class or group in which said position to be filled is classified.

From the foregoing provisions it is clear that the names and addresses of the three persons standing highest on the eligible list must be certified for appointment, and the certification of fewer than three names does not meet the requirement of the law. This purpose is made more manifest by the further provisions which permit a certification from other lists when an eligible list does not exist for the grade or class to which said position belongs.

A question very similar to the one under consideration here was before the court in the case of the State ex rel. v. Hoglan, 64 O. S., 532. The controversy in that case arose over the removal of the municipal civil service commission of the city of Columbus by the mayor of said city, the principal ground of removal being that said commission had not certified the required number of names from an eligible list as provided by the civil service law then in force. That law provided:

> "In case of any vacancy in the classified service of said city, notice shall be given the commission by the appointing power of said vacancy, and thereupon the commission shall certify in writing to the appointing power, the names, addresses and grades of the candidates, not exceeding three in number, for any such vacancy, whose names shall stand highest on the appropriate register, and it shall then be the duty of the appointing power to appoint on probation, to fill such vacancy, one of the said candidates whose name shall have been so certified."

It appears from the facts stated that the commission in question claimed that it complied with the foregoing statute by furnishing the name of one such person when requested, while the construction placed upon said statute by the mayor was that it required said commission to furnish the names of three persons, and upon refusal of the commission to adopt the mayor's construction he made the order of removal. The court in passing upon the facts thus presented said:

> "The court is of the opinion that the commission erred in the construction it placed on the statute. The fair construction is that they should certify to the proper department when requested at least two names, on the other hand we think the mayor is in error in his claim that it should certify three names."

It will be observed that the statute considered in the foregoing case was not as specific as the statute under consideration here, because the former fixed the number at not exceeding three, yet the court held that this required more than one.

I am, therefore, of the opinion that permanent appointments in the competitive class may not be legally made from a list of fewer than three names.

In view of this conclusion I would respectfully suggest that your commission at once certify the required number of names to the appointing authorities in the cases mentioned in your inquiry, and that upon such certification you require new appointments to be made which, of course, would not prevent the appointment of the persons now holding said positions under said former appointments. Should no eligible list exist for such positions, resort may be made to other lists which are most appropriate to secure the requisite number of names for certification. This suggestion is made because the payment of the salaries of said appointees may be made the subject of attack at any time under the provisions of section 486-29, G. C., as amended 106 O. L., 418.

See State ex rel., Bailey et al. v. George et al., O. L. B. No. 12, Vol. 61, page 123.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1237.

OFFICES COMPATIBLE—MEMBER VILLAGE BOARD OF EDUCATION—CLERK OF VILLAGE COUNCIL.

The duties of the offices of member of village board of education and clerk of the village council are not incompatible, and both positions may be held contemporaneously by one person.

COLUMBUS, OHIO, February 4, 1916.

HON. GEORGE C. VON BESELER, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—I have your letter of January 29, 1916, as follows:

> "One William Cramer in the village of Fairport, Lake county, Ohio, has been elected to the position of village clerk. Also he has been elected as a member of the board of education, serving that board also as its clerk.
>
> "I have examined the statutes very carefully, and as well all the reports of the attorney-general. I am unable to find any law prohibiting one person from holding both the office of member of the board of education of the village and clerk of the council.
>
> "I can see no incompatibility in his being both clerk of the board of education and clerk of the village, unless it be that in the apportionment and arrangement of funds from taxation he might unduly favor one or the other, in his conference with the county auditor and county budget commission.
>
> "If you have passed on this matter heretofore, will you please cite me to the opinion, and if not, may I please have, at your earliest possible convenience, your view of the situation."

I concur in your conclusion that there is no incompatibility in the offices named in your foregoing inquiry. While the party in question, as a member of the village board of education, which is a taxing authority under the laws of this state, is charged with official duties in relation to the work imposed by law upon the county

budget commission, yet as clerk of the village council he has no official connection whatever with the budget commission, and I am unable to conceive of any circumstances under which he as clerk of said council would be called into conference with the county budget commission. It is only when the duties which are imposed by law of various positions are incompatible that the rule of incompatibility may apply. In this case, as before observed, there are no duties imposed by law upon the clerk of the village that would conflict in any manner whatever with the discharge of the duty imposed by law upon a member of the village board of education.

I am, therefore, of the opinion that the offices of member of the village board of education and of clerk of the council of said village are not incompatible, and may be held by the same person.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1238.

CONTRACT BETWEEN SEREFF BROTHERS, CONTRACTOR, AND STATE ARMORY BOARD—WHEN AND HOW BOARD MAY COMPLETE UNFINISHED CONTRACT—NO AUTHORITY FOR CONTRACTOR OR SUB-CONTRACTOR TO PERFECT LIEN AGAINST STATE PROPERTY.

Under the first division of article V of the contract made between Sereff Brothers, contractors, and the state armory board, the state armory board may supply additional workmen and materials necessary, and pay for same without taking the contract away from the original contractors.

Under the second division of said article V the state may take the contract away from the original contractors, but in so doing must comply with the provisions of section 5259, G. C.

There is no authority for contractors or sub-contractors to perfect a lien against state property.

COLUMBUS, OHIO, February 5, 1916.

HON. BYRON L. BARGAR, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—Under date of January 15, 1916, you wrote to me as follows:

"I herewith enclose the following papers, relative to the Spencerville, Ohio armory contract.

"No. 1. A letter from Major Gamble of Spencerville, Ohio, dated January 11, 1916, stating that the contractors, Sereff Brothers, have done no work on the armory for a week.

"No. 2. A certificate dated January 14, 1916, signed by Architect Best, contractors' foreman, P. P. Baker, and Lieutenant Neidhardt, stating that no construction work on the armory since January 6, 1916, had been done.

"No. 3. A paper signed January 14, 1916, by Sereff Brothers by P. H. Sereff, contractors, purporting to relinquish their contract for the said armory.

"The state entered into a contract on April 14, 1915, for the construction of said armory with J. W. and P. H. Sereff, for the aggregate sum of $17,792.75, which includes extras to date.

"Prior to December 23, 1915, the board has allowed estimates for payment on said contract aggregating $9,424.00..

"The said contractors owe to sub-contractors and for materials and labor, all on account of this armory, a sum probably in excess of the balance that would be due contractors, if the armory was completed. But their contract is only four-fifths completed, and about twenty per cent. of the armory remains to be finished.

"Meanwhile said contractors have attempted to give orders on the state to some of their creditors, and other creditors have attempted to file liens, and have advised the board of their claims against the said contractors.

"Please direct further procedure of the board, in the light of section 5259, and other laws relating to conditions stated."

With your letter you submitted the above named enclosures. This entire question is answered by the provisions of section 5259, G. C., wherein it is stated:

"In case of default upon the contract, the board may sue on the bond and advertise for other bids for the completion of the work."

Article V of the contract entered into by your board with the said J. W. Sereff and P. H. Sereff on April 14, 1915, provides as follows:

"Should the contractors at any time refuse or neglect to supply a sufficiency of properly skilled workmen, of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any agreement herein contained, such refusal, neglect or failure being certified by the architect, the owner shall be at liberty, after three days' written notice to the contractors, to provide any such labor or materials, and to deduct the cost thereof from any moneys then due or thereafter to become due to the contractors under this contract; and if the architect shall certify that such refusal, neglect or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractors for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon, and to employ any other person, or persons, to finish the work, and to provide the material therefor; and in case of such discontinuance of employment of the contractors he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expenses incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractors, but if such expense shall exceed such unpaid balance, the contractors shall pay the difference to the owner. The expense incurred by the owner, herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default shall be audited and certified by the architect, whose certificate thereof shall be conclusive upon the parties."

Article V of the contract, above quoted, is divisible into two parts. The first part provides that if the contractors fail or neglect to supply a sufficiency of properly skilled workmen or materials of the proper quality, or to prosecute the

work with promptness and diligence, etc., the owner, after notice to contractors, is authorized to supply such labor or materials and deduct the cost thereof from moneys in its hands due the contractors. If the state proceeds under this provision of article V and simply supplies the deficiency created by the neglect of the contractors, it could not in any sense be considered as default upon the contract since, in contemplation of such provision, the contract still remains in the contractors.

The second division provides that if the architect certifies that the refusal, neglect or failure of the contractors is sufficient grounds, the owner shall be at liberty to *terminate* the employment of the contractors, to enter upon the premises and take possession, and to employ other persons to finish the work. It is further provided that the contractors shall not be entitled to further payment under the contract until the work is wholly finished and the new contractors are paid the amount due them. Since this second provision of article V looks to a termination of the contract, any action thereunder would be, within the provisions of section 5259, G. C., supra, a default upon the contract and would require an advertisement for bids for the completion of the work and also notice to the bondsmen.

It appears from the papers submitted that the contractors, Sereff Brothers, under date of January 14th, have advised your board that their financial condition prohibits them from the performance of the work under the contract, and that they are not able to secure money due and, therefore, relinquish said contract. They further ask that if after completion of the building there is any money due, said money be proportioned to the creditors who have supplied materials or labor, or both, on the building.

It further appears from a letter from you under date of January 21st, that your architect, Mr. Best, has figured out that to complete the armory at Spencerville, Ohio, it will require the sum of $3,719.00, and from your first inquiry that there is approximately $8,000.00 still on hands unexpended of the original amount set aside for the construction of said armory. In your letter of inquiry you ask me to direct further procedure of the board in the light of section 5259, G. C., and other laws relating to conditions stated.

In answer thereto I would state that if your board desires to permit the contractors to continue under the contract, and your board to supply the deficiency of properly skilled workmen and materials, it may do so after three days' written notice to the contractors, and would be authorized to deduct the cost thereof from any moneys now due or hereafter to become due to the contractors under this contract.

But if your board determines that it desires to turn the contract over to somebody else, it will have to proceed under the provisions of section 5259, G. C., and advertise for bids for the completion of the work. In both instances, however, due notice should be served upon the bondsmen of the contractors. Under no circumstances should the board recognize in any way the attempt of Sereff Brothers to relinquish the contract since the acceptance of the relinquishment of the contract might release the bondsmen.

I state the above as a general proposition for the reason that there appears to be more than sufficient funds now in your hands with which to complete the building by providing the properly skilled workmen and materials of proper quality, or if the other course be taken a sufficient amount on hand to cover the contract price for the completion of the work should a new contract for such completion be awarded to another contractor. After the completion of the work under either of the above methods and the payment of all bills incurred thereby, if there is any money that has not been spent in order to complete such work still available then, the same may be paid over to the original contractors or as they direct.

The state does not recognize any lien against state property. There is no power in a sub-contractor or material man to perfect a lien against the property of the state. This matter was decided in opinion No. 935 rendered under date of October 14, 1915, to Hon. J. E. Shatzel, secretary board of trustees, Bowling Green State Normal College, Bowling Green, Ohio, copy of which is herewith enclosed.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1239.

TELEPHONE COMPANIES—CONTRACT OF SALE—INVENTORY OF PROPERTY REQUIRED IN ORDER TO FIX AND DETERMINE RATES, TOLLS, CHARGES AND RENTALS TO BE CHARGED UPON CONSUMMATION OF SALE—IRONTON, OHIO

A, a telephone company owning and operating a local telephone exchange and property in a certain city and its vicinity, and B, a telephone company owning and operating a separate telephone plant and property in said city and vicinity and in addition long distance lines and telephone exchanges in other localities, apply jointly to the public utilities commission for the approval of a contract of sale by B to A of its local exchange and property in the common locality, one of the features of which contemplates the connection of the exchange of A, after its acquisition of the additional property, with the toll lines of B, so that the subscribers of the local exchange shall have long distance service throughout the field of operations of B.

As a part of said agreement B is to receive stock and bonds of A.

Held: That upon such application it is the duty of the public utilities commission, under section 614-61, *G. C., to appraise the telephone property within the city and its vicinity which will, upon the consummation of the sale, constitute the plant of A, and on the basis of the valuation so ascertained to fix and determine the rates, tolls, charges and rentals to be charged by A.*

COLUMBUS, OHIO, February 5, 1916.

The Public Utilities Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—You submit to me the following statement of facts and inquiry:

"The Home Telephone Company of Ironton, Ohio, and the Central Union Telephone Company, own and operate separate local telephone exchanges and property in the city of Ironton and its vicinity, with all of that owned by the Central Union Telephone Company being located within a radius of nine miles of the city of Ironton. In addition thereto the Central Union Company owns and operates long distance lines and telephone exchanges in the states of Ohio, Indiana and Illinois, it being an Illinois corporation. The Home Telephone Company is entirely local to Ironton and its vicinity.

"Upon joint application of these companies this commission is asked to approve the sale by the Central Union Company of its local telephone exchange and property in Ironton and vicinity to the Home Company. As a part consideration for the proposed sale and transfer, the companies intend to enter into a traffic agreement whereby the toll lines of the Central Union

Company are to be connected with the exchange of the Home Company, giving the subscribers of the Home Company access to all the lines and stations of the Central Union Company.

"As a part of the purchase price the Central Union Company is to receive $50 000.00 of the stock and $13,000.00 of the bonds of the Home Company, the purchase price being $63,725.00. The Commission has approved the sale for the consideration above named. In approving this sale the commission respectfully requests your opinion as to whether it shall require the petitioning parties to comply with section 614-61, or only with section 614-60 of the General Code of Ohio.

"The same question was propounded to Attorney-General Hogan by the public service commission on October 6, 1911, to which he replied on November 24, 1911. On November 29, 1911, Mr. Hogan, by letter to the commission, qualified his opinion of the 24th, stating that he was still investigating the question and that later on he could give the commission a rule for permanent guidance. This commission has no evidence that Mr. Hogan gave any additional or supplementary opinion on the subject. The matter has been standing in that condition since November 29, 1911.

"The question involved here is being raised in connection with other telephone purchases and sales, and this commission respectfully asks for your views as to the correctness of Mr. Hogan's opinion and for your opinion generally as to the question herein presented."

The facts upon which Attorney-General Hogan based his opinion and the facts presented to me by you, presenting the same legal questions and calling for a construction, primarily, of sections 614-60 and 614-61 of the General Code, it will be unnecessary for me to write a separate opinion if I find that Attorney-General Hogan has expressed conclusions with which I can agree.

I note that in Mr. Hogan's opinion of November 24, 1911, which involves a lengthy and careful analysis and comparison of the two sections in question, he stops short of saying unqualifiedly that your commission should ascertain and determine the valuation of the merged property, and upon such valuation fix the rates to be charged, as provided for in section 614-61 of the General Code. I find also that on November 29, 1911, he addressed a communication to you in which he substantially recalls his opinion of November 24, 1911, and suggests that doubt should be resolved in favor of the jurisdiction of the commission, and that you should proceed to ascertain and determine the value of the properties in question and fix the rate to be charged for service. I find no record in this department of any opinion which Attorney-General Hogan may have given on the question you present, except the opinion and the letter to which you refer.

Being substantially in accord with the analysis of said section 614-60, as made by Mr. Hogan, and being in accord with the conclusions he arrived at therein with reference to the application of said section, it is unnecessary, in answering your question, to again analyze said section.

I am not in accord with the conclusions which he appears to have arrived at in his said opinion with reference to section 614-61, and particularly with reference to paragraph 4 of said section. These sections being of length and set out in full in his opinion appearing in attorney-general report for the year 1911, at page 729, and in the annual report of your commission for the year 1912, at page 712, it is unnecessary to restate the two statutes herein, except paragraph 4 of section 614-61, which is as follows:

"No consolidation, purchase, lease or contract by which two or more telephone companies merge or operate their lines or plants jointly or in con-

nection with each other, shall become valid or effective until after the commission shall have ascertained and determined the valuation as provided in this act upon which the rates, tolls, charges and rentals are based and also shall have fixed and determined such rates, tolls, charges and rentals so to be charged."

It will be observed that section 614-60 applies to public utilities generally, while section 614-61, immediately following said section 614-60, in the act of May 31, 1911 (102 O. L., 549), applies exclusively to telephone companies; that the two sections as enacted, each complete in itself, are for manifestly different purposes, yet in each the legislature has conferred rights upon telephone companies which before their enactment were forbidden by law; that section 614-61 provides for and makes mandatory the valuation of the property of telephone companies and the fixing of rates, tolls, charges and rentals to be charged by such companies as come within its purview, while said section 614-60 does not so provide. Again, section 614-60 refers to and is limited to the connection of physical properties, while section 614-61 refers to and applies to the merger of corporate entities. I therefore reach the conclusion that section 614-61 is applicable to the question presented by you. It remains then to determine whether or not under said section 614-61 there must be a valuation and the fixing of rates thereon.

In order to ascertain the legislative intent in the enactment of said sections, and their relationship to each other, if any, I have made examination of the legislative records relating thereto and find that said paragraph 4 of said section 614-61 was not a part of the original draft of said section, but was added to the section by a conference committee to which the bill had been referred by the legislature. This paragraph 4, while to me quite clear in its own provision and intent, is not so clear when read in connection with the remainder of the section of which it is a part. However, an analysis of the section reveals its express purpose and its clear intent.

It is a question whether or not the words "consolidation," "purchase," "lease," or "contract," as used in said section 614-61 make that section applicable to the case under consideration. In my opinion they do. The word *sale* necessarily implies purchase, and vice versa. I approve the legal interpretation given to these words by Mr. Hogan in his opinion to you and may add thereto that in my opinion the legislature intended these words to include, and that they do include, every form of transfer of property by which two or more telephone companies merge or operate their plant jointly in connection with each other, where the result is the elimination of the factor of competition as tending to regulate rates.

It is urged by counsel for the Central Union Telephone Company that there is nothing to be gained by requiring the appraisal and fixing rates as a necessary incident to the consummation of the transfer under consideration; that rates may be investigated and fixed by the commission at any time. In the enactment of paragraph 4 of section 614-61, the legislature evidently considered both of these questions and decided that the time to fix the rate should be concurrent with the merger, and that by so fixing the rate at that time it eliminated the inducement to inject into property fictitious values upon which a rate might be fixed.

The claim is also made that section 614-61 does not apply in this instance because all of the property of the Central Union Telephone Company is not being sold to the Home Telephone Company of Ironton. By the sale under consideration, the Central Union Company transfers to the Home Company all of its telephone facilities in and within a radius of nine miles of Ironton, leaving the Home Company the sole owner of all the telephone property in and within said territory. What were competing companies are now merged and under one ownership and control. So far as affecting the interests of the users of telephones in Ironton and

within a radius of nine miles thereof, it is unimportant as affecting the application of this section, whether or not the Central Union Telephone Company may own other telephone property, and located elsewhere.

Without further discussion, I may express my conclusion and opinion that you should proceed to ascertain and determine the valuation of the property in question and to fix and determine the rates, tolls, charges and rentals, so to be charged by the Home Telephone Company of Ironton.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1240.

WORKMEN'S COMPENSATION LAW—INDUSTRIAL COMMISSION ADVISED TO ADJUST PREMIUM DUE STATE INSURANCE FUND FROM THE COLUMBUS BOLT WORKS.

The industrial commission of Ohio advised to adjust the question as to the amount of premium due the state insurance fund from the Columbus Bolt Works Company.

COLUMBUS, OHIO, February 5, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of a letter from your department which is as follows:

> "The industrial commission respectfully requests your opinion on the questions involved in the matter of state insurance carried by the Columbus Bolt Works Company under the workmen's compensation law, as evidenced by the enclosed statements and records. The following motion passed by the industrial commission expresses the wishes of the commission in general terms:
>
> "'The following action was taken by the commission on January 10, 1916:
>
> "'Mr. Post and Mr. Barrett were present for a conference with the commission relative to the amount of premium due from the Columbus Bolt Works Company.
>
> "'The matter was discussed at some length after which Mr. Eliot moved that all papers in the case be referred to the attorney-general for an opinion as to the rights of the parties; that he be instructed not to bring suit and that on the preparation of his opinion he be requested to take the matter up personally with the commission; that Mr. Watson be instructed to co-operate with the attorney-general and to demonstrate to the commission the steps taken to arrive at the conclusions set forth in the two settlement sheets.
>
> "'The motion was seconded by Mr. Duffy, and voted upon as follows: Mr. Duffy, aye; Mr. Eliot, aye; Mr. Yaple, aye.'
>
> "The questions involved are technical and it would be very difficult to commit them to writing so as to be perfectly clear to you. Messrs. Follett and Price, of your office, conferred with the industrial commission a few days since with reference to these questions."

There are several other papers attached to your letter which clearly show that there is a misunderstanding existing between the industrial commission of Ohio and the Columbus Bolt Works Company, of Columbus, Ohio, as to whether or not there is a deficit in the amount of premium due the state insurance fund from the Columbus Bolt Works Company, or as to whether there is a credit in said fund in favor of the said company.

In accordance with the suggestion contained in your letter we have discussed the matter with Mr. E. E. Watson, your actuary. The history of this transaction, as given by Mr. Watson, is about as follows:

The Columbus Bolt Works was one of the first subscribers to the state insurance fund, it being risk No. 55. The first premium paid by this company was on March 27, 1912. At this time a classification of the employment of this company was made, which was designated as class 10, sub-class 22. Premiums were paid to the state insurance fund upon this classification based upon an estimated pay roll at the rate adopted for this class and sub-class, which premiums were paid for five periods of six months each and the period of payment under this classification extended from March 28, 1912, to October 14, 1914, a total premium being paid amounting to $7,084.43. This amount was paid to the state insurance fund upon the estimated pay rolls covering the five periods above named. Upon the audit of the pay rolls covering said five periods it was found that the actual pay roll expenditure was in excess of the estimated pay roll for said five periods, and that the amount of premium due the state insurance fund based on the actual pay roll expenditure covering said periods was $7,400.28, which left a balance due the state insurance fund on October 14, 1914, from the Columbus Bolt Works of $315.85.

It seems that about this time a Mr. Sohl, who had charge of this branch of the business of the Columbus Bolt Works Company, conceived the idea that a part of its pay roll should be placed under a different sub-class. This question was taken up with the state liability board of awards or someone of its departments and accordingly a division of the pay roll was made—a part being rated under class 10, sub-class 22, and a part being placed in class 10, sub-class 44. This division was made retroactive. Under this division of the pay roll the amount of premium due the state insurance fund covering the five periods from March 28, 1912, to October 14, 1914, based upon actual pay roll expenditure for said five periods was $4,876.49; whereas, the amount of premium paid to the state insurance fund upon the estimated pay roll under the classification of class 10 and sub-class 22 amounted to $7,084.43, which, therefore, left an unearned premium credit to the Columbus Bolt Works Company on October 14, 1914, of $2,207.94. The amount of premium due the state insurance fund based upon the actual pay roll expended under class 10, sub-class 22 and 44 for the period from October 14, 1914, to April 14, 1915, plus a penalty for death, was $862.04. This amount deducted from the unearned premium credit due to the Columbus Bolt Works Company on October 14, 1914, left a balance of unearned premium due the Columbus Bolt Works Company on October 14, 1915, of $1,345.90. The amount of premium due the state insurance fund for the period from April 14, 1915 to October 14, 1915, based upon an estimated pay roll under class 10, sub-classes 22 and 44, was $940.06, and which amount deducted from the balance of unearned premium due the employer on April 14, 1915, left a balance of unearned premium due the Columbus Bolt Works Company on October 14, 1915, of $405.84. A settlement sheet went forward to the Columbus Bolt Works Company showing a credit due it of $405.84.

About this time a question arose in the auditing department of the industrial commission of Ohio as to whether there had been a proper classification of this employment. Mr. Watson informs us that Mr. Sohl was called to the office of the industrial commission and that he (Mr. Sohl) was informed by Mr. John Hig-

gins, then auditor, that the settlement sheet of June 2, 1915, which showed a credit of $405.84 to the Columbus Bolt Works Company was incorrect and it could not be considered as a basis of settlement.

About July 1, 1915, the Columbus Bolt Works Company was reorganized and a majority of the stockholders in the old company became minority stockholders in the new company. In the meantime Mr. Sohl was taken ill and the question of adjustment or settlement on a proper classification with reference to the amount of premium due was never settled by Mr. Sohl, because of his illness, and shortly thereafter Mr. Sohl died.

The new company, on September 3, 1915, was advised by a settlement sheet of that date, which showed a calculation of premium due the state insurance fund based upon the original classification of the industry, to wit: Class 10, sub-class 22, which showed an earned premium covering five periods from March 28, 1912, to October 14, 1914, of $7,400.28. It showed a credit by advance premiums based upon estimated pay rolls covering said five periods in the sum of $7,084.43, which left a balance due to the state insurance fund on October 14, 1914, of $315.85.

The settlement sheet of September 3, 1915, also showed a premium due in the sum of $1,105.00 based upon an estimated pay roll expenditure from October 14, 1914, to April 14, 1915, which advance estimated premium, together with the additional earned premium due as of October 14, 1914, in the sum of $315.85 made a total amount due to the state insurance fund of $1,420.85.

At this time a representative of the new or reorganized Columbus Bolt Works Company came to the industrial commission and claimed that upon the reorganization of this company the new company was led to believe that the settlement sheet of June 25, 1915, which showed a credit of $405.84 was correct and that they had accepted this settlement from the industrial commission as correct and as an asset of the old company. He was informed that the latter settlement sheet under date of June 25, 1915, was recalled from Mr. Sohl personally and that no adjustment had been made of the matter. This representative of the new company attempted to see Mr. Sohl about the matter but was unable to do so on account of his serious illness, and no information was gained by the new company from Mr. Sohl because of his subsequent death. The matter was then referred by the commission to Mr. Watson, its actuary, who had under date of October 18, 1915, calculated the amount of earned premium due the state insurance fund from the Columbus Bolt Works Company covering the periods from March 28, 1912, to October 14, 1915, and which showed a total amount due of $9,866.33. It showed also that the advance premiums which were paid upon the estimated pay rolls covering the same periods amounted to $7,084.43, which therefore leaves an additional earned premium due the state insurance fund covering said period in the amount of $2,801.90. The settlement sheet of October 18, 1915, which shows an estimated pay roll expenditure from October 14, 1915, to April 14, 1916, and an advance estimated premium of $984.24, which together with the additional premium which was a balance due covering seven periods from March 28, 1912, to October 14, 1915, made a total amount due to the state insurance fund of $3,786.14 to April 1, 1916.

I find that Mr. Watson in his calculation and classification of this industry under date of October 18, 1915, has used a different class and sub-class than was originally used to classify this concern, to wit: He has used class 10, class 25, sub-class 22, 72, 38½ and 11-a, whereas class 25 or sub-class 72, 38½ and 11-a do not appear in any of the former classifications of the industry. The amount of the actual pay roll expended is also different in Mr. Watson's calculation than the amount contained in previous settlement sheets. Mr. Watson also informs us that there has always been great difficulty experienced with this company in getting the actual amount of the pay roll expenditure and that the new organization or

company realized this when it took over the old company and it employed Mr. Edwin Merrill, a former employe of the industrial commission, to audit its pay roll with a view to applying a proper classification and proper rate against the same. Mr. Watson also says that Mr. Merrill's report as to the audit of the pay rolls shows something like $1,400 or $1,600 additional premium due the state insurance fund, which amount is not correct, however, owing to some improper application of the system of rating as against said pay rolls. The resolution controlling the application of retroactive rates to the pay rolls, which has been adopted by your commission, is as follows:

> *"Be it further Resolved,* That no sub-class receive a reduction whose losses have equaled or exceeded its earned premium; and,
>
> *"Be it further Resolved,* That every rate revision (where the rate revision is a reduction) be on a retroactive basis from the time the employer paid his first premium into the state insurance fund, provided the sub-class has not shown a deficit in any previous financial statement, in which event the rate shall be retroactive to the date the sub-class exhibited a deficit;
> * * *"

The error throughout this entire transaction seems to have occurred in the improper application of the rate in that the commission's rule had been disregarded by some one in its application on a retroactive adjustment against a period showing a deficit, whereas the rate should not have been applied beyond any period which shows a deficit, and it appears that the application was made without regard to any particular period, where a deficit was shown. This seems to be where the error has occurred.

Mr. Watson informs us that it is his opinion that the newly organized Columbus Bolt Works Company would be willing to adjust this matter by paying to the state insurance fund an amount somewhere about $1,800.00 to $2,000.00. He has also informed us that if a settlement can be made upon this basis and on condition that this company remains as a contributor to the state insurance fund, that under the present rules and system of rating he will individually classify and rate this company, and that within a period of approximately two years based upon the accident experience which has developed with the Columbus Bolt Works Company any amount remaining unpaid between the amount of $1,800.00 or $2,000.00 and $3,786.14 will be recovered to the state insurance fund.

If this statement of the actuary is true and can be successfully carried out by agreement with the Columbus Bolt Works Company it would seem to be advisable to adopt that plan.

The question submitted in your letter above quoted is one which concerns the administration and policy of your department in relation to the proper classification and rating of the employments of employers coming within the provisions of the workmen's compensation law, and it seems that an adjustment should be made between your commission and the Columbus Bolt Works Company which would be satisfactory both to the commission and the company.

There is, however, a legal question involved as to the power of the commission to go back of a six-months period in adjusting rates. Inasmuch as you have been following the rule of going back beyond such period, I would hesitate to recommend any change until the question is raised by some contributor and passed upon by the court of last resort.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1241.

BUILDING COMMISSION—SALARY—SECTIONS 2343 TO 2366, G. C., APPLICABLE TO COMMISSION—COUNTY COMMISSIONERS APPROVE PLANS AND PROSECUTING ATTORNEY APPROVES CONTRACTS—HOW INMATES ARE TO BE CARED FOR WHEN INFIRMARY DESTROYED.

1. *The time of fixing the salary of a building commission, appointed under the provisions of section* 2333, *G. C., and the method of paying such salary are matters wholly within the discretion of the judge appointing said commission. The bond required of each person appointed must be the same in amount as required of county commissioners, and the clerk of the board of county commissioners may act as clerk of said commission.*

2. *Section* 2338, *G. C., as amended by the adoption of the Code in* 1910, *limits the powers of building commissions as granted in the original act creating them, and the provisions of sections* 2343 *to* 2366, *G. C., applying to the erection of public buildings must be observed by said commissions. In case of the erection of an infirmary, the county commissioners must approve the plans as provided by section* 2349, *G. C., and the prosecuting attorney must approve the contracts as provided by section* 2356, *G. C.*

3. *When a county infirmary has been destroyed by fire the inmates thereof, during the erection of a new building, may be placed in infirmaries in other counties, but such disposition of them is strictly a temporary emergency proceeding and if they may be cared for within the county such plan is to be preferred.*

COLUMBUS, OHIO, February 5, 1916.

HON. DEAN E. STANLEY, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—I have your letter of January 19, 1916, as follows:

"An election having been held in Warren county, pursuant to the provisions of section 5639-1 of the General Code of Ohio, upon the expenditure of money in the erection of an infirmary building, and having resulted favorably to such an expenditure, the commissioners are now about to apply to a judge of the common pleas court of this county for the appointment of four persons as members of the building commission as provided by section 2333 of the General Code. Section 2342 provides that the auditor shall be the clerk of the building commission. Section 2409 provides for the appointment of a commissioner's clerk and relieves the auditor from the duty of acting as secretary to the board of commissioners as provided in section 2566.

"I desire to inquire first, when the four gentlemen, who are to act as members of the building commission in connection with the county commissioners, are appointed should their compensation be fixed at that time under section 2334, G. C., by the judge appointing them, or should it be fixed at the time of the completion of their work?

"Second. Is an order of the court appointing them fixing the amount of their bond necessary, or should they give the same bond which the commissioners in this county have given, which is $5,000.00?

"Third. Is the auditor their clerk or is he relieved from that duty by reason of the fact that the commissioners have heretofore appointed a commissioner's clerk?

"Fourth. Do sections 2343 to 2366, G. C., inclusive, apply to building commissions appointed under Sec. 2333, G. C., and does the last paragraph of Sec. 2338, which reads, 'and shall be governed by the provisions of this chapter relating to the erection of public buildings of the county,' as construed by the court in the case of The State, ex rel., v. Cass, 13 C. C. N. S. at page 449, change the rule as laid down by the supreme court in the McKenzie, et al., v. State case in 76 O. S., at page 369? It will be noted that Sec. 2338 was last amended on March 14, 1906, that the case of McKenzie v. The State above referred to was decided June 4, 1907, but inasmuch as the case of McKenzie v. State was probably brought prior to the last amendment of Sec. 2338, and inasmuch as the circuit court in 13 C. C. N. S., at page 449, hold that a commission appointed previous to the amendment of Sec. 2338, G. C., was not governed by the provisions of Sec. 2343, G. C., to Sec. 2366, G. C., inclusive, it occurs to me that possibly the amendment to Sec. 2338, G. C., would be held to change the rule as laid down in McKenzie v. State.

"Fifth. If Sec. 2343, G. C., to Sec. 2366, G. C., inclusive, apply, then in that event, should the plans, drawings, etc., be approved by the commissioners under Sec. 2349, as a body separate from the building commission, the board of infirmary directors having been abolished?

"Sixth. Is the prosecuting attorney, under Sec. 2356, G. C., required to sign the contract for the new building and is he required to sign the contract with the architect in the event each of such contracts exceed $1,000.00?

"I desire to inquire further whether or not in a county in which the infirmary has been destroyed by fire, if the commissioners may legally contract with infirmaries in other counties for the care of a part of the inmates of such destroyed infirmary, when there is no suitable building that may be utilized for an infirmary pending the rebuilding of the destroyed structure?"

In answer to your first question, the time of fixing the compensation of the members of the building commission in question under the provisions of section 2334, G. C., is a matter addressed entirely to the discretion of the court. This is also true of the method of payment. The compensation may be fixed at the time of appointment as a salary to be paid at stated intervals, or it may be fixed and allowed in such sums as the court thinks proper from time to time during the course of the employment of the commission, or it may be paid in one lump sum at the completion of the work of the commission, but the amount so paid under any plan or method is subject to the limitation that it may not in the aggregate exceed two and one-half per cent. of the amount received by the county from the sale of bonds or from taxes raised for the purpose of constructing said building.

Answering your second question, section 2336, G. C., commands and requires each member of the commission to give a bond in the same amount as required of county commissioners. The statute therefore fixes the amount of the bond and no order of the court is necessary in that regard.

I am of the opinion in answer to your third question that a clerk of the board of county commissioners, appointed under the provisions of said section 2409, G. C., may perform for the building commission the duties imposed by section 2342, G. C., upon the county auditor.

The paragraph in section 2338, G. C., to which you refer in your fourth question, which reads as follows: "And shall be governed by the provisions of this chapter relating to the erection of public buildings of the county," was first made a

part of said section by the adoption of the code in 1910. It is generally understood that this amendment was made to this section in view of the construction theretofore placed upon said section in the case to which you refer, viz.: McKenzie v. The State, 76 O. S., 369. The effect of this amendment, therefore, is to limit the powers of the commission as granted in the original act and as constructed in the case aforesaid, and to confine said commission to an observance of all the provisions of the chapter named relating to the erection of public buildings. It follows that said sections 2343 to 2366, G. C., apply to building commissions and must be followed by them. The plans, therefore, must be submitted to the commissioners as provided by section 2349, G. C., and in this connection it must be observed also that said plans must be submitted to the state board of charities as provided by section 1353, G. C. The prosecuting attorney also must approve the contract made for the erection of the building as provided by section 2356, G. C.

Referring now to your last inquiry, while there are no statutory provisions covering the matter therein submitted, I incline to the opinion that the county commissioners under their general powers may make provision for caring for the former inmates of your infirmary by placing them in infirmaries of other counties until your new building may be completed. If this may be done as cheaply or at a less cost than by renting temporary quarters or by contracting for their care within your county there may be no ground for criticism or complaint and as the duty of caring for them is imperative upon the board of county commissioners, I think they may lawfully exercise their discretion in so doing by providing for their care in other infirmaries during the erection of your new building. This, however, should be regarded as strictly a temporary emergency proceeding and if said inmates may be cared for within your county at a reasonable expense, where they will be at all times under the personal supervision and control of your commissioners, such disposition of them is to be preferred.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1242.

AMENDMENT TO ARTICLES OF INCORPORATION OF THE UPSON-WALTON COMPANY DISAPPROVED—PURPOSE CLAUSE CONTAINS MORE THAN ONE MAIN PURPOSE.

The secretary of state advised not to accept or record the certificate amending the articles of incorporation of the Upson-Walton Company, because the purpose clause as amended contains more than one main purpose.

COLUMBUS, OHIO, February 5, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of February 1st, enclosing a certificate of amendment to the articles of incorporation of the Upson-Walton Company presented to you for filing and recording, also check of five dollars, a ten-cent revenue stamp, and a communication from Messrs. White, Johnson, Cannon and Neft, attorneys for the Upson-Walton Company, in which you request my opinion as to the legality of the amended purpose clause and whether you should accept and record the same. The proposed certificate of amendment recites, in part, as follows:

"*Resolved,* That the articles of incorporation of the Upson-Walton Company be, and the same are hereby amended so as to change article 3 from

"'Said corporation is formed for the purpose of carrying on a general cordage and ship chandlery business and for importing, manufacturing and dealing in all articles used in those branches of business, and also for importing manufacturing and dealing in all articles used in the construction, equipment and repairing of vessels, and in supplying the wants of vessels and their crews, and for building, owning, operating and selling vessels of all kinds.'

To

"'Said corporation is formed for the purpose of manufacturing, buying, selling, leasing and dealing in machinery, cordage, ship supplies, hardware, paint, oils, dry goods and other merchandise, and for the purpose of carrying on a general hardware, machinery, and railway mill and mine supply business, and to do all things that a general hardware or ship chandler company could or might do, and for importing, exporting, manufacturing and dealing in all articles used in those branches of business, and also for importing, exporting, manufacturing and dealing in all articles used in the construction, equipment and repairing of vessels, or in supplying the wants of vessels or their crews, and for building, owning, operating and selling vessels of all kinds, and to do all things incident thereto or connected therewith.'"

I am informed that this corporation has been incorporated and in active operation for a number of years. I do not, therefore, deem it necessary, or even advisable, at this time to consider the legality of the purpose clause contained in its original articles of incorporation. The sole question here to determine is whether or not the purpose clause which the company seeks to adopt by amendment is authorized by law. Section 8623, General Code, provides:

"Except for carrying on professional business, a corporation may be formed for any purpose for which natural persons lawfully may associate themselves."

The supreme court of Ohio in the case of State ex rel. v. Taylor, 55 O. S., 61, laid down the rule that corporations can be organized, under the above quoted language, for one main purpose only and such collateral purposes as may be incidental to the main purpose. This rule has been universally followed by my predecessors in office in advising your department.

I am clearly of the opinion that the proposed amendment to the purpose clause of the articles of incorporation of the Upson-Walton Company sets forth more than one main purpose. Among other things, it would permit the corporation to do a manufacturing business, a merchandise business and a transportation business.

I, therefore, advise you that you should not accept and record the proposed certificate of amendment of its articles of incorporation presented by the Upson-Watson Company.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1243.

STATE DENTAL BOARD—INTERPRETATION OF SECTION 1316, G. C., AND SECTION 22, ARTICLE II, CONSTITUTION—SPECIFIC APPROPRIATION REQUIRED OF MONEYS PAID INTO STATE TREASURY.

Section 1316, G. C., 106 O. L., 297, is not such an appropriation of the funds paid into the state treasury by the secretary of the state dental board as is contemplated by section 22 of article II of the constitution, as such funds cannot be used by said board until so appropriated.

COLUMBUS, OHIO, February 5, 1916.

DR. R. H. VOLLMAYER, *Secretary Ohio State Dental Board, Toledo, Ohio.*

DEAR SIR:—Your letter of January 31, 1916, requesting my opinion received, and is as follows:

> "As we have spent all the appropriation allowed us for transportation, it is necessary for us at this time either to be able to draw upon the money we have deposited with the state auditor or to apply to the emergency board for assistance. The last sentence of 1316 reads as follows:
>
> " 'Each week all moneys received by the secretary shall be paid by him into the state treasury to the credit of a fund for the use of the state dental board.' "
>
> "I believe that in 1913 there was a law passed by the general assembly requiring the auditor to put all moneys received by him from the various state boards into the general fund. This section 1316, however, was amended by the general assembly of 1915 to read that this money should be placed in the state treasury to the credit of a fund for the use of the state dental board. Will you please let me know at your earliest convenience whether or not it would be proper for us to draw a voucher on this fund?"

Section 1316, G. C., 106 O. L. 297, provides in part as follows:

> "Each week all moneys received by the secretary shall be paid by him into the state treasury to the credit of a fund for the use of the state dental board."

Section 22 of article II of the constitution of the state of Ohio provides as follows:

> "No moneys shall be drawn from the treasury except in pursuance of a specific appropriation made by law."

The effect of the provision of section 1316, supra, is to require the secretary of the Ohio state dental board to pay into the state treasury each week all moneys received by him, and directs that the same be carried in a fund for the use of said board, thereby precluding the use of said money for any other purpose, but said provision is in no sense an appropriation of such moneys as contemplated by section 22 of article II of the constitution, supra.

I am, therefore, of the opinion that it would not be proper for the auditor of state to issue a warrant against said funds upon a voucher drawn by your board until a specific appropriation of said moneys has been made by the general assembly.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1244.

APPROVAL OF AMENDMENT TO ARTICLES OF INCORPORATION OF THE GEORGE B. LUPHER COMPANY—UNISSUED COMMON STOCK CHANGED TO PREFERRED STOCK.

Secretary of state advised to receive and record the certificate of amendment to the articles of incorporation of the George B. Lupher Company which changes, by unanimous written consent of all its stockholders $50,000 *of its unissued common stock to preferred stock.*

COLUMBUS, OHIO, February 7, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State of Ohio, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of February 3, 1916, with enclosures, in which you request me to advise you whether or not you should accept and record the certificate of amendment to its articles of incorporation presented to you by the George B. Lupfer Company.

In your letter you state that the authorized capital stock of this corporation is $100,000.00, consisting entirely of common stock. The corporation by its proposed amendment seeks to change $50,000.00 of its authorized common stock to preferred stock, and to create certain designations, preferences and restrictions upon the voting power thereof.

The certificate recites that the proposed amendment is authorized by the written consent of all the stockholders of said corporation. I am in receipt also of a letter from Mr. Charles J. Pretzman, attorney for the George B. Lupher Company, under date of February 4, 1916, in which he states that: "No part of the $50,000.00 of common stock which the company by its amendment seeks to change to preferred stock has ever been issued."

Upon the facts herein recited, and for the reasons set forth in my opinion to you of January 11, 1916, being opinion No. 1160, I am of the opinion that you are authorized to accept and record the said certificate of amendment of the George B. Lupher Company.

I am returning to you the said certificate of amendment, check for $5.00, and ten-cent internal revenue stamp enclosed in your letter.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1245.

STATE HIGHWAY COMMISSIONER—FORM OF BOND OF DEPOSITORY FOR MONEYS PRIVATELY CONTRIBUTED FOR ROAD WORK.

Form of bond prescribed of the depository for moneys contributed to the state highway commissioner for road work.

COLUMBUS, OHIO, February 7, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of January 18, 1916, which reads as follows:

"I respectfully direct your attention to your opinion No. 1154 in which you advise that the state highway commissioner should act as custodian of private funds contributed in connection with state road improvement, with the condition that the depository furnish a surety bond for the safe keeping of such funds.

"I am attaching hereto a blank form of depository bond and respectfully request that your office make the insertions necessary to constitute such blank a valid bond in accordance with your opinion.

"If it is found that the blank form submitted cannot be satisfactorily filled in so as to meet our requirements, I respectfully request that you furnish this department with a blank form of bond which will amply protect me when acting as custodian of private funds."

I suggest the following as a proper form of bond to be used in the case suggested by you:

BOND OF DEPOSITORY FOR FUNDS CONTRIBUTED FOR ROAD WORK.

Know All Men by These Presents:

That The_____
(Insert correct legal corporate title of bank and location of same.)
a corporation formed under the laws of the_____
If state bank insert state
_____, as principal,
of Ohio. If national bank insert United States of America.)
and The_____
(Insert correct legal corporate title of surety company.)
a corporation formed under the laws of the state of_____
(Insert state in
_____, and duly qualified and licensed
which surety company is incorporated.)
to transact the business of executing and guaranteeing bonds and undertakings within the state of Ohio, as surety, are jointly and severally bound unto Clinton Cowen, as state highway commissioner of the state of Ohio, in the sum of _____ dollars ($_____),
(Insert amount of deposit.)
for the payment of which the said The_____
(Insert name of bank.)
and the said The_____ above
(Insert name of surety company.)
named, do bind themselves, their successors and assigns.

THE CONDITION OF THIS OBLIGATION IS SUCH, that whereas the said The_____has been
(Insert name of bank.)
designated by the state highway commissioner of the state of Ohio as a depository for the purpose of receiving on deposit moneys contributed by divers persons to said state highway commissioner of the state of Ohio for use in improving the following described road, to wit: _____;
(Insert description of road.)
and said state highway commissioner has agreed to deposit as such highway commissioner with said The_____said
(Insert name of bank.)
moneys so contributed, and has required of said The_____
(Insert name of bank.)
a bond to be executed and deposited with him, with surety thereon, conditioned for the safe keeping and repayment of said moneys.

NOW THEREFORE, if the said The_____
(Insert name of bank.)
shall pay over to said state highway commissioner upon demand made therefor or upon his written order or check any and all said moneys which shall be so deposited or which may come into the custody of said The_____
(Insert name of bank.)
free from any discount or deduction of any kind therefrom, and shall save the state of Ohio and said state highway commissioner free from any loss whatsoever upon such deposit or deposits made with said The_____,
(Insert name of bank.)
and if said The_____shall pay to and
(Insert name of surety company.)
settle with said state highway commissioner the full amount of said deposits due and unpaid from said The_____within sixty
(Insert name of bank.)
(60) days after notice is given said The_____
(Insert name of surety company.)
that such The_____has failed, refused or
(Insert name of bank.)
neglected to pay over to said state highway commissioner any and all moneys which may be in the custody of said The_____
(Insert name of bank.)
and covered by this bond, then this obligation shall be void, otherwise it shall be and remain in full force and effect.

IN WITNESS WHEREOF, The_____
(Insert name of bank and location of same.)
as principal, and The_____as surety,
(Insert name of surety company.)
have caused this bond to be signed by the proper officers, respectively, of each of such corporations as the acts of said corporations, and the corporate seal of each to be hereunto affixed this_____day of_____,
(Insert date of execution of this bond.)
191____.

The_____
(Correct legal corporate title of bank.)
By_____
(Affix Seal of Bank.) Its President, and
_____
Its Secretary, Cashier.

The_____
(Correct legal corporate title of surety company.)
By_____
(Affix Seal of Surety Company.)
_____

* * * *

A power of attorney for the signatory officers of the surety company, together with a financial statement of such company, should be attached to the bond.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1246.

JAIL OR TURNKEY FEES ALLOWED BY SECTION 2845, G. C., MUST BE PAID BY SHERIFF INTO HIS FEE FUND—HOW PAID IN CASES WHERE STATE FAILS TO CONVICT—WHEN SHERIFF MAY BE PAID SUCH FEES.

The costs known as jail fees allowed by section 2845, G. C., for receiving, discharging and surrendering a prisoner, when paid to the sheriff in cases from a city court having a contract with the county for the care of its prisoners, are received by said sheriff by virtue of his office and must be paid by him into the sheriff's fee fund.

In cases wherein the state fails to convict, such fees may be submitted to the county commissioners with other costs, as provided by section 2846, G. C., and if allowed by said commissioners may be paid to the sheriff.

COLUMBUS, OHIO, February 7, 1916.

HON. FORREST G. LONG, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR:—I have your letter of December 23d submitting the following statement and inquiries:

> "Logan county has a jail for its own state prisoners and also has a contract with the city of Bellefontaine, Ohio, for the care of city prisoners. When a prisoner is put into this jail fifty cents is charged against him in the costs and when said prisoner is taken out of jail another fifty cents is charged against him in his costs, commonly called turnkey's fee. All of such fees have heretofore been turned into the sheriff's fee fund. State inspector holds that turnkey fees, in city cases, belong to the sheriff individually, but the city solicitor holds the opposite opinion.
>
> "State inspector also says that in state cases, where the state fails to convict, the turnkey fees belong to the sheriff individually.
>
> "The sheriff has no official turnkey but does the work himself or hires it done both for state and city cases. We beg to ask your opinion in answer to the following questions:
>
> "1. Where the sheriff receives turnkey fees through the city court of Bellefontaine, to whom do they belong?
>
> "2. In cases where the state prosecutes and fails to convict, to whom do the fees belong?
>
> "3. If the turnkey fees, in municipal cases as above stated and in state cases where the case is lost as above stated, belong to the sheriff individually, can he recover from the due fee fund the amount of such fees paid in by him during the year 1915?"

If the city of Bellefontaine has a contract with Logan county whereby the county jail is used by the city for its prisoners, the sheriff of said county who receives said city prisoners into the county jail and discharges them therefrom does so by virtue of his official position as sheriff of said county. The costs, known as jail or turnkey fees, to which you refer, are, therefore, due the sheriff as such county official, are earned by him as such official under section 2845, G. C., and the services for which said fees are paid to him are part of his official duties as sheriff of Logan county. It follows, therefore, that such fees, when so received by him, should be paid with other fees and costs into the sheriff's fee fund.

In answer, therefore, to your first question, when such fees are paid to the sheriff of said county through the city court of Bellefontaine they belong to the sheriff's fee fund and should be paid into said fund by the sheriff when so received.

In answer to your second question it may be said that in all cases wherein the state fails to convict such fees belong to no one because they may not be taxed against either the defendant or the state of Ohio. However, in such cases these fees, with other costs which have been earned by the sheriff in cases wherein the state fails to convict, may be submitted to the county commissioners under the provisions of section 2846, G. C., which provides in part as follows:

> "Upon the certificate of the clerk and the allowance of the county commissioners the sheriff shall receive from the county treasury in addition to his salary his legal fees for services in criminal cases wherein the state fails to convict and in misdemeanors upon conviction where the defendant proves insolvent, but not more than three hundred dollars shall be allowed for the services rendered in any one year of his term."

This section expressly directs that the allowance made thereunder shall be received by the sheriff *in addition to his salary*. By reason of this provision, therefore, all allowances made under favor of this statute are paid to the sheriff and belong to him independent of his salary. This application of the law is in harmony with an opinion of my predecessor, Hon. T. S. Hogan, reported at page 1182 of volume II of the attorney-General's report for the year 1912. In this opinion a full history of the legislation upon this particular matter is given.

Therefore, in answer to your second question I must advise that said fees in the cases mentioned therein, viz.: Cases wherein the state fails to convict, may be submitted to the county commissioners under favor of said section 2846, supra, and if allowed by said commissioners belong to the sheriff.

The foregoing observations made in answer to your first and second inquiries sufficiently answer your third inquiry. However, I desire to say that in all cases in which prisoners are committed to the county jail, as stated by you in your first inquiry, the jail fees paid in such cases belong to the sheriff's fee fund and may under no circumstances be claimed by the sheriff. In all other cases jail fees stand precisely as other costs and when paid to the sheriff he must cover them into the county treasury with all other fees. When, however, the state fails to convict or when in cases of misdemeanor the defendant proves insolvent, these fees may be submitted to the county commissioners as provided by section 2846, G. C., supra, and if allowed by said commissioners may be paid and belong to the sheriff.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1247.

MUNICIPAL CORPORATION—EXCESSIVE AMOUNTS ALLOWED BY CITY TO CONTRACTORS ON PARTIAL ESTIMATES—INTEREST NOT CHARGEABLE IN ABSENCE OF FRAUD—NOT ENTITLED TO INTEREST ON FINAL ESTIMATE UNTIL DEMAND FOR BALANCE AND REFUSAL.

If without fraud on the part of a contractor, he is allowed excessive amounts on partial estimates, he is not chargeable with interest during the time he was in possession of such excessive amounts; otherwise if fraud on his part.

If by mutual mistake contractor has on final estimate not been paid full amount due him, he is not entitled to interest on balance due, until demand for balance and refusal.

COLUMBUS, OHIO, February 8, 1916.

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

GENTLEMEN:—Under date of December 21, 1915, you submitted for my opinion two questions.

The first question which you ask is stated as follows:

> "Our examiners have developed some unusual conditions in the city of Akron, Ohio, as regards the payments to contractors for construction of public improvements, and we desire to know what your ruling would be as to charging interest on the excessive payments to said contractors upon partial estimates, etc. For instance, it was found that in some paving contracts, the quantities allowed on *partial* estimates greatly exceeded the estimated quantities in the preliminary estimate as well as the actual quantities determined in the final estimate. This practice, or custom, was quite general in the operations of the engineering department and resulted in contractors having the use of a considerable sum of money that otherwise would have been in the city treasury earning the depository rate of interest.
>
> "*Question* 1. Under such circumstances could a finding for recovery be enforced against the contractors for interest upon the moneys received upon excessive partial estimates, and if so, should the computation be made at the legal rate (6%) or at the rate paid by the depository bank?"

The partial payments on public improvements are based on the estimates of the engineer, and if the engineer has incorrectly estimated the amount and the contractor has received the amount without knowledge of the incorrect estimate, it is a mutual mistake of fact.

The rule as laid down in 22 Cyc., page 1506, is as follows:

> "It has been held that interest will not be allowed on money paid and received through a mutual mistake of the parties, *without fraud or misconduct on the part of either,* until after discovery of the mistake and ascertainment of the person to whom the money is rightly due; but in other cases interest has been allowed notwithstanding such mistake."

I have been unable to find any case in Ohio which bears directly upon this subject, but the rule as first laid down above seems to me to be the correct rule.

That is to say, if without fraud or misconduct upon the part of the contractor he has received what he supposed to be a proper estimate of the amount of work done by him and has been paid thereon, he should not be chargeable with interest for having received an amount over and above what in fact was the proper estimate; but if through fraud on his part an improper estimate has been paid him and he has received money that is in excess of the amount rightfully due him, he should be chargeable with interest.

In the case which you submit it appears that upon the final estimate the proper amount has been paid to the contractor; but if said contractor has, through fraud, obtained a greater sum on partial estimates than that to which he was entitled, he has been benefited thereby to the extent of the excess and the city has been damaged thereby.

If the contractor, in the absence of fraud or misconduct on his part, has received excessive payments on partial estimates, and the city has subsequently paid him the proper amount on final estimate, I believe that that could properly be considered as an accord and satisfaction, but not so if fraud intervenes. Fraud being present, there can be no proper accord and satisfaction.

Answering your first question, therefore, I am of the opinion that a finding could not be enforced against the contractor for interest on moneys received upon excessive partial estimates in the absence of fraud, but that if he has fraudulently received excessive partial estimates he may be charged with interest for the time that he had the use and benefit of money received on such partial estimates.

You further inquire as to the rate at which interest should be computed. The interest charged against a contractor who has fraudulently received money upon excessive partial estimates is by way of damages, and is to be computed at the rate the money would have earned had such payments not been made, which would be at the depository rate of interest.

Your second question is as follows:

> "In some instances it has been found that the contractor, accepting payment on final estimate, certified to by the engineer and allowed by the director of service, had not been paid for all work actually performed by him under his contract. For instance, in one improvement, although sidewalks on both sides of the street had been constructed, a certain contractor had only been paid for sidewalk on one side of the street. In another street paving contract, he had not been paid for the brick pavement; but in both instances, said contractor had accepted the final estimate of the engineer, which was erroneous in the particulars set forth.
>
> "*Question* 2. Under the above circumstances, would the contractor be entitled to interest on the moneys withheld by reason of said errors, and at what rate of interest?"

A contract with the city which does not provide for interest to be paid on deferred payments would not bear interest except by way of damages.

It has been held that

> "Where the fact of nonpayment is ascribable to mutual misapprehension of the parties, * * * interest does not run from that time till the debt is demanded."
>
> Perley on the Law of Interest, page 138.

In the case which you have submitted there was undoubtedly a mutual mistake of the engineer in estimating the work and the contractor in accepting the final payment.

Such being the case, I am of the opinion that under the facts stated by you the contractor would not be entitled to interest on the moneys withheld by reason of the said error until he had made demand therefor and the same had been refused. If he has made demand and the same has not been paid over to him the rate of interest to which he would be entitled would be the legal rate of interest, which has been fixed in Ohio at six per cent.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1248.

COUNTY HIGHWAY SUPERINTENDENT—WHAT TOWNSHIP OFFICERS SHOULD ATTEND MEETING PROVIDED BY SECTION 7189, G. C.—TOWNSHIP CLERKS SHOULD NOT ATTEND—HOW EXPENSES AND PER DIEM OF TOWNSHIP OFFICERS ARE TO BE PAID.

1. *The county highway superintendent in calling the meeting provided for by section 7189, G. C., should not request the attendance of township clerks, and even should a township clerk attend such meeting, his expenses and per diem for such attendance may not be paid from the public treasury.*

2. *Where township officers attend the meetings provided for by section 7189, G. C., their actual and necessary expenses incurred in such attendance should be paid from the general fund in the county treasury and their per diem should be paid from the township treasury.*

3. *The per diem of township trustees for their attendance at the meeting provided for by section 7189, G. C., comes within the limitation of $150.00 provided by section 3294, G. C.*

COLUMBUS, OHIO, February 8, 1916.

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

GENTLEMEN:—I have your communication of January 24, 1916, which reads as follows:

> "We would respectfully ask for your construction of the meaning of section 7189, General Code, as amended 106 O. L., 615, as same may affect the following questions:
>
> "(1) May the county highway superintendent, in calling a meeting provided for, include the clerks of townships; and if so, are their expenses and per diem, or compensation, to be paid?
>
> "(2) Where township officers are requested to attend this meeting, are the expenses of attendance to be paid out of the county treasury; if so, out of what fund?
>
> "(3) Are the per diems, or compensations, of township officers to be paid out of the county treasury, or out of the township treasury?
>
> "(4) In the case of township trustees, does the per diem so paid them come within the limitation of $150.00 a year as provided by section 3294, G. C.?"

Section 7189, G. C., 106 O. L., 615, referred to by you, reads as follows:

> "It shall be the duty of the county highway superintendent to annually call a meeting within the county, at a time and place to be approved by the state highway commissioner, of all the township and county authorities having directly to do with the construction and repair of roads and bridges within the county. Such meeting shall be open to the general public. At such meeting, the county highway superintendent, or such other person as may be designated by the state highway commissioner, shall instruct the proper authorities as to the best and most economical plans for repairing and maintaining the roads and bridges of the county, so as to provide a uniform system of highway work for the county. Each official attending such meeting shall receive for attending such meeting his actual and necessary expenses in addition to his regular per diem, or salary, the same to be paid by the county treasurer on itemized vouchers approved by the county highway superintendent."

Referring to your first question, it will be noted from the section above quoted that only those county and township authorities having directly to do with the construction and repair of roads and bridges are required to attend the meeting called by the county highway superintendent. Township trustees and township highway superintendents are township officers of this class, but it cannot be said that township clerks have directly to do with the construction and repair of roads or bridges. It therefore follows that the county highway superintendent, in calling the meeting provided for by section 7189, G. C., should not request the attendance of township clerks, and even should a township clerk attend such meeting, his expenses and per diem or compensation for such attendance may not be paid from the public treasury.

Your second and third questions involve a construction of the language used in the last sentence of the section above quoted. It will be noted that in this sentence reference is made to the "regular per diem" of those officers attending the meeting. The regular per diem of township trustees is payable from the township treasury. I am of the opinion that the word "same" as used in this sentence refers only to the expression "actual and necessary expenses." The statute directs that such expenses must be paid by the county treasurer and it must, therefore, have been intended by the legislature that payment should be made from the county treasury, and inasmuch as the statute does not direct payment from any specific fund, it must have been in the mind of the legislature that payment should be made from the general county fund. Answering your second and third questions, specifically, I advise you that where township officers attend the meeting provided for by section 7189, G. C., their actual and necessary expenses incurred in such attendance should be paid from the general fund in the county treasury and their per diem should be paid from the township treasury.

Section 3294, G. C., provides that the compensation of any township trustee to be paid from the treasury shall not exceed one hundred and fifty dollars in any year including services in connection with the poor. Inasmuch as the per diem of township trustees for their attendance at the meeting provided for by section 7189, G. C., is to be paid from the township treasury, it follows, in answer to your fourth question, that such per diem comes within the limitation of $150.00 provided by section 3294, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1249.

CLERK OF COURTS—COMMISSION ALLOWED FOR COLLECTING MONEYS ON JUDGMENTS SUCH AS ALIMONY ORDERED PAID TO CLERK—FEE FOR ENTERING ON CASH BOOKS, COSTS RECEIVED —NO COMMISSION MAY BE CHARGED ON DEPOSITS OR PRE-PAYMENT OF COSTS IN DIVORCE CASES.

Clerks of courts are required to charge and collect a commission of one per centum on the first one thousand dollars and one-fourth of one per centum on all exceeding one thousand dollars of all money to them paid pursuant to an order of court or on judgments, except payments of costs and fees, which have not been collected by the sheriff or other officer on order of execution.

The fee of twenty-five cents for entering on the cash books costs received may be charged but once in each cause.

No commission may be charged on deposits or pre-payment of costs in divorce cases, by the clerk of common pleas court.

COLUMBUS, OHIO, February 8, 1916.

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

GENTLEMEN:—Your inquiry under date of January 28, 1916, is as follows:

"Sections 2977 and 2978 of the county salary law requires the officers therein named to tax and collect all the fees allowed by law for the benefit of their fee funds. Section 2901, General Code, contains the following provision:

"'* * * For receiving and disbursing money, other than costs and fees, paid to such clerks in pursuance of an order of court or on judgments, and which has not been collected by the sheriff or other proper officer on order of execution, to be taxed against the party charged with the payment of such money, a commission of one per centum on the first one thousand dollars, and one-fourth of one per centum on all exceeding one thousand dollars; * * *'

"Would this percentage apply to the receipts of alimony by the clerk, ordered by the court to be paid to the clerk and to be disbursed by him?

"If you hold in the affirmative, does the percentage, which the clerk would charge to the person paying the alimony in a court, be a cost which would entitle the clerk to charge the additional fee mentioned in section 2901, General Code, which reads as follows:

"'For entering on cash book costs received in each cause, twenty-five cents;' and would this apply in instances, where alimony is ordered paid in a court weekly? In other words, if you hold in the affirmative, would the commission and the entry fee have to be taxed on every payment of alimony?

"Would the commission mentioned in section 2901, General Code, as quoted above, apply to deposits required by the court to be made in divorce cases to guarantee costs, and would same also apply to attorney fees ordered paid into court by the court at any time and in any kind of a case?

"We think these questions are important because we believe that in no instance do clerks of courts tax this percentage for receiving and disbursing alimony."

Section 2900, G. C., provides in part:

> "For the services hereinafter specified, when rendered, the clerk shall charge and collect the fees provided in this and the next following section and no more."

In the next following section (2901) is found the provision first above quoted in your inquiry. The language of the provision of section 2901, G. C., quoted, when read in connection with that of section 2900, G. C., supra, is clear, specific and unequivocal to the effect that the clerk of courts shall charge and collect a commission of one per centum on the first one thousand dollars, and one-fourth of one per centum on the excess of that amount of all moneys received and disbursed by him, pursuant to an order of court or on judgments, except costs and fees and money collected by the sheriff or other proper officer on order of execution. Barring the specific exceptions, the language of the provision under consideration comprehends all money received and disbursed by the clerk in pursuance of an order of court or on judgments, so that unless payments of alimony come within such specific exceptions, they would be within the requirement of this provision for the collection of the commission prescribed.

Alimony is clearly not within the exception of fees and costs and, therefore, when not collected by the sheriff or other proper officer on order of execution, but paid pursuant to an order or on a judgment of court to the clerk in the discharge of such order or judgment for distribution by the clerk, such payments seem to come clearly within the requirement that the clerk shall charge and collect the prescribed commission, to be taxed against the party charged with the payment of such money. I am therefore of opinion that your first inquiry must be answered in the affirmative, and that it is the duty of clerks of courts to charge and collect the commission prescribed in that part of section 2901, G. C., above quoted, upon all receipts of alimony ordered by the court to be paid to such clerk and by him disbursed.

The language quoted from section 2901, G. C., in your second inquiry, is another of numerous specifically enumerated fees in which it is provided that clerks shall charge and collect.

It will be observed that the language here used is hardly susceptible of such construction as would require the collection of twenty-five cents for the entry of each payment of costs received in each cause. On the contrary, it seems quite clear that the meaning of this provision is that the clerk shall charge and collect once in each cause for entering on the cash book the costs received by him in that cause. It will therefore follow that if the commission referred to is an item of costs in the cause at all, the fee of twenty-five cents for entering on cash book costs received would be chargeable but once in each cause.

Answering your second inquiry more specifically, I am of opinion that the commission should be taxed on every payment of alimony ordered by the court to be paid to the clerk, and that the fee of twenty-five cents for entering on the cash book costs received may be charged but once in each cause.

The first part of your third and last inquiry, I assume, has reference to the pre-payment of costs in divorce cases, which is required in the provisions of section 11981, G. C., following:

> "No clerk of a court of common pleas shall receive or file a petition for divorce or alimony until the party named as plaintiff therein, or some one on his or her behalf, makes pre-payment or deposit with the clerk of such an amount as will cover the costs likely to accrue in the action, exclu-

sive of attorney fee, or gives such security for the costs as in the judgment of the clerk is satisfactory. * * *"

This pre-payment or deposit is only an advance payment of costs and fees and is, therefore, within the exception specifically made in the provision of section 2901, G. C., relative to commission on money received and disbursed by the clerk.

I am, therefore, of opinion that commission may not be charged and collected on pre-payments or deposits for costs in divorce cases. Such money is not in any sense paid pursuant to an order of court or on judgment.

As to the second part of your third inquiry, it may be said that it is hardly practicable here to lay down a rule that would cover every conceivable case without exception. In the majority of those cases in which attorneys' fees, as such, are required to be paid into court for an opposite party, such attorney fees constitute a part of the judgment proper, or are taxable as costs in the case. If such attorney fee is taxable as costs in the case, then under the exception as to fees and costs, no commission is chargeable thereon. If the attorney fees are a part of the judgment proper, then payments thereon to the clerk would be subject to the commission.

It may be observed that what are usually termed attorney fees in divorce and alimony cases are in fact a part of alimony pendente lite, and if paid to the clerk on order of the court would be subject to the commission charge the same as other payments of alimony ordered by the court to be paid to the clerk.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1250.

CANAL LANDS—SALE OF A PORTION OF SUCH LANDS IN VILLAGE OF NEWBURGH HEIGHTS, CUYAHOGA COUNTY, AND ALSO IN VILLAGE OF MILLERSPORT, FAIRFIELD COUNTY, OHIO.

COLUMBUS, OHIO, February 8, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of January 26, 1916, transmitting to me resolutions providing for the private sale of certain state canal lands in the village of Newburgh Heights, Cuyahoga county, Ohio, to The American Steel and Wire Company; and certain portions of the spoil embankment of the abandoned Ohio canal property in the village of Millersport, Fairfield county, Ohio, to the trustees of the Methodist Episcopal church of Millersport.

I note in both instances that the valuation of the land to be sold is less than five hundred dollars—the land in Newburgh Heights being valued at three hundred and fifty dollars, and the land in Millersport being valued at fifty dollars.

I also note that all the jurisdictional facts have been found by you to exist, and I have therefore attached my signature to the duplicate copies of the two resolutions providing for the sale of the lands in question, and I am herewith returning the same to you.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1251.

DISAPPROVAL OF LEASE OF CERTAIN RESERVOIR LANDS TO THE RUSSELL'S POINT AMUSEMENT COMPANY.

COLUMBUS, OHIO, February 8, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of February 4, 1916, transmitting to me for examination a lease of certain reservoir lands to The Russell's Point Amusement Company.

It does not appear, from an examination of this lease, whether the lessee is a corporation, or whether it is a partnership operating under a fictitious name. I learned, from an investigation of the records in the office of the secretary of state, that The Russell's Point Amusement Company is a domestic corporation.

I therefore suggest that there be inserted in the first clause of the lease, following the name of the lessee, a recital to the effect that said lessee is a corporation duly organized and existing under the laws of the state of Ohio. The lessee being a corporation it follows that proper evidence that the directors of the corporation authorized the making of the lease should also be required by you. The directors of the corporation, if they have not already done so, should adopt a resolution authorizing the making of the lease and instructing the president and secretary of the corporation to execute the same on behalf of the company. Triplicate copies of this resolution, properly certified, should be furnished, and one copy attached to each copy of the lease. The officers of the corporation should also attach the corporate seal, if the company has a seal.

For the reasons above stated I am returning the lease in question without my approval.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1252.

APPROVAL OF LEASES OF CERTAIN CANAL AND RESERVOIR LANDS.

COLUMBUS, OHIO, February 8, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of February 4, 1916, transmitting to me for examination the following leases of canal and reservoir lands:

	"Valuation.
"A. B. Jones, land at Indian Lake	$883.33
"Thomas E. Thorpe, embankment lot at Indian Lake	883.33
"Mrs. Margaret Byers, Logan, Ohio, abandoned Hocking canal lands at Logan, Ohio	300.00
"C. C. Sherwood, Maumee, Ohio, portion of the old abandoned side cut canal in village of Maumee, Ohio	100.00
"Anthony Toerner, Logan, Ohio, abandoned Hocking canal lands in the village of Logan	300.00"

I find these leases to be in regular form, and I am therefore returning the same to you with my approval endorsed on the triplicate copies thereof.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1253.

ROADS AND HIGHWAYS—IMPROVEMENT MADE UNDER SECTION 6956-1, G. C., NOW REPEALED—WHEN ASSESSMENT MAY BE MADE ON LAND PREVIOUSLY ASSESSED AND LYING WITHIN ONE MILE OF TERMINUS OF ROAD IMPROVED.

Where a road was improved under sections 6956-1, et seq., G. C., now repealed and the road in question connects with or intersects another road previously improved, lands lying within one mile of the terminus of the road improved under sections 6956-1, et seq., G. C., and assessed for the other road previously improved, should also be assessed for a part of the cost of the improvement made under sections 6956-1, et seq., G. C.

COLUMBUS, OHIO, February 8, 1916.

HON. JOSEPH W. HORNER, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—I have your communication of January 20, 1916, from which it appears that the improvement of that portion of the Newark-Linnville road immediately north of the National pike and intersecting or connecting with said pike was petitioned for and constructed under the provisions of sections 6956-1 to 6956-15, of the General Code, now repealed. The lands lying south of the National road and within one mile of the southern end of the Newark-Linnville road improvement referred to above have been assessed on account of the improvement of the National road. You desire to know whether any portion of the cost of improving that portion of the Newark-Linnville road referred to above should be assessed against the lands lying south of the National road and within one mile of the southern end of the Newark-Linnville road improvement, in view of the fact that such lands have already been assessed on account of the improvement of the National pike.

It should first be observed that the right to make the assessment under the repealed sections is preserved by the saving provisions of the Cass highway law. Section 6956-10, G. C., provided, among other things, that not less than twenty per cent. nor more than thirty-five per cent. of the cost and expense of an improvement constructed under section 6956-1, et seq., of the General Code, including all damages and compensation awarded, should be assessed upon and collected from the owners of real estate lying and being within one mile from either side, end or terminus of the improvement and assessed according to benefits derived from the improvement as determined by the commissioners. It was further provided that such assessment should be in addition to all other assessments authorized by law, notwithstanding any limitations upon the aggregate amount of assessments on such property.

I know of no principle of law which, in the absence of a statutory inhibition, precludes assessing real estate for a portion of the cost of a road improvement which confers benefits on the real estate in question merely because such real estate has been previously assessed for the improvement of another and different road; and it could not be said that because a particular parcel of real estate is benefited by the improvement of one road no benefit could be conferred upon it by the improvement of another and different road. Some of the old road laws of Ohio contained certain exceptions as to lands previously assessed for other roads, but the statute under which the assessment in this case is to be made expressly recognized the existence of previous assessments for other improvements, and contained no exception in favor of lands previously assessed for such improvements.

I am, therefore, of the opinion that the lands referred to by you should be assessed for a part of the cost of the improvement in question, which assessment, like all others, must be according to the benefits derived from the improvement.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1254.

BOARD OF CENSORS OF MOTION PICTURE FILMS—MEMBERS OF SUCH BOARD ARE IN UNCLASSIFIED SERVICE OF STATE CIVIL SERVICE.

The members of the board of censors of motion picture films are included in the unclassified service under the provisions of paragraph 3 of section 486-8, G. C., 106 O. L., 404.

COLUMBUS, OHIO, February 9, 1916.

The State Civil Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your letter of February 3, 1916, submitting the following inquiry:

> "Will you, therefore, kindly render us an opinion as to whether or not the members of the board of moving picture censors, under the industrial commission, are exempted from the classified service by any provision of section 486-8 of the civil service law?"

The board of censors of motion picture films was created by an act of the general assembly passed April 16, 1913, which is found in 103 O. L., page 399, et seq. Section 1 of this act, being section 871-46 of the General Code, provides as follows:

> "There is created under the authority and supervision of the industrial commission of Ohio, a board of censors of motion picture films. Upon the taking effect of this act, the industrial commission shall appoint with the approval of the governor, three persons, one for one year, one for two years and one for three years, who shall constitute such board. Upon the expiration of the term of each member so appointed a successor shall be appointed in like manner for a term of three years."

Section 486-8 of the General Code, 106 O. L., 404, to which you refer in your inquiry, provides that the civil service of the state of Ohio and the several counties, cities and city school districts thereof shall be divided into the unclassified service and the classified service. Said section further provides that the unclassified service shall comprise certain positions which shall not be included in the classified service and proceeds to specify in twelve paragraphs what positions shall be exempt from examinations required by the civil service act. Paragraph 3 of said exceptions provides as follows:

> "The members of all boards and commissions and heads of principal departments, boards and commission appointed by the governor or by and with his consent; and the members of all boards and commissions and all heads of departments appointed by the mayor, or if there be no mayor

such other similar chief appointing authority of any city or city school district. Provided, however, that nothing contained in this act shall exempt the chiefs of police departments and chiefs of fire departments of municipalities from the competitive classified service as provided in this act."

This paragraph of said section 486-8, supra, places the members of all boards and commissions appointed by the governor or by and with his consent in the unclassified service. The section first quoted requires that all members of the board of censors of motion picture films shall be appointed with the approval of the governor. In legal meaning and effect there is no perceptible difference between an appointment made by and with the consent of the governor and one made with his approval. It necessarily follows that members of said board of censors must be held to be included in the provisions of said paragraph 3 aforesaid, which exempt all members of boards appointed by and with the consent of the governor.

I therefore hold that members of the board of censors of motion picture films by virtue of said provisions of paragraph 3 of section 486-8 aforesaid, are included in the unclassified service and are therefore exempt from all examinations required by the civil service law.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1255.

STATE FIRE MARSHAL—PAYMENTS MADE FROM ITEM A-3, 106 O. L., 690, ARE NOT SUBJECT TO APPROVAL OF STATE CIVIL SERVICE COMMISSION.

The item designated as A-3 in the appropriations made for state fire marshal, 106 O. L., 690, does not include persons in the classified civil service in the regular employ of said department, and payments from the appropriation for said item are not subject to the approval of the state civil service commission.

COLUMBUS, OHIO, February 9, 1916.

HON. BERT B. BUCKLEY, *State Fire Marshal, Columbus, Ohio.*

DEAR SIR:—I have your letter of February 1, 1916, as follows:

"Referring to the appropriation for the department of state fire marshal, H. B., 701, with particular reference to the item appearing at the top of page 33, reading as follows:

"'A-3. Unclassified—

Fees, mileage and maintenance of witnesses, township clerks, special attorneys and stenographers.....$5,474.00'

"Kindly advise this department whether the state civil service commission has any jurisdiction over the expenditures from this contingent fund."

The item designated as A-3 in the appropriations made for your department, 106 O. L., 690, is not intended to include persons in the classified civil service in

the regular employ of your department. In addition to the fees and mileage of witnesses, this appropriation is intended for the payment of stenographers employed temporarily to take testimony and statements, and to furnish transcripts of same when necessary for the use of your department in the preparation and prosecution of cases in which it is interested.

As this appropriation is not intended for the payment of persons in the classified civil service in the regular employ of your department, payments which may be made therefrom are not therefore subject to the approval of the state civil service commission. Your inquiry therefore is answered in the negative.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1256.

COUNTY COMMISSIONERS—LIMITED IN CONTRACTS FOR MEDICAL AND SURGICAL TREATMENT AND HOSPITAL SERVICE TO PERSONS WHO ARE PROPER COUNTY CHARGES—LEVY AUTHORIZED BY SECTION 3138-2, G. C.—HOW CONTRACTS WITH HOSPITALS UNDER SECTION 2502, G. C., ARE LIMITED.

The authority conferred upon county commissioners by the provisions of sections 3138-1, *G. C.,* 103 *O. L.,* 67, *and* 3138-2, *G. C., is limited to making contracts with corporations, joint stock companies and associations mentioned in section* 3138-1, *G. C., for medical and surgical treatment, hospital service and attendance necessary to the proper care and maintenance of the indigent sick and disabled persons who are under the law a proper county charge.*

The payment of the contract price for such service must be made from the proceeds of the levy authorized under section 3138-2, *G. C., and is subject to the provisions of sections* 5660 *and* 5649-3*d, G. C.*

The authority conferred by the provisions of section 2502, *G. C., is limited to contracts with hospitals for reimbursement for the maintenance, support and treatment of indigent poor in such hospital.*

COLUMBUS, OHIO, February 9, 1916.

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

GENTLEMEN:—Your communication under date of January 31, 1916, is as follows:

> "We are sending you herewith copy of a letter addressed to this department by Hon. Frank J. Murray, probate judge of Madison county, and we would ask your written opinion upon the three questions propounded by Judge Murray in said letter."

The letter of Hon. Frank J. Murray, probate judge of Madison county, to which you refer, is as follows:

> "About two years ago a number of the leading citizens got together and organized what they denominated 'The Health and Welfare League.' Its purpose being to promote the health and general welfare of the community by teaching the people to be clean, to keep their surroundings sanitary, and to administer to the wants of the indigent sick and disabled.

"We work under the supervision of the state board of health.

"To do our work effectively we employed a professional nurse who was sent us by the state board of health. This nurse spends her time going from home to home of the poor people. Where she finds sickness baths are given, changes of clothing are furnished, and instructions given in what and how to cook proper food for the sick. Where there are children this nurse cleans them up, instructs the girls in cooking and sewing, and if there is any defect of vision or adenoids or bad tonsils, a report is made and necessary and proper relief furnished by the league. Likewise visits are made to the schools and examinations made of the students.

"The nurse visits all the homes of the poor people, and it is the effort of the league to bring relief to these people in their homes.

"The report of the nurse for the past year shows that she has been making about eighty to one hundred visits to such homes per month.

"No charge is made for the nurse's services, and any needed surgical operations are paid for by the league.

"This league is incorporated as a corporation not for profit, and has a membership of about one hundred members who contribute fifty cents per year dues. The rest of the money necessary to run the affair is raised by tag day collections and contributions.

"Some time ago a lady of the county died leaving twelve acres in the town of London to the county commissioners to be used by them for a hospital or for any other similar charitable purpose.

"This league thought that with the approval and aid of the commissioners it would equip one of the houses as a sort of an emergency hospital and make it the center and basis of its other health and welfare work.

"The commissioners agreed to help us in this latter undertaking, but when we investigated the property it was found to be in such run-down condition that it would not be feasible to do what we intended in the way of a hospital, so with the consent of the commissioners we have given up that plan for the present. Instead of using this property, we have rented a few rooms elsewhere in the town, which we use for headquarters, and to this place the children are brought for examination for defective vision, adenoids, etc.

"I have attempted to give you the detail information concerning our work. The commissioners have signified their willingness to give us financial aid in the work we are doing without requiring us to equip and maintain the hospital, but I, as a member of the league, have not been satisfied in my own mind that this can be legally done, and because of a difference of opinion we have agreed to submit the matter to you for instruction, realizing, as we do, that if the money is given over to us, it will be your department of inspection and supervision that will call us to time if it is improper.

"Upon the foregoing facts we would like to know:

"1. Whether, under section 3138-1 as amended in Vol. 103, page 67, the commissioners can legally give us aid to carry on our work. Our actual expense is about eleven hundred dollars per year.

"2. If we go ahead and equip an emergency hospital on the property bequeathed to the county, and there take care of the indigent sick of the county who desire to avail themselves, can the county give us financial aid?

"3. If under this last situation the county can help us, will not the aid given have to bear a reasonably close relation to expense we incur in the actual taking care of the indigent, or will the fact that we do take

care of a few of the indigent be sufficient justification for the commissioners allowing us as much money as they deem fit, of course keeping within the maximum fixed by law?"

Section 3138-1 of the General Code (103 O. L., 67), to which reference is made, and section 3138-2 of the General Code, provide as follows:

"Section 3138-1. That the board of county commissioners of any county may enter into an agreement with a corporation or association, organized for charitable purposes, or if there is no such corporation or association, then with any corporation or association organized for the purpose of maintaining and operating a hospital in any county where a hospital has been established, or may hereafter be established, for the care of the indigent sick and disabled, excepting persons afflicted with pulmonary tuberculosis, upon such terms and conditions as may be agreed upon between said commissioners, and such corporation or association, and said commissioners shall provide for the payment of the amount agreed upon, either in one payment, or installments, or so much from year to year as the parties stipulate.

"Section 3138-2. The board of commissioners may annually, at the June session, levy a tax not exceeding two-tenths of one mill upon the taxable property of said county for the purpose of providing such aid and assistance to any such corporation or association; and all taxes so levied and collected under this act shall be applied under the order of said board to the purpose for which the same are so levied and collected."

It may be first noted that with reference to agreements with corporations or associations organized for the purpose of maintaining and operating a hospital, the authority of the county commissioners may be exercised only in a "county where a hospital has been established, or may hereafter be established, for the care of the indigent sick and disabled." It appears that as yet no such hospital has been so established in the case under consideration, and that part of the section just quoted would, therefore, be without application.

I fail to find any record in the office of the secretary of state of the incorporation of "The Health and Welfare League" referred to and as stated in the above correspondence. If, however, the statement as to the incorporation should be in error, I think sufficient appears in the facts presented to fully warrant the assumption that "The Health and Welfare League" is at least an association organized for charitable purposes such as is contemplated by the terms of section 3138-1, of the General Code, supra.

Any association such as is within the contemplation of section 3138-1 of the General Code, supra, will of necessity be also within and subject to the provisions of section 6 of article VIII of the constitution, which is as follows:

"No laws shall be passed authorizing any county, city, town or township, by a vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation or association whatever; or to raise money for or to loan its credit to, or in aid of, any such company, corporation or association. * * *"

From this it clearly follows that no such construction of section 3138-1 of the General Code, supra, may be accepted as to permit the county commissioners to raise funds and appropriate the same to the mere aid or maintenance of any

corporation or association of whatever kind, however laudible its purpose or praiseworthy its accomplishments. This was very clearly pointed out in an opinion of my predecessor, Hon. Timothy S. Hogan, which is found at page 1067 of the report of the attorney-general for the year 1911.

In view of this constitutional inhibition it must be presumed, unless the language admits of no other reasonable interpretation, that the purpose in its enactment was not merely to permit the county commissioners to raise money for the aid of a corporation, joint stock company or association. One of the first duties of public authorities is, however, the care and maintenance of the indigent and helpless poor of society, and this duty has to a very considerable extent heretofore, either directly or indirectly, devolved upon the county commissioners. It would not seem unreasonable, therefore, to assume that the purpose of the enactment of sections 3138-1 and 3138-2, General Code, supra, was to enable the county commissioners to more conveniently and effectively provide for the proper and necessary medical and surgical treatment of the indigent residents of the county who are, under the law, a proper county charge. In other words, the purpose of sections 3138-1 and 3138-2 of the General Code, supra, is to authorize the county commissioners to contract with that class of corporations and associations therein defined for medical and surgical treatment, hospital service and the attendance necessary to the proper care and maintenance of the indigent sick and disabled persons who are under the law a proper county charge.

I am inclined to the view that a contract so limited in its terms and operation for the payment to such corporations or associations as come within the terms of section 3138-1 of the General Code, of a sum not in excess of the fair and reasonable value thereof, made by the commissioners with such corporation or association for medical and surgical treatment, care, maintenance and hospital service of the indigent sick and disabled persons who are a proper county charge, would not contravene the provisions of section 6 of article VIII of the constitution. That is to say: "the aid and assistance" mentioned in section 3138-2 of the General Code, must in all cases be confined to the contract price as a fair and reasonable sum for the services hereinabove defined.

The contract or agreed price to be paid for the above service is not authorized to be paid from the general county fund nor from the poor fund, but on the contrary a special levy is provided therefor. Section 3138-1 is enabling only, hence the use of the word "may" in the succeeding section. It seems quite apparent that it was the legislative intent that in event the agreement provided for in section 3138-1 of the General Code shall be entered into, then the commissioners "shall" make the levy provided for in section 3138-2 of the General Code, and that the price agreed upon shall not be paid out of any other fund than that produced by such levy.

The contract above defined would in any event be subject to the provisions of sections 5660 and 5661 of the General Code, which, in part, are as follows:

> "Sec. 5660. The commissioners of a county * * * shall not enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of money, unless the auditor or clerk thereof, respectively, first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate, and in process of collection and not appropriated for any other purpose; * * *
>
> "Sec. 5661. All contracts, agreements or obligations, and orders or resolutions entered into or passed contrary to the provisions of the next preceding section, shall be void. * * *"

Such contracts or agreements would also be subject to the further provisions of section 5649-3d of the General Code, as follows:

> "At the beginning of each fiscal half year the various boards mentioned in section 5649-3a of this act, shall make appropriations for each of the several objects for which money has to be provided, from the moneys known to be in the treasury from the collection of taxes and all other sources of revenue, and all expenditures within the following six months shall be made from and within such appropriations and balances thereof, but no appropriation shall be made for any purpose not set forth in the annual budget nor for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of receipts and balances."

Since, as it is assumed, no such levy has been made and is now in process of collection, there can be no fund now appropriated which could be certified against as provided in section 5660, of the General Code, supra.

I am, therefore, of the opinion, in answer to your first inquiry, that the county commissioners are without authority to enter into any agreement with "The Health and Welfare League" under the provisions of sections 3138-1 and 3138-2, of the General Code, on the facts submitted, and more particularly are they without authority to otherwise raise money for the aid of such association or corporation. That is to say, the authority under the sections referred to conferred upon the county commissioners is limited to that class of contracts or agreements hereinabove defined, and in the absence of such contract no "aid or assistance" may be afforded or given by the county commissioners to any corporation, joint stock company or association named or referred to in said section 3138-1 of the General Code.

In addition to sections 3138-1 and 3138-2 of the General Code, it is provided by section 2502 of the General Code as follows:

> "Except in counties containing hospitals supported by public funds, the commissioners of any county, in their discretion, may pay to a hospital organized or incorporated for purely charitable purposes, in which the indigent poor of the county may receive, free of charge, needed medical and surgical treatment, a sum not to exceed twenty-five hundred dollars each year. Such amount shall be paid from the county poor fund in equal payments on the first day of January and July, and shall be for the maintenance and support of such indigent poor and the reimbursement of such hospital for treatment thereof. Nothing herein shall authorize the payment of public funds to a sectarian institution."

This section of the General Code is also subject to the provisions of section 6 of article VIII of the constitution, if such hospital is maintained and operated by a corporation, joint stock company or association, and to that general principle of the law of taxation that public funds may not be raised for purely private use and benefit, if such hospital were established, maintained and operated by a private individual so that the operation of this section is, by force of the constitutional provision and the general principles of law referred to, limited to contracts such as are defined in the earlier part of this opinion. It will be noted that the payment of such sum as is mentioned in the earlier part of this section, is specifically limited in the concluding portion thereof to a reimbursement for maintenance, support and treatment of indigent poor in such hospital.

It will be noted further that contracts under this section may be made only with "hospitals organized or incorporated for purely charitable purposes." It could hardly be maintained that "The Health and Welfare League" is such a hospital as is contemplated by the provisions of the section, or that it has, established and in operation, such hospital as is contemplated by the terms of the statute now under consideration.

Contracts under this section would also be subject to the provisions of sections 5660 and 5649-3d of the General Code, supra, and for the same reasons as suggested in reference to contracts under the provisions of section 3138-1, could not be entered into by the county commissioners under the state of facts submitted.

In answer to your second and third questions, I am of the opinion that the county commissioners may enter into such an agreement only with "The Health and Welfare League" as is defined in the answer to the first inquiry, and therefore that further consideration of the second and third enquiries is rendered unnecessary.

Attention is called to opinion No. 893, under date of October 5, 1915, a copy of which is herewith enclosed, in which it is held that the board of education of a school district may, under authority of section 7692 of the General Code (103 O. L., 897), appoint a school physician and a trained nurse to aid in the performance of the duties of such school physician.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1257.

PROPOSED AGREEMENT BETWEEN STATE AND THE MIAMI CONSERVANCY DISTRICT, APPROVED.

A proposed agreement between the state of Ohio and the Miami conservancy district may lawfully be executed by the superintendent of public works, acting on behalf of the state, and when the same has been approved by the governor it will be valid.

COLUMBUS, OHIO, February 10, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of February 3, 1916, transmitting to me a copy of an agreement between the state of Ohio and the Miami conservancy district, relative to the temporary occupancy of certain portions of the Miami and Erie property by the conservancy district for the purpose of constructing levees and other similar works. The agreement in question has been executed by the conservancy district but has not yet been executed by you and you request my opinion as to whether or not your department has a right to enter into the contract in question.

The agreement and accompanying resolution of the directors of the Miami conservancy district, authorizing execution of the same, read as follows:

> "At a meeting of the board of directors of the Miami conservancy district held at its office in Dayton, Ohio, on Saturday, January 22, 1916, there being present Messrs. Deeds, Allen and Rentschler, upon motion of Mr. Rentschler, seconded by Mr. Allen, and upon roll call, as follows: Mr. Allen voting aye, Mr. Rentschler aye, and the President, Mr. Deeds, aye,

it was resolved that the president of the board, duly attested by the secretary, be authorized and directed to enter into an agreement with the superintendent of public works of the state of Ohio, to be approved by the proper officers of the state, reciting the necessity of the agreement with the proper preambles and specifications for the conveyance to the state of Ohio, as specified in the agreement hereinafter written, for the temporary occupation of certain canal property therein specified, and is therein fully stated, and that the president and secretary be fully authorized to carry the same into effect.

"The agreement is as follows:

"AGREEMENT.

"This agreement made and entered into this 22d day of January, 1916, and between the state of Ohio, through its authorized agent, the superintendent of public works, and duly approved by the governor, both officers of the state of Ohio acting for and on behalf of said state pursuant to law, party of the first part, and the Miami conservancy district, a political subdivision of the state of Ohio, a corporation duly established under the conservancy law of Ohio by the court of common pleas of Montgomery county, Ohio, in case No. 36847, June 28, 1915, and duly filed with the secretary of state of Ohio and recorded June 30, 1915, which district was established for the purpose of protecting not only farm lands and public roads in the valley of the Great Miami river from devastating floods, but also the municipalities of Piqua, Troy, Tippecanoe City, Dayton, Miamisburg, Franklin, Middletown, Hamilton and others and which extends from the Loramie reservoir in Shelby county on the north following the Great Miami river and its tributaries down through Hamilton county, party of the second part, Witnesseth:

"Whereas, it becomes necessary in the official plan for flood protection of said district that certain canal lands of the Miami and Erie canal be temporarily occupied; and,

"Whereas, the said officers of the state of Ohio in the performance of their duties desire to protect the ownership of the state in its public works and if possible increase the value of the same by acquiring additional lands and privileges for the improvement of canal lands for a ship canal, which the state may hereafter determine to construct, without any additional cost or expense to the state; and,

"Whereas, the canal property to be temporarily occupied, provided for herein, has not been navigated for many years and is not navigable by reason of the destruction of its banks, locks and works by floods and other causes; and,

"Whereas, the official plan of the party of the second part will require certain temporary flood gates, as hereinafter specified, for the protection of said district from floods; and,

"Whereas, by its power under the law and upon the approval of the official plan, the party of the second part is willing and agrees to compensate the state of Ohio for its privileges herein, and should the state of Ohio determine at some future time to improve or enlarge its present canal system or construct a barge canal, the conservancy district agrees that, at all places where the canal lands are occupied by the constructions or works of the district or where such lands may be within the possible flood line of

the water within the reservoirs, it will furnish the state of Ohio a right-of-way of the same width and cross section as that now occupied by said canal, which right-of-way shall be protected from floods by the district without expense to the state, or if said right-of-way and flood protection is not furnished the state within a reasonable time to be named by the proper state authority, the district agrees to pay in cash the amount of money required therefor by the state; and,

"Whereas, it is specifically agreed by the said district that so long as any part of the public works of Ohio remains within the territory which would be flooded by reason of the construction or operation of any part of the works or devices of the Miami conservancy district, as shown by its official plan, it will repair the same without expense to the state for any damage done to the public works of Ohio on demand of the superintendent of public works, or his successor; and,

"Whereas, it is specifically agreed that the state of Ohio shall not by reason of this agreement lose title to or alienate any of its property or any of its rights to the canal, and that the arrangement outlined in this agreement is a temporary one to hold only until such time as navigation is resumed or the state determines upon a policy as to its canal lands; and,

"Whereas, the word 'temporary' as used herein does not signify that the works or plans of the Miami conservancy district are temporary, but indicates that as against the state the works of the district contained in the several items below enumerated are temporary, and that other plans consistent with the protection of the said district will be inaugurated by the district in lieu thereof in order to carry out its flood protection plans, and that such changes will not be a burdensome expense, and that such new plans cannot be perfected until the plans of navigation or other plans have been made definite by the state; and,

"Whereas, under section 15 of the conservancy law of Ohio under the general powers therein defined, the party of the second part is authorized and empowered to construct any and all of the works and improvements of said district across, through or over any public highway or canal, in or out of said district, and to remove or change the location of any canal or other improvement in or out of said district, and the right to sell real or personal property or any easement, riparian right, right-of-way or canal, for any necessary purposes; and,

"Whereas, it is further agreed that such works as are hereinafter described under the several items will not be constructed until plans for such construction have been submitted by the party of the second part to the superintendent of public works and have been approved by him. This, however, shall not apply to item 7 so as to require the said superintendent of public works to approve the plans and construction of the proposed dam, but the plans for the construction of a canal across said dam shall be submitted by the proper authorities to the said party of the second part for its approval; and,

"Whereas, all of said plans are subject to the approval of said court of common pleas in the adoption of said official plan of said the Miami conservancy district according to law.

"Now, therefore, It is agreed that the particular points where the canal property will be affected by the works of the district and the particular arrangement to be entered into are outlined in detail, as follows:

"*Item* 1. At a point about one and one-quarter miles north of the village of Lockington, where it is necessary to construct a road across the

canal, the conservancy district agrees to construct, at its own expense, a lift bridge equal in character to those heretofore built and of sufficient dimensions to care for traffic and span the canal. However, as such a bridge probably would deteriorate before the canal again comes into operation, it is agreed that the construction of such bridge shall be postponed until the canal is in operation, and that until such time, a road crossing may be built across the canal by means of a fill through which shall be placed a pipe of sufficient dimensions to carry the water flowing in the canal, the exact size of said pipe to be determined and approved by the superintendent of public works. This fill shall be similar in character to the one now crossing the canal a short distance south of the point indicated.

"*Item* 2. At a point about three-quarters of a mile north of the village of Lockington, where it is necessary to construct a road crossing over the canal, it is agreed that an exactly similar course shall be taken, as in the above mentioned case, and that the exact size of such pipe shall be determined and approved by the superintendent of public works.

"*Item* 3. Between these two crossings, it is agreed to allow the construction of a highway within the canal right-of-way and immediately adjoining the canal, this highway to be removed, whenever, due to resuming navigation in the canal, such removal shall, in the opinion of the superintendent of public works, or his successor, be desirable.

"*Item* 4. It is agreed that at a point just north of the city of Troy, where a ditch now crosses under the canal, a levee shall be built across the canal, immediately south of such ditch, with sufficient opening to allow water now flowing in the canal to pass, said opening to be fitted with gates which may be closed during floods, the size of said gates to be determined and approved by the superintendent of public works, when the water otherwise would flow into the city of Troy. It is further agreed that such levee will be removed whenever, as a result of the resumption of navigation, such removal shall, in the opinion of the superintendent of public works, or his successor, be desirable.

"*Item* 5. It is agreed that a levee may be constructed on the east side of the canal, within the canal right-of-way, extending from the above mentioned point southerly to high ground within the limits of the city of Troy of such height as may be necessary to prevent flood waters from the Miami river crossing the canal and flowing into the city of Troy, it being further agreed that such levee shall be removed whenever, with the resumption of navigation, the superintendent of public works, or his successor, shall indicate such removal to be necessary or desirable.

"*Item* 6. It is agreed that at Tippecanoe City a levee may be constructed along the canal, for all or a part of the distance from the crossing of the east and west road just north of the city, southerly to the southerly corporation limits of Tippecanoe City, such levee may be wholly or partly within the canal right-of-way, and may, if necessary, cross from one side to the other of the right-of-way. In the bottom of this levee, where it follows within the canal right-of-way, a 24-inch pipe shall be placed to furnish water to all persons now receiving water, through this reach of the canal, under lease from the state, the size of said pipe to be approved and determined by the superintendent of public works. It is further agreed that whenever navigation is resumed in this section of the canal, the Miami conservancy district will remove such levee, rebuilding it to the same elevation, at a sufficient distance to the east, to protect fully the Miami and Erie canal through this section. It is further agreed that if

the state of Ohio determines at some future time to improve or enlarge its present canal system or construct a barge canal through Tippecanoe City, the Miami conservancy district will, prior to building the levee as above outlined, subject to the approval of the conservancy court, provide the state with a right-of-way to the width and cross section of the present canal property directly east of the present right-of-way of said canal throughout said entire distance, except for such land as may now be occupied by the power plant of the water supply and lighting plant of Tippecanoe City.

"Item 7. It is further agreed that the state shall have a right to construct a canal on the side of the dam which is to be built across the Miami river about six miles below Tippecanoe City, whenever the state of Ohio shall determine to improve or enlarge or construct a new canal, and the said district agrees that the state shall have the right-of-way across said dam for its canal of the same width and cross section as the present canal, and if any enlargement of said Taylorsville dam shall be required to accommodate said canal, it shall be done at the expense of the said conservancy district and not at the expense of the state of Ohio. It is further agreed that until navigation is resumed in the canal, at the point where the outlet works of the dam across the canal right-of-way, the Miami conservancy district may build a concrete weir and may occupy the present location of the canal, on the condition that whenever navigation is resumed, in case the state shall not avail itself of the right to cross the river valley on the dam, the Miami conservancy district will remove such part of said concrete weir as may be necessary, will replace it with a gate, and will replace the cross section of the canal.

"Item 8. It is agreed that the conservancy district may, at its own expense, renew and strengthen the canal gates and appurtenances above Findlay street, in the city of Dayton, so as to make the city secure against flood waters entering through the canal, the size of said gates to be determined and approved by the superintendent of public works.

"Item 9. It is agreed that the Miami conservancy district may construct sluice gates and openings at points on the Miami and Erie canal in the city of Miamisburg, in order to prevent the overflow of the city by water flowing through the canal, as follows:

"Near the north line of the city, three 4 x 5-foot sluice gates; north of Sycamore creek, one 4 x 5-foot sluice gate, and south of Sycamore creek one 4 x 5-foot opening.

"It is agreed that all these structures shall be removed, when, with the resumption of navigation, the superintendent of public works, or his successor, shall indicate that their removal is desirable.

"Item 10. It is agreed that the Miami conservancy district may construct near Mound street, in Miamisburg, an emergency outlet for storm water from the Mound street storm sewer into the canal, to afford protection to the city against flooding from the hillside water. Said outlet shall be removed by the Miami conservancy district at its expense at any time that the navigation of the canal is resumed by the state, if, in the judgment of the superintendent of public works, such removal is necessary to the proper use of the canal. The said conservancy district agrees to remove from the canal without expense to the state any deposits left thereby reason of the construction or operation of said storm water sewer and to repair all damages to the canal caused by the construction or operation of said sewer.

"*Item* 11. It is agreed that the Miami conservancy district may, at its own expense and cost, raise the banks of the canal through the southern part of the city of Miamisburg to such an extent that flood water will not flow out of the canal into the city, such fill to be removed whenever, in the opinion of the superintendent of public works, such removal may be necessary to provide for navigation.

"*Item* 12. It is agreed that at Middletown a levee may be carried across the canal to prevent flood water from entering the city through the canal, this levee to be provided with three 5 x 6-foot sluice gates, these sluice gates to be left open at all times, except during flood, provided the Miami conservancy district shall remove these gates at any time when, in the opinion of the superintendent of public works, their removal may be necessary in order to provide for navigation. The size of said gates shall be determined and approved by the superintendent of public works.

"*Item* 13. It is agreed that a levee may be constructed on the east bank of the canal, extending from the proposed gates at Middletown above mentioned, northerly to about 500 feet above the Poast Town road of such height as may be necessary to prevent flood waters from the Miami river crossing the canal and flowing into the city of Middletown, it being further agreed that such levee shall be removed, whenever with the resumption of navigation, the superintendent of public works, or his successor, shall indicate such removal to be necessary or desirable.

"*Item* 14. It is agreed that a levee may be constructed on the bank of the canal, extending from the levee crossing at the southerly end of the city of Middletown, northerly to the canal locks near Eighth street to such height as may be necessary or desirable. Such levee shall be removed by the Miami conservancy district at its expense at any time that the navigation of the canal is resumed by the state, if, in the opinion of the superintendent of public works, such removal is necessary to the proper use of the canal.

"*Item* 15. It is agreed that the Miami conservancy district may construct two 5 x 5-foot sluice gates at the levee crossing of the canal opposite Gill street in the city of Piqua, in order to prevent the overflowing of the city by water flowing through the canal during floods, the size of said gates to be determined and approved by the superintendent of public works.

"It is agreed that these structures shall be removed when, with the resumption of navigation, the superintendent of public works shall indicate that their removal is desirable.

"*Item* 16. It is agreed that the plans and specifications for all pipes, valves, gates, sewers and other devices located on or over the state canal property shall be approved by the superintendent of public works of Ohio prior to the commencement of work thereon, and the sizes mentioned in this contract shall be subject to such changes and modifications as the superintendent of public works may deem necessary. This, however, shall not apply to the Taylorsville dam or appurtenances.

"*Item* 17. It is agreed that the Miami conservancy district shall indemnify the state of Ohio for any loss or damage that may result from any interference on the part of the Miami conservancy district with the rights of any lessees of the state of Ohio on any lease now in existence.

"This agreement signed in quadruplicate the day and year first above written.

"Witnesses as to signatures of
the party of the first part:

"Superintendent of Public Works.
"PARTY OF THE FIRST PART.

"Witnesses as to signatures of
the party of the second part:
"O. N. FLOYD,
"MARC H. BRIDGE.

THE MIAMI CONSERVANCY DISTRICT,
By E. A. DEEDS, *President.*

"Approved ---- 1916.

"Attest: EZRA M. KUHNS, *Secretary.*
"PARTY OF THE SECOND PART.
(Seal)

"I, Ezra M. Kuhns, secretary of the Miami conservancy district, in charge of the records and minutes of the board of directors of said district, do hereby certify, that the foregoing resolution together with the agreement thereto attached is a true copy thereof taken from the minutes of the proceedings of said board of directors of the Miami conservancy district.

"In witness whereof, I have hereunto affixed my name and the seal of said district this 22d day of January, 1916.

"EZRA M. KUHNS,
(Seal) *"Secretary, The Miami Conservancy District."*

* * * *

Section 15 of the conservancy law, being section 6828-15, G. C., 104 O. L., 20, authorizes the board of directors of a conservancy district to construct any and all of its works and improvements across, through and over any canal and to remove or change the location of any canal. By the same section the board of directors of a conservancy district is authorized to purchase and sell real property, easements and riparian rights. It would not be argued, of course, that this section would authorize the board of directors of a conservancy district to construct its works across the canals of the state or to change the location of such canals unless the consent of the state be first secured. The conservancy act does not provide any method by which such consent may be secured, but in so far as the facts of this particular case are concerned, it would seem clear that ample authority in the premises is conferred upon the superintendent of public works by section 412, G. C., 103 O. L., 120, which provides that the superintendent of public works shall have the care and control of the public works of the state and shall make such alterations or changes thereof and construct such devices or improvements as he may deem proper in the discharge of his duties and may, subject to the approval of the governor, purchase on behalf of the state such real or personal property rights or privileges as it may be necessary in his judgment to acquire in the maintenance of the public works or their improvement, subject to the approval of the governor.

The agreement submitted by you does not involve the alienation by the state of its title to or right in any canal land. It cannot be said that the state is leasing or selling any of its canal property, but the agreement does involve the acquiring by the state of real property and easements, and in view of the provisions of section 412, G. C.,such agreement may therefore be consummated only with the approval of the governor.

There is no doubt that under section 412, G. C., the superintendent of public works, if he had an appropriation available therefor, would be authorized to con-

struct on the canal property of the state many, if not all, of the works which the conservancy district proposes to construct. These works are designed in the main to protect adjoining property from damage from flood waters which find their way into the canal. Damage of this sort has always been made the basis of claims against the state, and the legislature has been often asked in the past to appropriate money for the payment of such claims. It requires no forced construction, therefore, to conclude that the superintendent of public works would, under section 412, G. C., if appropriations were available therefor, be authorized to construct along and across the canals of the state dams and other works calculated to protect the adjoining property from flood waters, provided these dams did not interfere with navigation. Navigation has been abandoned in the canal property affected by the agreement now under consideration, and the gist of the proposed agreement is that the superintendent of public works grant permission to the conservancy district to construct dams and other works on the canal property, which works cannot interfere with navigation for the reason that there is no navigation on this part of the canal. These works are to be so constructed as to care for the rights of persons who are buying water from the state, and the conservancy district agrees to remove the works at any time that their removal is necessary or desired in the judgment of the superintendent of public works, on account of the resumption of navigation in that part of the canal affected. In other words, the superintendent of public works grants to the conservancy district authority to do certain things which he might do if he had the necessary appropriations available. In exchange for these privileges, the state acquires certain real estate and easements, and in so far as the agreement involves the acquisition of real estate and easements, the approval of the governor is, as has already been pointed out, required.

I am therefore of the opinion, and advise you, that you may lawfully execute an agreement of this character, and that when the same has been approvel by the governor, it will be valid.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1258.

WHEN JUVENILE COURT *MAY* COMMIT A DELINQUENT MALE CHILD TO OHIO STATE REFORMATORY—CHILD SIXTEEN YEARS OF AGE *AT TIME OF HEARING.*

Under section 1652, *G. C.,* 103 *O. L.,* 871, *a juvenile court may commit a delinquent male child, who is delinquent because of having committed a felony, and who at the time of the hearing is sixteen years of age or over, to the Ohio State Reformatory, even though such child was not yet sixteen years of age at the time of committing such felony.*

COLUMBUS, OHIO, February 10, 1916.

HON. C. P. KENNEDY, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—The letter of Mr. J. C. Musser, assistant prosecuting attorney, under date of February 3, 1916, asking my opinion, received and is as follows:

> "On December 23, 1915, Joseph Frame was bound over to the grand jury of this county by the police judge of the city of Akron. At that time it appeared that Frame was seventeen years of age. Some time later

it was learned through Frame's parents that at the date of his hearing in the Akron police court he was but fifteen years of age, and that he would not attain his sixteenth year until January 25, 1916.

"The result was that yesterday, February 2, an affidavit was filed in the probate court, charging the said Joseph Frame with being a delinquent male child. Frame was found guilty by the court, but was not sentenced. I recommended to the probate judge that Frame be committed to the Ohio State Reformatory. Probate Judge Lytle was of the opinion that this boy be committed to that institution, but doubted his power to so commit him, owing to the construction which he, Judge Lytle, placed on the last sentence of section 1652 of the General Code, as amended in 103 O. L., page 872.

"Judge Lytle was of the opinion that Frame, being but fifteen on the day the felony was committed,and arriving at the age of sixteen years between the date of his arrest and the date of his hearing, the said Joseph Frame could not be committed to the Ohio State Reformatory.

"I personally, am of the opinion that section 1652, G. C., should be interpreted to mean that the delinquent child's age at the date of his hearing is the determining factor. However, the judge has requested me to write you for your opinion upon this section of the code, which I am accordingly doing."

Section 1644 of the General Code, 106 O. L., 458, provides in part as follows:

"For the purpose of this chapter, the words 'delinquent child' includes any child under eighteen years of age who violates a law of this state. * * * A child committing any of the acts herein mentioned shall be deemed a juvenile delinquent person, and be proceeded against in the manner hereinafter provided."

Section 1652, G. C., 103 O. L., 871, provides in part as follows:

"Where it appears at the hearing of a male delinquent child, that he is 16 years of age, or over, and has committed a felony, the juvenile court may commit such child to the Ohio State Reformatory."

Section 2084 of the General Code, 103 O. L., 879, provides as follows:

"Male youth, not over eighteen nor under ten years of age, may be committed to the boys' industrial school in the manner provided by law on conviction of an offense against the laws of the state."

Section 2131, G. C., 103 O. L., 885, provides as follows:

"The superintendent shall receive all male criminals between the ages of sixteen and thirty years sentenced to the reformatory. * * *"

At the outset it should be observed that a boy under eighteen years of age who commits an act which constitutes a felony, and who is tried before the juvenile court, is not tried for the felony, but such act gives to the juvenile court jurisdiction to sentence him to the proper institution as a delinquent child.

It is apparent from the foregoing provisions that it was the intention of the legislature to make it possible for all delinquent boys to be committed to the boys' industrial school, but to lodge in the courts the discretion to commit a delinquent

boy to the Ohio State Reformatory where the delinquency was due to the committing of a felony, and the boy has reached the age at which he may be received at that institution.

I am therefore of the opinion that the language of section 1652, G. C., supra, should be given its natural and apparent meaning, which is that if it appears upon the hearing of a delinquent male child that his delinquency is due to his having committed a felony, and he is *at the time of the hearing* sixteen years of age or over, he may be committed to the Ohio State Reformatory. It follows from the foregoing that your juvenile court is authorized to commit the boy in question to the Ohio State Reformatory, and that institution is authorized to receive him.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1259.

SHERIFF—CONVEYING MORE THAN ONE PRISONER TO WORKHOUSE AT SAME TIME—MILEAGE MAY BE CHARGED ONLY ONCE—CANNOT CHARGE ON EACH WRIT.

When conveying more than one prisoner to a workhouse at the same time, the sheriff is only authorized to charge the mileage as fixed in section 12385, *G. C., once; he is not authorized to charge such mileage on each writ.*

COLUMBUS, OHIO, February 10, 1916.

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

GENTLEMEN:—Under date of January 24th you submit for my opinion the following inquiry:

> "We desire to call your attention to an opinion of Attorney-General Timothy S. Hogan, approving an opinion of Hon. Wade H. Ellis, attorney-general, to be found in the annual report of attorney-general, 1913, Vol. 1, page 379, holding that officers serving writs are entitled to mileage for the actual number of miles traveled in serving each writ.
>
> "We desire your opinion as to whether this could be applied to the mileage of an officer conveying more than one prisoner to a workhouse at the same time, in view of the language of section 12385, General Code. Does the clause in said section, 'To be allowed as in penitentiary cases,' have reference to the number of guards that may be employed by the officer, as provided in section 13725, General Code; or does it refer to the manner and method of allowance and payment for transportation?"

I have examined the opinion rendered by Mr. Hogan, referred to by you in your letter, and find that the same was rendered to your bureau under date of October 8, 1913. The inquiry as submitted in that opinion was as follows:

> "May a sheriff serve two writs such as subpoenas, summonses, *writs of conveyance to workhouse,* either in civil or criminal cases, on the same trip and charge mileage upon each of such writs?
>
> "If you hold that mileage is limited to the distance actually traveled, how should it be taxed?"
>
> "May it be apportioned to the several writs in taxing costs?"

In that opinion reference was made to an opinion rendered by Hon. Wade H. Ellis, as attorney-general, on February 2, 1905, and found reported in the report of the attorney-general for 1905, at page 51. The opinion of Attorney-General Ellis was relative to the construction of section 1230-b, R. S., respecting the right of the sheriff of Champaign county to charge mileage on each of two writs served on William Wooley in the Ohio State Reformatory at Mansfield, when both writs were served at the same time.

Attorney-General Hogan in his opinion calls attention to that part of section 2845, G. C., which provides as follows:

> "In addition for the fee for service and return the sheriff shall be authorized to charge on each summons, writ, order or notice, *except as otherwise specifically provided by law,* a fee of eight cents per mile going and returning, provided, that where more than one person is named in such writ, mileage shall be charged for the shortest distance necessary to be traveled."

and then states the law to be that the rule laid down by Mr. Ellis should be followed until otherwise provided by law. The rule laid down by Mr. Ellis was stated to be that the statutory mileage could be allowed on both writs referred to in the inquiry.

Mr. Hogan was undoubtedly endeavoring to answer the question submitted to him generally, and did not take cognizance of the provisions of section 12385, G. C., which provides as follows:

> "The sheriff, or other officer, transporting a person to such workhouse shall have the following fees therefor: six cents per mile for himself, going and returning, and five cents per mile for transporting each convict, and five cents per mile going and coming for the services of each guard, to be allowed as in penitentiary cases, the number of mile to be computed by the usual routes of travel, to be paid in state cases out of the general revenue fund of the county on the allowance of the county commissioners, and, in cases for the violation of the ordinances of a municipality, by such municipality on the order of the council thereof."

From a reading of the above section it is plainly to be seen that the sheriff of a county having no workhouse transporting more than one person to a workhouse provided for by the county commissioners is entitled himself to six cents a mile going and returning, and to five cents a mile for transporting *each convict,* and for the services of each guard five cents per mile going and coming.

In view of the language of section 12385, supra, I am of the opinion that the opinion rendered by Mr. Hogan, as found in Vol. 1 of the 1913 reports of the attorney-general, at page 379, is not to apply to the conveyance of more than one person to a workhouse by the sheriff of a county in which there is no workhouse.

You further ask whether the clause in said section 12385, supra, "To be allowed as in penitentiary cases," has reference to the number of guards that may be employed to help convey the convicts to the workhouse, or does it refer to the manner and method of allowance and payment for transportation. You refer to section 13725, G. C., which section provides as follows:

> "In transporting convicts to the penitentiary, the sheriff may employ one guard for every two convicts transported; but the court may authorize a larger number, in which case a transcript of the order of such court shall be certified by the clerk thereof, under the seal thereof, and the

sheriff shall deliver it to the warden of the penitentiary with such convict. The sheriff shall receive eight cents per mile for mileage, five cents per mile for transporting each convict, and six cents per mile for the service of each guard, the number of miles to be computed by the usual route of travel."

Section 12385 as originally enacted on March 19, 1883, 80 O. L., 220, provided that the sheriff or other officer transporting any person to such workhouse should have the same fees as allowed by law for transporting prisoners to the penitentiary. The fee allowed by law for the transportation of prisoners to the penitentiary was eight cents a mile for the sheriff, five cents per mile for transporting each convict, and six cents per mile for each guard; the number of guards to be employed to first receive the authority of the court, provided there was more than one guard for every two convicts transported.

In 81 O. L., 84, the compensation of the sheriff was changed as appears in section 12385, G. C., supra. Section 12385 specifically states the compensation which is to be received by the sheriff, and also the allowance to him for the service of each guard, but does not undertake to specify the number of guards that the sheriff might employ, whereas section 13725, relative to the transportation of convicts to the penitentiary does specify that the sheriff may employ one guard for every two convicts transported, but upon authority of court a larger number might be employed. While I would not state that the language "to be allowed as in penitentiary cases" has reference solely to the number of guards that may be employed, since under the provisions of section 13726 it is provided that:

"The warden of the penitentiary shall allow so much of the cost-bill and charges for transportation as is correct," and certify

and since under the provisions of section 12385 the county commissioners are to allow the bill, nevertheless for all practical purposes the language "to be allowed as in penitentiary cases," might be deemed to refer solely to the number of guards that may be employed. Under the provisions of section 12385 the amount paid is to be paid on the allowance of the county commissioners in state cases, and in cases of violation of ordinances on the order of the council of the municipality.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1260.

MUNICIPAL CORPORATION—COUNCIL DETERMINES WHO SHALL LET CONTRACTS FOR PRINTING OF MUNICIPAL BONDS.

The municipal council is the proper authority to determine who shall let contracts for the printing of municipal bonds, contracts and other instruments in writing in which the municipality is concerned, unless otherwise specifically provided by the General Code.

COLUMBUS, OHIO, February 10, 1916.

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

GENTLEMEN:—I am in receipt of your letter of February 2, in which you request my opinion as follows:

"We enclose herewith brief submitted by Hon. Fred L. Carhart, city solicitor of Marion, Ohio, and we would respectfully request your written opinion upon the following questions:

"Who is the proper municipal authority in cities to make contract for printing of municipal bonds? Has council the authority within itself, or may it delegate such authority to some other official, or is the authority lodged in the city solicitor?

"An early reply will be appreciated."

The brief of Mr. Carhart, referred to and enclosed in your letter, is in support of his claim that the authority to make contracts for the printing of municipal bonds is, in cities, lodged in the city solicitor. This claim is based entirely upon the language of section 4305 of the General Code, which is as follows:

"The solicitor shall prepare all contracts, bonds and other instruments in writing in which the city is concerned, and shall serve the several directors and officers mentioned in this title as legal counsel and attorney."

A reasonable and sensible construction of the language used in the above section must lead to the conclusion that the word "prepare" was intended to apply to the form, phraseology and contents of such contracts, bonds and other instruments in writing, and not to require the solicitor to reproduce by printing or otherwise the many required copies. To adopt the literal construction of the language of section 4375, urged in the brief submitted, would result in the conclusion that the manual preparation of all the numerous copies of contracts, bonds and other instruments in writing in which the city is concerned, is the statutory duty of the city solicitor, and this would lead to the further conclusion that if council failed to make an appropriation to pay the expense of typewriting or printing the necessary blank contracts, bonds and other instruments, the city solicitor would himself be obliged to write or print them, or pay the expense of such writing or printing from his own pocket.

There is no section of the General Code which definitely provides who shall make contracts for the printing of municipal bonds, contracts, etc. It follows, therefore, that the authority to authorize the making of such contracts rests in the council, which may make provision therefor either by general ordinance or by special act in each instance.

In the case of McCormick v. City, 81 O. S., 246, wherein was considered the question of who was by law authorized to let contracts for the publication of municipal ordinances, the court, in the second branch of the syllabus, uses the following language:

"Where the statute has not prescribed the person who shall execute such contracts in behalf of a municipal corporation, it is consistent with section 1536-653, R. S., for the council, by ordinance or resolution, to authorize the clerk thereof to execute such contract according to the directions of the council."

At page 254 of the opinion in the above case, the court say:

"It would seem that council may authorize, by resolution or ordinance, the board or department of public service to contract for the public printing, and we see no valid objection to giving the clerk of council authority

to make such contracts. The council appears to be the source of authority to contract, and it is the authority to make the necessary appropriations."

I, therefore, advise you that the authority in municipalities to determine who shall let contracts for printing of municipal bonds, contracts and other instruments in writing, in which the city is concerned, unless otherwise specifically provided by the General Code, is lodged in the municipal council, which may make provision therefor either by general ordinance or by special actions as occasion arises.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1261.

INTERPRETATION OF SECTION 5785, G. C., AS TO WHAT IS NOT "MISBRANDING" UNDER STATUTE—WHEN PRODUCT CONTAINS SUBSTANTIAL PROPORTION OF EACH OF SAID INGREDIENTS ON LABEL—WHAT CONSTITUTES SUBSTANTIAL PROPORTION OF ANY INGREDIENT—TOWLE'S LOG CABIN SYRUP.

Failure to place on the label under which a food product which is a mixture or compound is sold or offered for sale, the statement that same is a mixture or compound and the percentages of the ingredients thereof, as provided in section 5785, G. C., is not a violation of the laws which provide a penalty for "misbranding," provided such product contains a substantial proportion of each of said ingredients.

What is a substantial proportion of any ingredient mentioned on the label is under the statute a question of fact to be determined in each case. The law does not prescribe a definite standard by which the same may be determined.

COLUMBUS, OHIO, February 12, 1916.

The Board of Agriculture, Dairy and Food Division, Columbus, Ohio.

GENTLEMEN:—Your letter of January 27, 1916, asking my opinion received, and is as follows:

"Referring to opinion No. 1044 rendered by you to the board of agriculture dairy and food department, under date of November 26, 1915, with reference to proper labels for syrups, an additional question has been raised upon which we desire your opinion.

"Enclosed you will find a label which is being used by The Towle Maple Products Company, of St. Paul, Minnesota, and which is similar to labels being used by a number of manufacturers of syrup.

"The question we desire to ask is—does the label submitted herewith, or a label similar thereto, constitute a violation of any of the laws of the state of Ohio?"

The label referred to therein is as follows:

"One gallon net *Absolutely pure*

TOWLE'S
LOG CABIN
SYRUP
MADE OF
PURE CANE SUGAR AND MAPLE SUGAR
THE TOWLE MAPLE PRODUCTS CO.,
ST. PAUL, MINN. ST. JOHNSBURY, VT."

Opinion No. 1044 of this department, referred to by you, construes sections 12763, 12764, 12765 and section 5785, G. C., and I understand from statements of your Mr. Calvert and from briefs submitted with your letter, that your present question is directed particularly to section 5785, G. C., which provides as follows:

"Section 5785. Food, drink, flavoring extracts, confectionery or condiment shall be misbranded within the meaning of this chapter:

"1. If the package fails to bear a statement on the label of the quantity or proportion of morphine, opium, cocaine, heroine, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of such substances contained therein; (2) if it is labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so; (3) if in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package; (4) in case of a flavoring extract, for which no standard exists, if it is not labeled "artificial" or "imitation," and the formula printed in the manner hereinafter provided for the labeling of "compounds" or "mixtures" and their formulae; (5) if the package containing it or a label thereon bears a statement, design or device regarding it or the ingredients or substances contained therein, which is false or misleading in any particular; provided, that this section shall not apply to mixtures or compounds recognized as ordinary articles or ingredients of articles of food or drink, if each package sold or offered for sale is distinctly labeled in words of the English language as mixtures or compounds with the name and percentage, in terms of one hundred per cent. of each ingredient therein. The word "compound" or "mixture" shall be printed in letters and figures not smaller in height or width than one-half the largest letter upon any label on the package, and the formula shall be printed in letters and figures not smaller in height or width than one-fourth the largest letter upon any label on the package, and such compound or mixture must not contain an ingredient that is poisonous or injurious to health."

I also understand that no question is here raised as to subdivisions 1, 3 and 4 of the foregoing section, but that you are interested in the proper interpretation of the proviso thereof, and its relation to subdivisions 2 and 5.

Section 5785, supra, is a definition of "misbranding," the penalty for which is fixed by section 12758, G. C., which provides as follows:

"Section 12758. Whoever manufactures for sale, offers for sale or sells a drug, article of food, or flavoring extract which is adulterated or misbranded as the terms 'drugs,' 'food,' 'flavoring extract,' 'adulterated' and 'misbranded' are defined and described by law, or manufactures, offers or exposes for sale or delivers a drug or article of food and fails, upon

demand and tender of its value, to furnish a sample thereof for analysis, shall be fined not less than twenty-five dollars nor more than one hundred dollars, and for each subsequent offense, shall be fined not less than one hundred dollars nor more than two hundred dollars or imprisonment in the county jail not less than thirty days nor more than one hundred days, or both."

The proviso in section 5785, G. C., cannot be said to impose any imperative duty upon any one as to the manner in which merchandise sold or offered for sale shall be labeled, but its effect is to exclude from the operation of section 12758, G. C., supra, "mixtures or compounds recognized as ordinary articles or ingredients of articles of food or drink," which, if sold without being labeled as prescribed therein, would come within the definition of "misbranding," and thereby subject dealers therein to the penalty provided in said section 12758, G. C.

The label submitted by you and quoted above does not purport to comply with the provisions of the proviso, but this fact alone does not make the use thereof a violation of section 12758, supra, but it must be further determined whether an article so labeled comes within the definition of "misbranding" as laid down in said section 5785, G. C. Subdivision 2 of said section provides as follows:

"If it is labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so;"

Subdivision 5 provides as follows:

"If the package containing it or a label thereon bears a statement, design or device regarding it or the ingredients or substances contained therein, which is false or misleading in any particular;"

In the absence of a statutory standard or a definite interpretation by the courts it is, of course, impossible to lay down any hard and fast rule as to the proportions of ingredients which a product sold under a label such as that submitted by you and quoted herein should contain in order to avoid a violation of the foregoing provisions of law.

I submit, however, for your consideration a ruling of the United States department of agriculture, issued under date of July 5, 1907, in which that department places its interpretation on similar provisions of the national food and drug act of June 30, 1906, as follows:

"The director of the agricultural experiment station at Orno, Maine, in a recent letter made the following statement:

"'There are in Maine many sirups which are labeled something like this:

"'"A Fancy Quality Sirup Made from Pure Maple and White Sugar." Many of these sirups carry but little maple, one company saying that in a sirup analogous to this they put 90 per cent. of cane sugar and 10 per cent. of maple.'

"When both maple and cane sugars are used in the production of sirup the label should be varied according to the relative proportion of the ingredients. The name of the sugar present in excess of 50 per cent. of the total sugar content should be given the greater prominence on the label, that is, it should be given first. For example, a sirup the sugars of which consist of 51 per cent. cane sugar and 49 per cent. maple sugar

would be properly branded as 'Sirup Made from Cane and Maple Sugar,' or as 'Cane and Maple Sirup.' The terms 'maple sugar' and 'maple sirup' may only be used on the label as part of the name when those substances are present in substantial quantities as ingredients. They should not appear on the label as part of the name when only a small quantity of those substances is used to give a maple flavor to the product. A cane sirup containing only enough maple sirup or maple sugar to give a maple flavor is properly labeled as 'Cane Sirup, Maple Flavor,' or 'Cane Sirup Flavored with Maple.'

"Whenever it is necessary to declare cane sugar (sucrose) on a label it should be declared as cane sugar and not as white sugar.

"Frederick L. Dunlap,
"George P. McCabe,
"Board of Food and Drug Inspection.

"Approved: W. M. Hays, Acting Secretary of Agriculture, Washington, D. C., July 5, 1907."

While your board is, of course, not bound by the foregoing interpretation, yet it would be justified in adopting the same as the proper interpretation of the Ohio law; or it may decide upon any other minimum which to it may seem proper, but in this connection I call your attention to the case of in re Wilson decided by the United States circuit court in Rhode Island, and reported in 168 Federal Reporter, 566. In that case the court had under consideration the question of whether a syrup labeled "Gold Leaf Syrup" and "composed of maple and white sugar," which syrup in fact contained ten per cent. of maple sugar and ninety per cent. of white sugar, was misbranded within the meaning of the national food and drug act. The court held that such syrup was not misbranded and said:

"In order to convict a person of misbranding upon such a showing of fact, the court would be obliged to go entirely beyond all the established legal principles upon the question of deceit and misrepresentation, and beyond any of the decisions of the equity courts as to what is abhorrent to the conscience of a chancellor. In fact, I think that we should be obliged to go, not only outside the boundaries of legal and equitable rules, but also outside the boundaries of rational common sense."

In the light of this decision I would not advise prosecutions for misbranding in cases where it is found that a product sold under a label such as the one submitted to me and quoted herein, does in fact contain as much as ten per cent. of maple sugar. Where the percentage of maple falls below ten per cent. it is necessarily within the discretion of your board as to whether prosecutions should be instituted, and the courts must determine whether such a product is misbranded under the provisions of section 5785, G. C., supra.

Your question, therefore, must be answered by saying that the label submitted by you, and quoted herein, is not of itself a "misbranding" under section 5785, G. C., supra, but it must be determined by ascertaining the contents of the product sold thereunder whether such a label constitutes misbranding.

Summarizing my opinion I advise that no label is in and of itself illegal under the sections which have been considered in this opinion. It is impossible for the board of agriculture either to approve or disapprove a label as such without knowledge of the contents of the package which it purports to describe. This statement is of itself sufficient to answer the precise question which you submit.

Second: Whether or not a particular can of syrup or other food product

is misbranded depends upon two factors: the nature of the contents and the statements or representations on the label. These two factors must be compared in the case of each can in order to determine whether or not an offense is committed.

Third: The proviso which has been considered does not have the force of a positive requirement, so that in the event that a given product is or purports to be a compound or mixture of more than one ingredient it is not necessary on that account that the word compound or mixture be used as a part of the name, nor that the formula be set forth upon the label.

Fourth: If, however, the label of a food product describes the contents of the package or can as consisting of a mixture or compound of two or more ingredients, such label would be misleading if it should appear upon analysis or otherwise that the ingredients so mentioned on the label were not present in the product in substantial quantities or proportions, or that the product actually contained some other ingredients not mentioned on the label of an inferior or deleterious character. In such event the package would be misbranded within the meaning of the law. However, the mere mention of two ingredients on the label does not amount to a representation that such ingredients are present in the product in equal proportions.

Fifth: What is a substantial proportion of an ingredient mentioned on the label is under the statute a question of fact to be determined in each case. The law does not prescribe a definite standard by which it may be determined that a given percentage or proportion of a certain ingredient is or is not substantial.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1262.

STATE CENTRAL COMMITTEE OF A POLITICAL PARTY—STATUTE DOES NOT FORBID COMMITTEE DIVIDING COUNTY INTO DISTRICTS FOR PURPOSE OF ELECTING DELEGATES TO STATE CONVENTION.

Section 4953, G. C., 103 O. L., 478, does not forbid the state central committee of a political party making provision for the districting of counties so that delegates and alternates to the state convention may be selected from such districts in such counties.

COLUMBUS, OHIO, February 12, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of February 10, 1916, as follows:

> "Under the law of the state of Ohio, are state central committees authorized to have counties districted so that delegates and alternates to state convention may be elected from such districts in such counties, or must delegates and alternates to state conventions be elected at large from such counties?"

Your inquiry involves a consideration of section 4953, G. C., 103 O. L., 478, which provides as follows:

> "Candidates for presidential elector shall be nominated by delegate state conventions, the delegates to which shall be chosen at a primary

election which shall be held on the last Tuesday in April, 1916, and similarly every fourth year thereafter. The state committee of each political party shall determine the time and place for holding the state convention of such party, and shall apportion the delegates and alternates throughout the state in proportion to its party vote for governor cast in the several counties at the last preceding general election. Each state committee shall also, by resolution, determine the ratio of representation in such state convention. In addition to nominating candidates for presidential elector such state convention shall formulate the state party platform for that year."

The primary purpose of the foregoing section is to require that delegates to state conventions which nominate candidates for presidential electors shall be chosen at a primary election held on the last Tuesday in April, 1916, and every fourth year thereafter. It must be conceded that without any other or further provision than the requirement that delegates to said convention shall be elected at a primary election, the state committee of each political party would be authorized to make all other necessary provisions to carry this purpose of the law into effect. This is so because at common law such committees are vested with such power and authority as the political organization which they represent confers upon them. The legislature knew this and, therefore, in the further provisions of this section it did not furnish or undertake to furnish a complete, detailed method or plan whereby all matters connected with the selection of delegates to said conventions should be regulated. It provided, however, that the state committee of each party shall fix the time and place of holding its convention, that it shall determine the ratio of representation in that convention, and that the delegates thereto should be apportioned by it throughout the state in proportion to the party vote for governor cast in the several counties in the state at the last preceding general election. It is contended that under these provisions of the law the authority of the state committees with regard to the selection of delegates ends with the execution of the power thus conferred and that, therefore, said committees have no further rights that may be exercised in the determination of how and in what manner each county may apportion its delegates. It is further contended that, by the express provisions of the foregoing section, with reference to the apportionment of delegates, the county is made the unit for the election of said delegates.

I am unable to agree with either contention. The authority delegated by this statute to state committees to fix the time and place of holding a convention, to determine the ratio of representation and to apportion delegates in proportion to the vote of each county, did not confer upon them any new rights or vest in them any authority they did not already possess. The authority to do these things has always been vested in such committees, and gives them such authority by virtue of the rules and regulations of the political organizations which they represent. The statute recognizes the existence of political parties, and does not attempt to (and it is quite doubtful if the legislature would have the power to) prescribe all the powers and duties of political parties. There is nothing to show any purpose of the legislature to in any way limit or restrict the ordinary rights and authority of state committees, but, upon the contrary, the provisions under consideration are very general in their character and, as before observed, do not in any manner confer any new rights or authority upon said committees.

I am unable, therefore, to conclude that it was the intention of the legislature, in the enactment of these provisions, to in any manner impose any restriction upon the recognized jurisdiction and authority of state committees. Again, it is not by any means clear that the provision regarding apportionment, measured by its own

language, has the effect of making a county the unit for the election of delegates. It is very difficult to determine from the language used, whether the vote of each county is not made the unit of apportionment rather than the unit of election. In other words, it is the vote of each county which determines the apportionment, and when such apportionment is made in accordance with said vote, I am unable to see, from the provisions of the law, any limitation or restriction made upon the right of a committee to subdivide such apportionment within such county. The apportionment must be in proportion to the votes of each county, and when that requirement of the law is met, no further condition or restriction is imposed upon any action a state committee may determine to take in reference to said apportionment.

I am therefore of the opinion that the provisions of said section in regard to the apportionment provided for therein do not so limit the authority of a state committee as to prevent or prohibit it from prescribing and directing a reasonable division of said apportionment within a county. In this connection there may be some question as to whether any apportionment of delegates within a county may be made effective by reason of the provisions of the primary election laws. That is to say, whether when such apportionment of delegates is made their election is feasible under the general system of primary elections, as provided by law. This is a matter which must be considered by any authority in making a division of delegates within a county. Any subdivision of territory for the election of delegates must be made with due regard to the operation of the primary election law. Whether or not the division of territory is practicable for the conduct of the primary is a matter for the determination of the election authorities.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1263.

AFFIDAVIT OF THE CENTRAL OHIO RAILROAD COMPANY—SECRETARY OF STATE ADVISED TO RECEIVE AND FILE SAME—FEE TO BE CHARGED.

Secretary of state advised to receive and file the affidavit presented to him by The Central Ohio Railroad Company for the purpose of furnishing a record in his office showing the existence and amount of the capital stock of said company; and to charge as a fee for recording the same twenty cents per one hundred words with the minimum fee of not less than five dollars.

COLUMBUS, OHIO, February 12, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of February 9, 1916, in which you ask my opinion as follows:

> "We are herewith submitting to you for an opinion a blank affidavit of C. W. Woolford, secretary of THE CENTRAL OHIO RAILROAD COMPANY, presented to this office by Mr. J. L. Johnson, of the firm of Booth, Keating and Pomerene, Columbus, Ohio, and beg to submit the following question to you for an opinion:
>
> "'Should the aforesaid affidavit be received and filed and recorded by the secretary of state?

"'If your answer is in the affirmative, what fee should be collected from said company by the secretary of state for filing and recording the same?'"

The affidavit of C. W. Woolford, referred to in your letter, recites, in part, as follows:

"Affidavit further says that The Central Ohio Railroad Company was incorporated by special act of the general assembly of the state of Ohio, passed February 8, 1847; that subsequently said corporation became insolvent and duly passed into the hands of a receiver; that thereafter, on November 1, 1865, a meeting of the stockholders and creditors of said corporation was called for the purpose of reorganizing said corporation by virtue of an act of said general assembly passed April 7, 1863, entitled 'An act to provide for the adjustment of the affairs of insolvent railroad companies and for their reorganization without a sale of the property thereof,' at which meeting plans for the reorganization of said corporation were adopted in the form of resolutions which were written into the minutes of said meeting, and of which resolutions the following is a true copy: * * *"

Here follows a copy of the resolutions adopted by the stockholders and directors of said corporation on November 1, 1865, in the second paragraph of which the following statement is contained:

* * * "RESOLVED, that the body corporate to be created and constituted as aforesaid shall be called and known by the name of the 'THE CENTRAL OHIO RAILROAD COMPANY,' as reorganized, the capital stock of which company shall be the sum of *three millions of dollars;* * * *

"Affidavit further says that pursuant to the plans so adopted The Central Ohio Railroad Company as reorganized, was created with a capital stock of three million dollars.

"Affiant further says that he has reason to believe, and does believe, either that no certificate showing the reorganization and capital stock of said corporation, last aforesaid, was filed in the office of the secretary of state of the state of Ohio, as required by law, or that such certificate, if filed, has been lost from the records of that office, and that no trace of it can be found; and that this affidavit is made for the purpose of completing the records of the secretary of state of the state of Ohio in regard to The Central Ohio Railroad Company as reorganized."

As is stated in the affidavit, the sole purpose of seeking to file the same in your office is to secure a record of the existence and the amount of the authorized capital stock of said The Central Ohio Railroad Company, which was incorporated under a special act, and subsequently reorganized under a later general act.

I am unable to find any provision of the General Code which, in terms, makes it the duty of the secretary of state either to accept and record or to reject an affidavit of the character enclosed in your letter.

Section 8626 of the General Code provides, in part, as follows:

"Articles of incorporation shall be filed in the office of the secretary of state, who shall record them and shall also record certificates relating to that corporation, thereafter filed in his office * * *"

As was stated to you in my opinion under date of October 21, 1915, being opinion No. 957, the language of the section above quoted, as do other sections of the General Code, indicates the general legislative policy that all evidence of corporate existence and authority shall be recorded in the office of the secretary of state, and since the avowed purpose of filing and recording said affidavit is to secure a record in your office, which through oversight was neglected or through some mischance has been lost, I am of the opinion that you should receive and record the same.

Replying to your second question, I am of the opinion that you should charge for filing the affidavit in question a fee of twenty cents for each one hundred words contained therein, but in no event less than the minimum fee of five dollars, as provided in paragraph 12 of section 176 of the General Code.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1264.

CASS HIGHWAY LAW—LEVY AUTHORIZED BY SECTION 60 OF THE ACT, SECTION 3298-1, G. C., SUBJECT TO CERTAIN LIMITATION—TOWNSHIP TRUSTEES MUST MAKE LEVY UNDER ABOVE SECTION BEFORE THEY CAN PROVIDE FOR ISSUE OF BONDS—LEVY PROVIDED BY SECTION 72 OF HIGHWAY ACT, SECTION 3298-13, G. C., IS ABOVE TEN MILLS BUT WITHIN FIFTEEN MILLS LIMITATION—FUNDS DERIVED FROM BOND ISSUE UNDER SECTION 67 OF CASS HIGHWAY LAW, SECTION 3298-8, G. C., MAY NOT BE USED IN CO-OPERATION WITH STATE—LEVY AUTHORIZED BY SECTION 215 OF CASS HIGHWAY LAW, SECTION 1222, G. C., IS ABOVE TEN MILLS BUT WITHIN FIFTEEN MILL LIMITATON.

1. *As between the ten mill and the fifteen mill limitation, the levy provided for by section 60 of the Cass highway law, section 3298-1, G. C., is above the ten mills but within the fifteen mills.*

2. *Township trustees must make the levy provided for in section 60 of the Cass highway law, section 3298-1, G. C., and it must be determined that said levy does not furnish sufficient funds, before the trustees may even submit the question of a bond issue to the qualified electors of the township, and this is true even if the township trustees are aware at the present time that a levy which may be hereafter made will be insufficient for the purpose of improving the roads designated by them.*

3. *As between the ten mill and the fifteen mill limitation, the levy provided for by section 72 of the Cass highway law, section 3298-13, G. C., is above the ten mills but within the fifteen mills.*

4. *Funds derived from the issuance of bonds under section 67 of the Cass hihgway law, section 3298-8, G. C., may not be used in co-operation with the state highway department under section 185 of the Cass highway law, section 1192, G. C., and the related sections, even where the intercounty highway to be improved has been designated by the township trustees under section 3298-3, G. C.*

5. *As between the ten mill and the fifteen mill limitation, the levy provided for by the second paragraph of section 215 of the Cass highway law, section 1222, G. C., is above the ten mills but within the fifteen mills.*

COLUMBUS, OHIO, February 14, 1916.

HON. HUGH F. NEWHART, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR SIR:—I have your communication of January 29, 1916, which reads as follows:

> "Is the levy authorized under section 60 of the Cass highway act within the ten mill limitation or within the 15 mill limitation provided by law?
>
> "Must the township trustees make the levy provided for in section 60 before they provide for the issuing of bonds under sections 67 and 68 of the act, when they are aware at this time that this levy provided for in section 60 will be insufficient for the purpose?
>
> "Must the levy for sinking fund and interest to retire bonds issued as above, under sections 67 and 68, come within the ten mill limitation or within the 15 mill limitation?
>
> "May funds derived from the issuance of bonds under sections 67 and 68 be used in co-operation with the state highway department under sections 185, 186 and 187 of the act, provided the inter-county highway to be improved has been designated by the township trustees under section 62 of the act?
>
> "Must the levy authorized to provide for the township's proportion under section 215 of the act, come within the ten mill limitation?"

Referring to your first question, the levy authorized by section 60 of the Cass highway law, section 3298-1, G. C., is by the terms of that section made subject to the limitation upon the combined maximum rate for all taxes now in force. The language of the section, in so far as this feature of the matter is concerned, is almost identical with that of sections 105, 238 and 239 of the act, being sections 6926, 6956-1 and 3298-18 of the General Code. The question of whether the tax limitation prescribed in said sections 105, 238 and 239 of the act is ten mills or fifteen mills, was considered by this department in opinion No. 847, rendered to the Bureau of Inspection and Supervision of Public Offices, on September 21, 1915, and in that opinion it was held that as between the ten mill and the fifteen mill limitation, the levies provided for in sections 105, 238 and 239 of the act, are above the ten mills but within the fifteen mills. It was pointed out in that opinion that the answer therein given is not sufficient without some further explanation, and that as no levies might be made under the Cass highway law until 1916, consideration of the question of tax levies under that law might be deferred for a time. With the qualification expressed in that opinion to the effect that the answer to your question herein given may not, of itself, be sufficient, and that the matter may require further consideration, I advise you that as between the ten mill and the fifteen mill limitation the levy provided for by section 60 of the Cass highway law, section 3298-1, G. C., is above the ten mills but within the fifteen mills.

Your second question was considered in opinion No. 849, rendered by me to the Bureau of Inspection and Supervision of Public Offices, on September 21, 1915, and in accordance with the holding in that opinion I advise you that township trustees must make the levy provided for in section 60 of the Cass highway law, section 3298-1, G. C., and it must be determined that said levy does not furnish sufficient funds, before the trustees may even submit the question of a bond issue to the qualified electors of the township, and this is true even if the township trustees are aware at the present time that a levy which may be hereafter made will be insufficient for the purpose of improving the roads designated by them.

Your third question relates to the levy for sinking fund and interest purposes

in connection with bonds issued by township trustees under section 67 of the Cass highway law, section 3298-8, G. C., and the succeeding sections.

Section 72 of the act, section 3298-13, G. C., provides that levies for the payment of principal and interest on such bonds shall be in addition to the two mills authorized to be levied for general township purposes, but subject to the limitation on the combined maximum rate for all taxes now in force. The use of the expression "combined maximum rate for all taxes" in connection with the other language of the section, indicates that as between the ten mill and fifteen mill limitation the levy in question is above the ten mills but within the fifteen mills.

Your fourth question relates to the right to use funds derived from a bond issue under section 3298-1, et seq., of the General Code, in co-operation with the state highway department, under section 185 of the Cass highway law, section 1192, G. C., and the related sections, provided the inter-county highway to be improved has been designated by the township trustees under section 62 of the act, section 3298-3, G. C.

It should first be observed that chapter III of the Cass highway law relates to road construction and improvement by township trustees, while chapter VIII relates to the construction, improvement, maintenance and repair of roads and bridges by the state highway department. A full consideration of both chapters indicates that the tax levying and bond sections of each chapter are exclusive. In other words, the proceeds of a tax levied under section 3298-1, G. C., and the proceeds of bonds issued under section 3298-8, et seq., of the General Code, can be used only for road work carried forward by the township trustees.

It is provided by section 3298-2, G. C., that when collected the taxes authorized by the preceding section shall be paid to the treasurer of the township from which they are collected, and the money so raised shall be under the control of the township trustees of such township for the purpose of improving the roads of said township "as provided herein." The expression "as provided herein" evidently refers to the chapter in which section 3298-2 is found. The bond issue provided for by section 3298-8, G. C., is intended to take the place of an insufficient tax levy, and it is manifest that the proceeds of a sale of bonds issued under section 3298-8, G. C., must remain under the control of the township trustees and be used by them in the construction or re-construction of roads designated by them. If funds produced by a tax levy or by a bond issue, under chapter III of the act, were used in co-operation with the state highway department, the funds would, it is true, remain in the township treasury until finally paid to the contractor, but they would not be under the control of the township trustees, and the improvement would not be carried forward by the township trustees. Such part of the cost and expense of an inter-county highway improvement as is to be met by a township must, therefore, be paid from the proceeds of a tax levied by the township trustees under section 215 of the act, section 1222, G. C., or from the proceeds of a sale of bonds issued by county commissioners in anticipation of a tax levied by the township trustees, the bonds to be issued under section 216 of the act, section 1223, G. C.

Answering your question specifically, I therefore advise you that funds derived from the issuance of bonds under section 67 of the Cass highway law, section 3298-8, G. C., may not be used in co-operation with the state highway department under section 185 of the act, section 1192, G. C., and the related sections, even where the inter-county highway to be improved has been designated by the township trustees under section 3298-3, G. C.

Coming now to consider your last question, it is provided by section 215 of the act, that the levy for the purpose of providing a fund for the payment of the proportion of the cost and expense of an improvement carried forward by the

state highway department, to be paid by the township or townships, shall be in addition to all other levies authorized by law for township purposes, and shall be outside the limitation of two mills for general township purposes, but subject, however, to the limitation upon the combined maximum rate for all taxes now in force. In conformity with what has already been said in answering your first question, I advise you that as between the ten mill and fifteen mill limitation, the levy referred to by you is above the ten mills but within the fifteen mills.

I am enclosing a pamphlet containing opinions Nos. 847 and 849, of this department, referred to herein.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1265.

SCHOOL TEACHERS' PENSION FUND—PROPER TREASURER BEFORE AND AFTER CLERK ASSUMED DUTIES OF TREASURER OF SCHOOL FUNDS WHEN DEPOSITORY IS AND IS NOT PROVIDED—CITY SCHOOL DISTRICTS—VILLAGE SCHOOL DISTRICTS—RURAL SCHOOL DISTRICTS—SCHOOL DISTRICTS.

In a city school district in which a school teachers' pension fund has been established, and in which the board of education has not provided a depository for the school funds, or having provided a depository, has not dispensed with the treasurer of said funds under authority of said section 4782, *G. C., as amended in* 104 *O. L.,* 158, *the city treasurer, being ex officio treasurer of the city school district, is treasurer of the school teachers' pension fund under provision of section* 7889, *G. C.*

In a village or rural school district in which a teachers' pension fund has been established and in which the board of education has not provided a depository for the funds of said district in the manner provided by law, and has not dispensed with the treasurer of said funds under authority of said section 4782, *G. C., as amended, the county treasurer, being ex officio treasurer of the school funds of said district, is treasurer of the school teachers' pension fund under authority of said section* 7889, *G. C.*

In a school district in which a school teachers' pension fund has been established and is being maintained, and in which the board of education has provided a depository for the school funds in the manner authorized by law, and has dispensed with the treasurer of said funds under authority of said section 4782, *G. C., the clerk of said board, who is now performing all the services and discharging all the duties, and who is subject to all the obligations required by law of the treasurer of such school district, is treasurer of said school teachers' pension fund under provision of said section* 7889, *G. C.*

COLUMBUS, OHIO, February 14, 1916.

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

GENTLEMEN:—In your letter under date of January 8th you request my opinion upon the following questions:

"1. Who, before the amended law required the clerk of a school district to assume the duties of the treasurer of the school funds, was the proper treasurer of the school teachers' pension fund?

"2. Who, since the clerk has assumed the duties of the treasurer of the school funds, is the proper custodian of said school teachers' pension fund?"

Section 7875, G. C., provides that:

"When the board of education of a school district by resolution, adopted by a majority vote of the members thereof, declares that it is advisable to create a school teachers' pension fund for that school district, such fund shall be under the management and control of a board to be known as 'the board of trustees of the school teachers' pension fund' for such district."

Section 7879, G. C., provides that:

"Such board of trustees may invest such pension fund (created and maintained under provisions of sections 7877, 7879 and 7895 of the General Code) in the name of the board in bonds of the United States, or of the state of Ohio, or of any county, or municipal corporation, or school district in this state."

Said section further provides that said board "may make payments from such fund for pensions granted in pursuance of the laws relating thereto," and "may make and establish such rules and regulations for the administration of the fund as they deem best."

Section 7889, G. C. provides:

"The treasurer of such school district (in which a school teachers' pension fund has been established) shall be the custodian of such pension fund, and keep it subject to the order, control and direction of the board of trustees. He must keep books of accounts concerning the fund in such manner as may be prescribed by such board which always shall be subject to the inspection of the board of trustees or of any member thereof. Such treasurer shall execute a bond to the board of trustees with good and sufficient sureties in such sum as the board requires, which bond shall be subject to its approval, and be conditioned for the faithful performance of his duties as custodian and treasurer of the board."

Section 7890, G. C., provides:

"Such treasurer must keep and truly account for all moneys and profits coming into his hands belonging to such fund, and at the expiration of his term of office pay over, surrender and deliver to his successor all securities, moneys and other property of whatsoever kind, nature and description in his hands or under his control as treasurer. For his services he shall be paid not to exceed one per cent. annually of the amount paid into the fund during the year."

While the above provision of section 7889, G. C., makes the treasurer of a school district which has established a school teachers' pension fund, the treasurer of the board of trustees and as such the custodian of said fund, it will be observed that the treasurer of said school district as treasurer of said board of trustees and

as custodian of said fund, is in no way accountable to the board of education of said district. The bond required to be given by provision of the latter part of section 7889, G. C., is executed to said board of trustees and is subject to the approval of said board. In view of the provisions of sections 7889 and 7890, G. C., taken in connection with the above provisions of sections 7875 and 7879, G. C., it seems clear that the board of education of a school district is in no way charged with the administration of the school teachers' pension fund, and that said fund is not a fund of the school district within the meaning of section 7604, G. C., as amended in 106 O. L., 328, which provides that:

> "Within thirty days after the first Monday in January, 1916, and every two years thereafter, the board of education of any school district by resolution shall provide for the deposit of any or all moneys coming into the hands of its treasurer."

The provision in this latter statute has reference only to the funds belonging to the school district. This distinction must be borne in mind in the further consideration of your questions.

Section 4763, G. C., as in force prior to the date when said section, as amended in 104 O. L., 158, became effective, provided as follows:

> "In each city, village and township school district, the treasurer of the city, village and township funds, respectively, shall be the treasurer of the school funds. In each special district the board of education shall choose its own treasurer, whose term of office shall be for one year beginning on the first day of September."

This section as amended in 104 O. L., now provides as follows:

> "In each city school district, the treasurer of the city funds shall be the treasurer of the school funds. In all village and rural school districts which do not provide legal depositories as provided in section 7604 to 7608 inclusive, the county treasurer shall be the treasurer of the school funds of such districts."

Section 4782, G. C., formerly provided:

> "When a depository has been provided for the school moneys of a district, as authorized by law, the board of education of the district, by resolution adopted by a vote of a majority of its members, may dispense with a treasurer of the school moneys, belonging to such school district. In such case, the clerk of the board of education of a district shall perform all the services, discharge all the duties and be subject to all the obligations required by law of the treasurer of such school districts."

By the same act of the general assembly amending section 4763, G. C., as found in 104 O. L., 158, section 4782, G. C., as above quoted, was amended, and the only change effected by said amendment was to substitute the word "shall" in place of the word "may" before the word "dispense." While it might seem that the legislature in making this change intended to make said section 4782, G. C., mandatory instead of directory, I have held in opinion No. 656 of this department rendered to your bureau under date of July 27, 1915, that inasmuch as the action therein referred to is to be "by resolution adopted by a vote of a majority of its

members," the provision of said section authorizing the board of education of a school district to dispense with the treasurer of the school moneys belonging to such school district when a depository has been provided for said moneys in the manner authorized by law, must still be considered as directory rather than mandatory.

It will be observed that the above provision of section 4782, G. C., relates to the depository for school moneys belonging to the school district, and in view of the distinction hereinbefore referred to, the question arises whether or not, in a school district in which a school teachers' pension fund has been established, and in which the board of education has dispensed with the treasurer of the school moneys under provision of section 4782, G. C., the clerk of said board of education, who by provision of the latter part of said section, is now performing all the services, discharging all the duties and is subject to all the obligations required by law of the treasurer of such school district, is treasurer of the board of trustees of said pension fund and as such custodian of said fund.

While section 7889, G. C., provides that the treasurer of the school district shall be the custodian of the school teachers' pension fund, and section 4763, G. C., 104 O. L., 158, provides that in each city school district the treasurer of the city funds shall be the treasurer of the school funds, and further provides that in village and rural school districts which have not provided legal depositories in the manner authorized by law, the county treasurer shall be the treasurer of the school funds of such districts, it will be observed upon an examination of the statutes relating to the treasurer of the school funds of a school district, that the phrase "treasurer of the school funds," and the phrase "treasurer of a school district," are used interchangeably.

It seems clear that under provision of section 4763, G. C., as in force prior to its amendment in 104, O. L., the city treasurer was ex officio treasurer of the city school district, and as such treasurer of the school teachers' pension fund, if such fund was established in said district, providing the board of education of said district had not provided a depository for the school funds, and had not dispensed with the treasurer of said funds under authority of section 4782, G. C., and the treasurer of the funds of a village or township, respectively, being ex officio treasurer of the school funds of the respective village or township school district, was treasurer of the school teachers' pension fund of such district, if the same was established therein, providing the board of education of such district had not provided a depository for the school funds of said district and dispensed with the treasurer of the school funds under authority of said section 4782, G. C.

It seems equally clear that under provision of section 4763, G. C., as amended in 104 O. L., 158, the city treasurer is still ex officio treasurer of the city school district, and as such treasurer of the school teachers' pension fund, if such fund has been established in such district, providing the board of education of said district has not dispensed with the treasurer of the school funds of said district under provision of section 4782, G. C., as amended in 104 O. L., 158, and that the county treasurer, being ex officio treasurer of the school funds of all village and rural school districts in such county which have not provided depositories for the funds of such respective districts, in the manner authorized by law, and which have not dispensed with the respective treasurers of the school funds of such districts in the manner provided by said section 4782, G. C., as amended, is treasurer of the school teachers' pension fund, if such fund has been established in such districts.

I am of the opinion, therefore, in answer to your first question, that in a city school district in which a school teachers' pension fund has been established, and in which the board of education has not provided a depository for the school funds,

or having provided a depository, has not dispensed with the treasurer of said funds under authority of said section 4782, G. C., the city treasurer, being ex officio treasurer of the city school district, is treasurer of the school teachers' pension fund under provision of section 7889, G. C., and that in a village or rural school district in which a teachers' pension fund has been established, and in which the board of education has not provided a depository for the funds of said district in the manner provided by law, and has not dispensed with the treasurer of said funds under authority of said section 4782, G. C., the county treasurer, being ex officio treasurer of the school funds of said district, is treasurer of the school teachers' pension fund under authority of said section 7889, G. C.

It should be noted in this connection that section 7604, G. C., as amended in 106 O. L., 328, makes it mandatory on boards of education of school districts to provide depositories for the school funds, and section 7609, G. C., as amended in 106 O. L., 328, provides that the members of a board of education shall be liable for any loss occasioned by their failure to provide a depository, and in addition thereto requires them to pay the treasurer of the school funds two per cent. on the average daily balance of said funds during the time the school district is without a depository.

Replying to your second question I am of the opinion that in a school district in which a school teachers' pension fund has been established and is being maintained, and in which the board of education has provided a depository for the school funds in the manner authorized by law, and has dispensed with the treasurer of said funds under authority of said section 4782, G. C., the clerk of said board, who is now performing all the services and discharging all the duties, and who is subject to all the obligations required by law of the treasurer of such school district, is treasurer of said school teachers' pension fund under provision of said section 7889, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1266.

COUNTY BOARD OF EDUCATION—HOW MEMBERS ARE TO BE ELECTED—SERVE UNTIL SUCCESSORS ELECTED AND QUALIFIED.

Under provision of section 4729, G. C., as amended in 104 O. L., 136, the members of the county board of education elected on the second Saturday in June, 1914, for the terms of one, two, three, four and five years respectively, will hold office until the third Saturday in January of the respective years 1916, 1917, 1918, 1919 and 1920, and until their respective successors are duly elected and qualified.

COLUMBUS, OHIO, February 14, 1916.

HON. E. A. SCOTT, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR:—In your letter under date of January 15th you request my opinion as follows:

> "The county superintendent of schools for Adams county called a meeting by giving the proper notice to the presidents of boards of education in said county to meet at West Union, Ohio, on January 14, 1916, to elect

a member for county board of education as required by section 4729. There are 19 presidents in Adams county entitled to a vote, and 16 of said presidents were present at said meeting. The vote as shown by the minutes of the meeting gives eight votes to one candidate and seven to another—the one receiving the eight votes was declared elected by the chairman of the meeting. After the meeting adjourned a re-canvass of the ballots gave each candidate eight votes. I have given you the facts, and I desire your opinion on the following questions:

"1. Should not the county superintendent have called this meeting during the year 1915?

"2. Should not the candidate receive at least nine votes before there could be an election when 16 were present?

"3. Does not a vacancy exist when the presidents fail to elect?

"4. By whom should vacancy be filled? In the event the county board of education cannot agree on a member, then can the county commissioners fill said vacancy?

"5. Can a member of county board whose time has expired, but holding said position by reason of the fact, a member has not been elected to take his place, vote for himself to fill said vacancy?"

Section 4729, G. C., as amended 104 O. L., 136, provides in part as follows:

"On the second Saturday in June, 1914, the presidents of the boards of education of the various village and rural school districts in each county school district shall meet and elect the five members of the county board of education, one for one year, one for two years, one for three years, one for four years, and one for five years, and until their successors are elected and qualified. The terms of office of such members shall begin on the fifteenth of July, 1914, and each year thereafter on the third Saturday of January. Each year thereafter one member of the county board of education shall be elected in the same manner for a term of five years."

The presidents of the boards of education of the various village and rural school districts in your county having met on the second Saturday in June, 1914, and having elected five members of the county board of education for the respective terms provided in section 4729, G. C., the question arises whether the term of office of the member who was elected for one year and until his successor is elected and qualified, expired on the second Saturday in June, 1915, or whether said member held over until the third Saturday in January, 1916, and until the election and qualification of his successor.

While it is difficult to construe the above provisions of section 4729, G. C., in view of the patent ambiguity as to when said term expires, I think it was the intention of the legislature in providing for the first election of the members of the county board of education on the second Saturday in June, 1914, for the terms of one, two, three, four and five years respectively, and until their successors should be elected and qualified, and by further providing that in each year after 1914, one member of said county board of education shall be elected for a term of five years to begin on the third Saturday of January, that the member elected on the second Saturday in June, 1914, for the one year term should hold over until the third Saturday in January, 1916, and that the terms of office of the members elected for two, three, four and five years respectively, should expire on the third Saturday of January in the respective years 1917, 1918, 1919 and 1920.

This interpretation of the provisions of section 4729, G. C., in no way con-

flicts with the provisions of section 4732, G. C., 104 O. L., 137, that each county board of education shall meet on the third Saturday of July, 1914, and on the third Saturday of March of each year thereafter, and shall organize by electing one of its members president, and another vice-president, both of whom shall serve for one year."

I am of the opinion, therefore, in answer to your first question, that the meeting of the presidents of the boards of education of the various village and rural school districts of your county, on January 14, 1916, for the purpose of electing a member of the county board of education to succeed the member of said county board, who was elected at the meeting held on the second Saturday in June, 1914, for a term of one year, and until his successor should be elected and qualified, was properly called by the county superintendent under the above provisions of section 4729, G. C., as amended, and if said presidents of said boards of education had elected said successor, in compliance with the provisions of said statute, the person so elected, upon qualifying for the office of member of the county board of education, would have held said office for a term of five years commencing on January 15, 1916.

It appears, however, that only sixteen of said presidents were present at said meeting, and that eight votes were cast for one candidate and seven for another. In view of the provision of section 4730, G. C., as amended 104 O. L., 137, that, "the vote of a majority of the members present shall be necessary to elect each member of the county board of education," it is evident that there was a failure to elect. Your second question therefore must be answered in the affirmative.

Inasmuch, however, as the member of said county board, elected at the meeting held on the second Saturday in June, 1914, for a term of one year, holds over until his successor is elected and qualified, I am of the opinion in answer to your third question that no vacancy exists in said county board within the meaning of the latter part of section 4731, G. C., as amended 104 O. L., 137, which provides that,

> "Any vacancy on the board shall be filled in the same manner as is provided in section 4748 of the General Code."

The answer to your third question makes it unnecessary to answer your fourth question.

Your fifth question may be answered by observing that inasmuch as the member of the county board of education whose term has expired, is holding over by reason of the fact that a successor has not been elected to take his place, no vacancy in said board exists.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1267.

BOARD OF ADMINISTRATION— WITHOUT POWER TO ENTER INTO BINDING CONTRACT—NO OBJECTION TO PROPOSED RECIPROCAL ARRANGEMENT WITH OTHER STATES FOR CARE OF NON-RESIDENT INSANE.

Ohio Board of Administration is without power to enter into binding contract. No objection to proposed reciprocal arrangement for care of non-resident insane.

COLUMBUS, OHIO, February 14, 1916.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of yours of January 29, 1916, reading as follows:

> "Please note the enclosed from the state hospital commission of New York:
>
> "Will you be good enough to look over the proposed agreement, and let us know whether there would be any legal objections to this board's entering into such an agreement?"

The proposed agreement which you enclose reads as follows:

> "Reciprocal arrangement for the exchange of insane persons entered into by the state board of insanity of the commonwealth of Massachusetts and the state hospital commission of the state of New York.
>
> "(1) The term 'resident,' as used in this agreement, shall be a person who has lived continuously in either state for a period of at least one year and, subsequently to acquiring such a residence in either state, has not acquired a residence in any other state by living continuously one year in such other state; provided that time spent in an institution or on parole from an institution for the insane shall not be counted in determining the time of residence in a state.
>
> "(2) All insane residents of either state shall be promptly accepted by the institutions of such state.
>
> "(3) In certain cases where the relatives or legal guardians or committee or persons legally liable for the maintenance and support of the patient are residents of either state, and some member of the family, or the ward of such guardian or committee, acquires a residence as defined in this agreement in the other state and becomes a public charge because of insanity, for the convenience of the relatives and for humanitarian reasons the person may be accepted by the duly constituted authorities of the state in which such relatives, etc., reside.
>
> "(4) Each hospital in each state shall accept promptly persons paroled by such hospital when returned to the institution by the proper authorities of the other state during the period of parole.
>
> "(5) For the purposes of this agreement, the residence of a minor shall be considered the same as the residence of the parents.
>
> "(6) Accurate and detailed histories are to be presented by each state in asking for the acceptance of a patient.
>
> "(7) No person is to be transferred from one state to the other who is not in condition to travel without danger to himself or to others, such

transfers, however, to be made as soon as the mental and physical condition of the patient warrants.

"(8) In returning an accepted patient under this agreement, the state making the return shall bear all the expenses incurred, and the patient shall be accompanied in every case by an authorized agent of the state making the return to the place designated by the authorities of the state to which the patient is returned.

"(9) By mutual consent, in any particular case not covered by the terms of this agreement, it may be modified to meet the special conditions."

Admission to the hospitals for the insane in this state is regulated by statute. Section 1950, General Code, 103 O. L., 447, provides as follows:

"No person shall be admitted into any such hospital, who is not an inhabitant of the state, except by authority of the Ohio Board of Administration as provided by law. Within the meaning of this section, no person shall be considered an inhabitant who has not resided in the state one year next preceding the date of his or her application. No person is entitled to the benefits of the provisions herein except those whose insanity occurred during the time of his or her residence in the state. The board may direct the discharge of a person when they deem it expedient."

Section 1819, G. C., 103 O. L., 446, provides as follows:

"If the judge or superintendent finds that the person whose commitment or admission is requested has not a legal residence in this state, or his legal residence is in doubt or unknown, and is of the opinion that such person should be committed or admitted to such institution, he shall notify without delay the Ohio Board of Administration, giving his reasons for requesting commitment or admission."

Section 1820, G. C., 103 O. L., 446, provides as follows:

"The Ohio Board of Administration by a committee, its secretary, or such agent as it designates, shall investigate the legal residence of such person, and may send for persons and papers and administer oaths or affirmations in conducting such investigation. At any time after investigation is made, and before or after the admission, or commitment to such institution, a non-resident person whose legal residence has been established may be transported thereto at the expense of this state."

I see no objection to your board entering into the proposed arrangement, but it should be distinctly understood by all persons concerned that your board would be without power to enter into any binding contract of this sort that you might not afterwards modify yourselves or might not be wholly repudiated by your board or by the legislature of the state. Instead of it being a contract it should be gotten up in the form of a general understanding as to what the Ohio Board of Administration's policy at the present time would be.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1268.

PROBATE COURT—MAY GRANT MINISTER'S LICENSE TO SOLEMNIZE MARRIAGE—APPLICANT MUST BE AN ORDAINED OR LICENSED MINISTER *OF A SOCIETY OR CONGREGATION WITHIN THIS STATE.*

An ordained or licensed minister of any religious society or congregation within this state may apply to the probate judge of any county within the state in which he expects to perform the marriage ceremony for a license to solemnize marriages.

COLUMBUS, OHIO, February 14, 1916.

HON. GEORGE M. HOKE, *Probate Judge, Tiffin, Ohio.*

DEAR SIR:—Your letter of January 22, 1916, requesting my opinion, received and is as follows:

> "A regularly ordained minister of the gospel regularly officiated in this, Seneca county, some six or eight years ago, but never procured a minister's license to solemnize marriages from any probate court within this state. He then moved to another state where he has since officiated as minister of the gospel. He desires to come here to officiate at the wedding of a friend, after which he will return to his charge in the other state.
>
> "QUESTION—Can this court lawfully grant him a 'minister's license to solemnize marriages,' he not returning except to solemnize the marriage of his friend?"

Section 11182 of the General Code provides as follows:

> "An ordained or licensed minister of any religious society or congregation within this state, who has obtained a license for that purpose, as hereinafter provided, * * * may join together as husband and wife all persons not prohibited by law."

The license referred to in the foregoing section is provided for in section 11183 of the General Code, which provides as follows:

> "A minister of the gospel, upon producing to the probate judge of any county within this state in which he officiates, credentials of his being a regularly ordained or licensed minister of any religious society or congregation, shall be entitled to receive from the court a license, authorizing him to solemnize marriages within this state so long as he continues a regular minister in such society or congregation."

The section first quoted provides that an ordained or licensed minister of a religious society or congregation within this state, who has obtained a license for that purpose, may perform the marriage ceremony. Two conditions are prescribed by this statute. First, the minister must be an ordained or licensed minister of a religious society or congregation within this state. Second, he must have a license to solemnize marriages.

It follows from the foregoing provisions that if a minister has a license to perform the marriage ceremony and yet is not an ordained or licensed minister of a society or congregation within this state, he may not perform the marriage

ceremony. In view of these provisions it would seem that it is only an ordained or licensed minister of a society or congregation within this state who may obtain a license under section 11183, and yet the provisions of that section do not attach to the term "religious society or congregation" the further qualification "within this state." The difficulty, therefore, in answering your inquiry is in harmonizing the provisions of said two sections 11182 and 11183.

It is said by Rockel in his Probate Practice at page 1671, in note, that:

> "A minister need not reside nor have a charge in the county in which he applies for a permit. It is sufficient if he intends to officiate therein and perform the marriage ceremony."

Giving to the term "officiates," as it appears in section 11183, this construction, it follows that under the provisions of that section any minister of the gospel upon producing credentials of his being a regularly ordained or licensed minister of any religious society or congregation, either in this state or elsewhere, may receive from the probate judge of any county in which said minister expects to perform the marriage ceremony a license authorizing him to solemnize marriages.

I am of the opinion, however, in view of the conditions prescribed by section 11182, that it must appear that the applicant for a license is an ordained or licensed minister of a religious society or congregation within this state and when that fact is shown he may then apply for and receive from any probate judge in any county in the state in which he expects to perform the marriage ceremony a license authorizing him so to do.

Applying this construction to the facts stated in your inquiry, if the minister in question is an ordained or licensed minister of any religious society or congregation within this state, and he intends to officiate in your county at a marriage ceremony, he may lawfully receive a license authorizing him to solemnize marriages within this state so long as he continues as an ordained or licensed minister of such religious society or congregation.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1269.

COLLATERAL INHERITANCE TAX—SECTION 5331, G. C., 103 O. L., 463, CONSTRUED—LINEAL DESCENDANT—BEQUEST TO CHURCH.

Where property within the jurisdiction of this state passes by will to a person or persons, other than those expressly excepted by the provisions of section 5331, *G. C., as amended* 103 *O. L.,* 463, *even though said will was made in accordance with a verbal agreement between the testator and devisee or legatee, and in consideration for services rendered or to be rendered to said testator by said devisee or legatee, said property is nevertheless subject to the collateral inheritance tax under the provisions of said section* 5331, *G. C., as amended.*

When a person bequeaths or devises property to or for the use of father, mother, husband, wife, lineal descendant, or adopted child, during life or for a term of years, and the remainder to a collateral heir or to a stranger to the blood, the value of the prior estate shall be determined as of the date of the death of the testator and within sixty days thereafter by the appraisers appointed by and acting under the order of the probate court, and when so determined shall be deducted together with the sum of five hundred dollars from the appraised value of such property according to the provisions of section 5333, *G. C., as amended in* 104 *O. L.,* 463. *The value of the life estate shall be determined by the so-called Actuaries' combined experience tables and five per cent. compound interest in accordance with the provision of the latter part of section* 5543, *G. C.*

A bequest to a church is not one "to or for the use of an institution in this state for the purposes only for public charity or other exclusively public purposes" within the meaning of the provision of section 5332, *G. C., and as such a bequest, over and above the sum of five hundred dollars exempted by provision of section* 5331, *G. C., as amended, is subject to the collateral inheritance tax.*

COLUMBUS, OHIO, February 14, 1916.

HON. GEORGE THORNBURG, *Prosecuting Attorney, St. Clairsville, Ohio.*

DEAR SIR:—In your letter under date of January 5th you request my opinion as follows:

> "I desire your opinion as to the liability under sections 5331, et seq., General Code of Ohio, relating to collateral inheritance tax:
>
> "First: Walker V. Kilgore died testate May 6, 1914. By his will, duly admitted to probate in Belmont county, after providing for the payment of his just debts and funeral expenses, he gives, devises and bequeaths to his brother, William M. Kilgore, and Chattie M. Kilgore, wife of William M. Kilgore, all the remainder of his property, both real and personal, of any and every kind, wherever found; 'Providing, William M. Kilgore and Chattie M. Kilgore care for me in my last sickness.' After payment of all the debts and funeral expenses, (not including any claim which William M. Kilgore and Chattie M. Kilgore had for services rendered during his last sickness) there remained for distribution the sum of $10,826.30, including the appraised value of the real estate. The last sickness of the deceased covered a period of more than eleven years prior to his death, and services to a very considerable extent were rendered by William M. Kilgore and Chattie M. Kilgore. William M. Kilgore was named as executor and was duly appointed as such. No claim was presented by William M. Kilgore and Chattie M. Kilgore to the court for

allowance in view of the provision which gave them all of the property after payment of testator's debts; but upon application to determine the collateral inheritance tax, it is contended by William M. Kilgore and Chattie M. Kilgore that the services rendered in the last sickness of testator were reasonably worth more than the balance for distribution, and it is contended that there should be no collateral inheritance tax for this reason, and said William M. and Chattie M. Kilgore contend that they having cared for testator during his entire last sickness, the testator having been paralyzed for years before his death, that regardless of the fact whether they are not able to show the exact monetary value of the services rendered, the bequest and devise to them is compensation only for whatever services were actually rendered, and is in accordance with the verbal agreement between the testator and them, and that the will was made in pursuance of such agreement, and that there should be no tax. What is your opinion as to the rule to be followed in such case?

"Second. T. J. Buchanan died testate on November 25, 1914, leaving a widow, Clara G. Buchanan, age 47 years, who died March 12, 1915. By the terms of the will of T. J. Buchanan, he devises and bequeaths to his wife, Clara G. Buchanan, 'for and during the term of her natural life, and for her sole and exclusive use, our home residence property on North Chestnut street, in Barnesville, Ohio, and also the "Garden lot" lying west of C. J. Bradfield's residence property, in Barnesville, Ohio.' 'At the death of my wife, I hereby authorize and direct my executor, hereinafter named, to sell at public auction or private sale, as he may deem best, and upon such terms as he may deem best, and to convey to purchasers, by proper deed, or deeds, my residence property on North Chestnut street, Barnesville, Ohio, and the "Garden lot," above given to my wife during her natural life, and to divide and distribute the proceeds of such sale as follows: One-third to my sister, Mary W. Lewis; one-third to my sister, Eliza Griffin, and one-third to the heirs of my sister, Margaret Thompson, deceased, namely, her daughters, Mabel Thompson, Bertha Thompson Lauritzen, and Lidella Thompson.' At the time of the appraisement of the personal estate, the court ordered the real estate to be also appraised, and the residence property and the garden lot in the village of Barnesville, Ohio, was appraised at $7,870.00. In order to determine the value of the remainder liable for the collateral inheritance tax, is it necessary to determine and deduct the value of the prior life estate given to Clara G. Buchanan, the widow? The application to determine the collateral inheritance tax was not filed until after the death of Clara G. Buchanan; would this life estate be determined according to its actual duration, or would it be determined according to the expectancy of life of the widow at testator's death as given in the so-called mortality tables? If, according to mortality tables, what table shall be used? Would it be the duty of the appraisers to determine the valuation of the remainder, or the duty of the court? Section 5343 seems to be inconsistent in that it first provides that the value of the property subject to the tax shall be its actual market value as found by the probate court, but provides for the appointment of three, disinterested persons to appraise the property at its actual value, and also provides that, 'In case of an annuity or life estate, the value thereof shall be determined by the so-called Actuaries' combined experience tables and 5% compound interest.' What is meant by this last clause? After diligent inquiry and search, I have not been able to find any so-called Actuaries' combined experience tables and 5% compound interest. Can you furnish

a copy of such table, or inform where the same may be obtained? The Code gives the Actuaries' combined experience table at certain per cents., but not 5%.

"Third. By the will of said T. J. Buchanan, he gives and bequeathes 'To the Presbyterian Church of Barnesville, Ohio, the sum of one thousand dollars, to be paid to the trustees of said church in cash within a reasonable time after my death.' Is this bequest liable for the collateral inheritance tax? The Presbyterian Church of Barnesville, Ohio, is duly incorporated under the laws of Ohio."

Your questions will be considered in the order in which you have submitted them.

Section 5331, G. C., as amended in 103, O. L., 463, provides:

"All property within the jurisdiction of this state, and any interests therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which pass by will or by the intestate laws of this state, or by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor, to a person in trust, or otherwise, other than to or for the use of the father, mother, husband, wife, lineal descendant or adopted child, shall be liable to a tax of five per cent. of its value above the sum of five hundred dollars. Fifty per cent. of such tax shall be for the use of the state; and fifty per cent. of such tax shall go to the city, village or township in which said tax originates. All administrators, executors and trustees, and any such grantee under a conveyance made during the grantor's life, shall be liable for all such taxes, with lawful interest as hereinafter provided, until they have been paid, as hereinafter directed. Such taxes shall become due and payable immediately upon the death of the decedent, and shall at once become a lien upon the property, and be and remain a lien until paid."

Under the plain terms of the above provisions of section 5331, G. C., the passing of interests in property by will or by the intestate laws of this state, to or for the use of persons other than those expressly excluded, is sufficient to make the estate taxable.

While section 5332, G. C., adds to the list of exemptions by excepting from the operation of the provisions of section 5331, G. C., interests in property transmitted to certain public subdivisions or institutions and sections 5334, G. C., provides that:

"When a decedent appoints one or more executors or trustees, and instead of their lawful allowance makes a bequest or devise of property to them which would otherwise be liable to such tax, or appoints them his residuary legatees, and said bequests, devises, or residuary legacies exceed what would be a reasonable compensation for their services, such excess shall be liable to such tax, and the probate court having jurisdiction of their accounts shall fix such compensation."

I find no language in any provision of the statutes, relating to collateral inheritances, which modifies the general provisions of said section 5331, G. C., as above quoted, by making the fact that a devise is founded upon a valuable consideration material as affecting the question of the exemption of the same from the inheritance tax.

While in the case of Haggerty v. State, 55 O. S., 613, the court, in interpreting the word "sale" as used in said section 5331, G. C., held that:

> "The property 'which shall pass by sale' within the meaning of the act (the collateral inheritance statute) is such only as passes in transactions which are in fact gifts, though in form sales, and the act does not restrict the right to dispose of property by sale for a valuable consideration, which the parties, in good faith, deem adequate,"

it cannot be held that this decision goes to the extent of limiting the force and effect of the statute upon inheritances created by will to such as are in the nature of gifts as distinguished from those which rest upon a valuable consideration.

In interpreting the statute of the state of New York, which contains a provision similar to that of section 5331, G. C., the court in the case of In Re Gould, 156 N. Y., 423, held that:

> "The transfer by will, subjected to taxation by the act 1892, is not intended to be limited to property gratuitously given by will, but extends to a testamentary transfer in payment of a debt.
>
> "It matters not what the motive of a transfer by will may be, whether to pay a debt, discharge some moral obligation, or to benefit a relative. If the devise or bequest is accepted by the beneficiary, the transfer is made by will within the meaning of the transfer tax act."

and again in the case of In Re Kidd, 188 N. Y., 274, the court held:

> "Where it has been adjudicated by the supreme court, in an action brought by the step-daughter of a testator against his executors and trustees and beneficiaries named in his will, that she was entitled to all of the real and personal property of testator, under an ante-nuptial agreement between him and her mother whereby he agreed to devise and bequeath all of his property to such step-daughter, if no children should be born of his marriage with her mother, and the judgment directed the defendants to execute and deliver to the plaintiff all necessary releases and conveyances of such property, the property passing to testator's step-daughter under such judgment is not exempt from taxation under the transfer act, since the contract, enforced by such judgment and under which testator's step-daughter receives the property, was not a contract to convey the property, but a contract to make a will in her favor, and even if the testator had performed his agreement and given her his property by his will, the estate would have been subject to the tax."

The above cited authorities are in support of the proposition, that in the absence of express statutory provision to the contrary, an inheritance tax applies as well to a devise or bequest upon a valuable consideration as to one which is intended as a mere gratuity, and the further proposition that even where there has been a definite contract to make a will founded upon a valuable consideration, and the contract was executed on the part of the devisee or legatee, and the will made, property passing to said devisee or legatee by the terms of said will is subject to the inheritance tax without reference to the contract. In such case the devisee or legatee may renounce his respective devise or bequest and elect to claim from the estate of the decedent as a creditor, but he may not take under the will except on the terms upon which all other devisees or legatees, except those expressly exempt, take under the will, i. e., subject to the tax.

As stated by my predecessor, Hon. Timothy S. Hogan, in an opinion found in the annual report of the attorney-general for the year 1914, at page 1344 of said report:

> "A very clear distinction is made by the authorities between the taxability of property passing by will, founded upon a consideration, and property passing by deed, grant or sale intended to take effect after the death of the testator, and founded upon a consideration. For a deed intended to take effect at the death of the testator or other similar instrument is only *conventionally* an inheritance, and the convention which the statute constructs will be limited to the purpose of the statute, which is to guard against the evasion of the tax by the expedient of making sales, grants or deeds intended to take effect at the death of the testator; so that where the sale, grant or deed is in reality founded upon a valuable consideration it is not permitted to stand upon a different foundation from any other similar transaction merely because it happens to be so made as not to take effect until after the death of the testator, and is, therefore, not to be regarded as within the purview of the statute. But the real subject of the tax is the privilege of inheriting property. This is regarded as in a sense something other than a natural right, whereas the right to dispose of property by grant, sale or deed is a natural right inherent in the very idea of property itself. Therefore, no reason exists in the view of the authorities for making any such distinction as to taxation of inheritances created by will as is made with respect to conventional inheritances created by grant, sale or deed intended to take effect after the death of the testator."

While from your statement of facts it appears that there was a verbal agreement between the said Walker V. Kilgore and the said William M. and Chattie M. Kilgore, according to the terms of which the said Walker V. Kilgore was to make a will, in which, after providing for the payment of his just debts and funeral expenses, he was to devise and bequeath to his brother, William M. Kilgore, and Chattie M. Kilgore, wife of William M. Kilgore, all the remainder of his property, both real and personal, of any and every kind, wherever found, in consideration of services to be rendered by the said William M. and Chattie M. Kilgore in caring for him in his last sickness, and that said will was made in accordance with said verbal agreement, the property passes to the said William M. and Chattie M. Kilgore by the terms of said will, and I am of the opinion, therefore, that said property is subject to the collateral inheritance tax under the provisions of section 5331, et seq., of the General Code.

From your statement of facts in connection with your second inquiry it appears that the life estate in question was terminated on March 12, 1915, prior to the date when the application to determine the collateral inheritance tax was filed.

Section 5333, G. C., as amended in 103 O. L., 463, provides:

> "When a person bequeaths or devises property to or for the use of father, mother, husband, wife, lineal descendant, or adopted child, during life or for a term of years, and the remainder to a collateral heir, or to a stranger to the blood, the value of the prior estate, shall be appraised, within sixty days after the death of the testator, in the manner hereinafter provided, and deducted, together with the sum of five hundred dollars, from the appraised value of such property."

Under provision of the latter part of section 5331, G. C., as amended, the

collateral inheritance tax became due and payable immediately upon the death of the testator, T. J. Buchanan, and at once became a lien upon the property which by the terms of the will passed to the persons therein mentioned subject to the life estate of the widow of said testator.

It seems clear under the above provisions of the statutes that for the purpose of determining the collateral inheritance tax the value of the life estate as well as of the estate in remainder must be determined as of the date of the death of the testator, and while the property in question was not appraised until after the sixty-day period provided in section 5333, G. C., as amended, and until after the death of the life tenant, this fact is not material as affecting the value of the prior estate to be deducted from the appraised value of said property.

Under the terms of the will the widow was to have the sole and exclusive use of the property in question during the term of her natural life. I am of the opinion, therefore, in answer to your second question that the value of this life estate, based on the expectancy of life of the said Clara G. Buchanan, widow of the testator, and determined as of the date of the death of said testator, should be ascertained by the appraisers, appointed by and acting under the order of the probate court, and when so determined should be deducted together with the sum of five hundred dollars from the appraised value of said property, according to the provisions of section 5333, G. C., as amended.

The latter part of section 5543, G. C., provides that the value of the life estate "shall be determined by the so-called Actuaries' combined experience tables and five per cent. compound interest."

According to the Actuaries' combined experience tables as set forth in Wolfe's "Inheritance Tax Calculations," the present value of an annuity of $1.00, payable at the end of each year for the remainder of the life of a person at the age of forty-seven, is $12.02.

Assuming that the appraisers should find that the entire value of the real estate in question at the time of the death of the testator was $8,800.00, the estimated annual income on this valuation at 5% would be $440.00. Multiplying the above sum of $12.02 by 440 gives $5,288.80, the value of the life estate. This sum plus $500.00 deducted from the entire value of the property in question, which we have assumed to be $8,800.00, leaves a remainder of $3,011.20 which would be subject to the collateral inheritance tax.

The foregoing is merely an illustration of the application of the Actuaries' combined experience tables in determining the value of the life estate.

I am informed by the superintendent of insurance that the above mentioned work on collateral inheritance tax calculations has been carefully prepared, and that the tables therein set forth may be relied upon as being correct. If you desire to secure a copy of said work you can write to S. H. Wolfe, the author and publisher, 165 Broadway, New York City.

Your third question calls for an interpretation of that part of section 5332, G. C., which provides that the provisions of section 5331, G. C., shall not apply "to property or interests in property transmitted to * * * or for the use of an institution in the state for purposes only of public charity or other exclusively public purposes."

In an opinion of my predecessor, Hon. Timothy S. Hogan, as found in the annual report of the attorney-general for the year 1913, at page 1178 of said report, it was held that a bequest to a church is not one "to or for the use of an institution in this state for purposes only of public charity or other exclusively public purposes" within the meaning of the provision of section 5332, G. C., and that such a bequest is therefore subject to the collateral inheritance tax if it exceeds the amount exempted by section 5331, G. C.

I concur in said opinion, and therefore hold that the bequest, referred to in your third inquiry, over and above the sum of five hundred dollars exempted by provision of said section 5331, G. C., as amended, is subject to the collateral inheritance tax.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1270.

CENSUS BY DEPARTMENT OF LABOR AND COMMERCE IS NOT SUCH A FEDERAL CENSUS AS IS CONTEMPLATED IN SECTION 4871, G. C.—ANNUAL REGISTRATION OF ELECTORS IS BASED ON DECENNIAL FEDERAL CENSUS—CITY OF AKRON.

The basis upon which the requirement of annual registration of electors provided in section 4871, G. C., is the decennial federal census.

COLUMBUS, OHIO, February 14, 1916.

HON. CHARLES Q. HILDERBANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Yours under date of February 8, 1916, is as follows:

"We herewith enclose a communication from the Board of Deputy State Supervisors of Elections of Summit county, a communication from the Department of Labor, Washington, D. C., to Dow W. Harter, assistant prosecuting attorney, Akron, Ohio, a communication from the Department of Commerce, Bureau of the Census, Washington, D. C., to Charles Kennedy, prosecuting attorney, Akron, Ohio, and a map of the city of Akron with annexed territory to said city, and ask your opinion upon the following question, to wit:

"Under sections 4870 and 4871, G. C., of Ohio, is the census so taken, as shown in the aforesaid communications from the department of labor and department of commerce, such a federal census as is contemplated in the aforesaid sections of the statutes of Ohio?

"If your answer is in the affirmative, does the board of deputy state supervisors of elections of Summit county become automatically a board of deputy state supervisors and inspectors of elections, as provided in section 4788 of the General Code, or must the members of said board be appointed as deputy state supervisors and inspectors of elections, as provided in section 4789 of the General Code of Ohio, on the first day of May, 1916?"

The communication from the department of labor, directed to Dow W. Harter, assistant prosecuting attorney, Akron, Ohio, referred to, is in part as follows:

"In response to your request of January 24th, for a report on the census of Akron, Ohio, for April 10, 1915, I beg to inform you that as a preliminary to the study of infant mortality in Akron, the children's bureau employed local persons to visit each habitation in the city in order to learn the number of babies born during the years 1913 and 1914. At the same time, the visitors were instructed to learn the number of persons living in each habitation on April 10, 1915."

The result of the foregoing enumeration showed the total inhabitants of the city of Akron on April 10, 1915, to be 100,079.

The communication from the department of commerce, addressed to Hon. Charles Kennedy, prosecuting attorney, Akron, Ohio, is as follows:

> "My attention has been called to the enumeration of the city of Akron made by the department of labor, which gives the population of your city as 100,079. This, no doubt, is official so far as the department of labor is concerned."

The provisions of sections 4870 and 4871, G. C., to which you refer, pertinent to your inquiry, are as follows:

> "*Section* 4870. In cities which at the last preceding federal census had, or which at any subsequent federal census may have, a population of eleven thousand eight hundred or more, there shall be a general registration of electors in the several wards or precincts thereof in the manner, at the times and on the days hereinafter provided. * * *
>
> "*Section* 4871. In cities which now or hereafter may have a population of one hundred thousand or more, when ascertained in the manner provided in the preceding section, there shall be an annual general registration of all the electors therein in the several wards and precincts thereof on the days and in the manner hereinafter provided."

The answer to your inquiry turns upon the interpretation to be given to the phrase "federal census" as found in the statutory provisions above quoted. This phrase has an established and well recognized meaning when used in the ordinary affairs of every day life. It is a well defined rule of statutory construction that terms are to be interpreted in their plain and ordinary acceptation unless it is manifest from the context that they are used in a special or different sense or such interpretation is palpably inconsistent with the purpose of the statute. No such reason for a construction or interpretation other than that of the ordinary acceptation of the terms appears in the present instance.

The federal census is uniformly accepted and understood to mean the actual enumeration of the population required by clause 3, section 2 of article 1 of the constitution of the United States, and by the act of July 2, 1909, c2, section 1 (section 4385 of the United States, compiled statutes of 1913) is to be taken in the year 1910 and every ten years thereafter, the promulgation of which is provided for in certain respects by sections 3498 and 4212, G. C. In view of this accepted meaning of the phrase "federal census," it is manifest that only such census was in contemplation of the legislature in the enactment of the statutes under consideration.

The enumeration referred to in the letters accompanying your inquiry is manifestly not such a census as is contemplated in sections 4870 and 4871, G. C. This enumeration was only incidental to an investigation being made by the "children's bureau" of the department of labor of the United States government, and does not purport to be in any sense a federal census. While it is stated, supra, that such enumeration is to be regarded as official, by the department of labor, it is not in any wise asserted to be an official census.

I am therefore of the opinion, in answer to your first inquiry, that the enumeration therein referred to is not a federal census within the meaning of section 4870 and section 4871, G. C., and that the census to which the provisions of those sections now refer is the census which was taken by the federal government in the year 1910.

The foregoing answer to your first inquiry renders unnecessary consideration of your second question.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1271.

CORRUPT PRACTICE ACT—PERSONS MAY BE EMPLOYED TO DISTRIBUTE MARKED UNOFFICIAL BALLOTS AND CARDS AT POLLS ON ELECTION DAY.

The payment of $3.00 *for the services of a person to circulate and distribute marked unofficial ballots and cards, showing the name of a candidate and the office which he seeks, among the voters at the polls on election day is not in violation of the provisions of section* 5175-26, *G. C.,* 106 *O. L.,* 437.

COLUMBUS, OHIO, February 14, 1916.

HON. CHARLES E. BALLARD, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—Yours under date of February 5, 1916, is as follows:

> "I respectfully request your opinion upon the following question:
> A. is a candidate for public office in Clark county, Ohio, and after the election files with the board of elections in said county a statement of his expenses, as required by law, showing that on the day of election he employed B. to stay near the polls and 'circulate pamphlets and literature bearing on the election,' and paid him $3.00 for his services. Is A., the candidate, guilty of a corrupt practice, as provided under section 5175-26, G. C., of what is known as the 'Corrupt Practices Act,' providing the pamphlets and literature circulated are marked ballots and a card giving the name and stating the office for which A. is a candidate?"

The provisions of section 5175-26, G. C., 106 O. L., 437, to which you refer, and which are particularly applicable to your inquiry, are as follows:

> "Any person is guilty of a corrupt practice if he, directly or indirectly, by himself or through any other person, in connection with, or in respect of any election, pays, lends or contributes, or offers or promises to pay, lend or contribute any money or other valuable consideration, for any other purpose than the following matters and services, at their reasonable, bona fide and customary value; * * *
> "The preparation, printing and publication of posters, lithographs, banners, notices and literary material, reading matter, cards and pamphlets. * * * The preparation and circulation of letters, pamphlets and literature bearing on election. * * *"

Section 5175-26 was originally enacted in 102 O. L., 327, and defines a criminal offense, the penalty for the commission of which is prescribed by section 13323-1, G. C., a part of the same act.

These sections being penal, are subject to a strict construction against the state, or, stated conversely, a liberal construction in favor of one accused thereunder.

While the term "literature" has a narrow technical meaning which would manifestly not include marked ballots or cards such as are above referred to, the term in its ordinary meaning is susceptible of a much more comprehensive definition, as found in the Century dictionary, as follows:

"Literature:

"(2) The use of letters for the promulgation of thought or knowlelge; the communication of facts, ideas or emotions by means of books or other modes of publication.

"(3) Recorded thought or knowledge; the aggregate of books or other publications in either an unlimited or a limited sense."

and in the Standard dictionary as follows:

"(1) The printed productions of the human mind collectively."

It is not believed to be indulging in any strained or unusual construction or application of this term, as understood in its every day use, and in view of the rule of construction of penal statutes above suggested, to say that a marked unofficial ballot or a printed card, giving the name of a candidate, together with the office sought by him, is literature within contemplation of the provision permitting "the preparation and circulation of letters, pamphlets and literature bearing on election." It would hardly be conceived to be consistent with the provision permitting the printing and publication of cards if it were not contemplated that the same might be distributed and circulated among the electors of the election district. Indeed, the term "publication" itself as here used manifestly includes more than the mere printing of such cards and may without inconsistency be held to include the circulation or distribution, as well as the mere printing, of reading matter, cards and pamphlets.

I am therefore of opinion that the payment of $3.00 for the services of a person to circulate and distribute among the voters at the polls on election day marked unofficial ballots and printed cards, showing the name of a candidate and the office which he seeks, is not in violation of the provisions of section 5175-26, G. C., to which you refer.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1272.

PRESIDENT OF CITY COUNCIL—VACANCY IN OFFICE FILLED BY APPOINTMENT BY MAYOR.

In case of the death or resignation of the president of council, the vacancy thus created may be filled by appointment by the mayor and the president pro tem does not, under such circumstances, succeed to the presidency of council.

COLUMBUS, OHIO, February 15, 1916.

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

GENTLEMEN:—This department is in receipt of the following inquiry which I deem of sufficient importance to answer, and am therefore directing the opinion to you:

"When the presidency of the council of a city becomes vacant either by death or resignation, does the president pro tem become president, and the council elect a new councilman, as well as another president pro tem?

"According to section 4274 of the latest edition of Ellis' Municipal Code, this line of succession follows in the case of a vacancy in the mayorship, and does the same section apply in the case of a vacancy in the presidency of the council?"

The provisions of section 4274, G. C., to which reference is above made, provides as follows:

"In case of the death, resignation or removal of the mayor, the president of council shall become the mayor, and serve for the unexpired term, and until the successor is elected and qualified. Thereupon the president pro tem of council shall become president thereof, and shall have the same rights, duties and powers as his predecessor. The vacancy thus created in council shall be filled as other vacancies, and council shall elect another president pro tem."

The circumstances and conditions prescribed by the foregoing section, and under and by which the president pro tem of council succeeds to the office of president thereof, are wholly different from those stated in the foregoing inquiry. It is not possible by any rule of construction to extend the provisions of said section beyond their plain terms, and therefore they cannot apply to the conditions named in said inquiry. It follows that said section furnishes no authority for the succession of president pro tem of council to the office of president of council in case of the death or resignation of the latter.

The president of council is an elective officer under the provisions of section 4272, G. C. Other than the provisions of section 4274, supra, hereinbefore noted, no authority may be found in the statutes under which the president pro tem of council may succeed to the office of president of council. When the latter, therefore, becomes vacant under any circumstances other than those named in said section 4274, we must look to the general provisions of the law for the filling of vacancies in offices of municipalities, and that is found in section 4252, G. C., as amended in 103 O. L., 65, which provides as follows:

"In case of death, resignation, removal or disability of any officer or director in any department of any municipal corporation, unless otherwise provided by law, the mayor thereof shall fill the vacancy by appointment, and such appointment shall continue for the unexpired term and until a successor is duly appointed, or duly elected and qualified, or until such disability is removed."

The president of council is an officer of the municipality. He therefore comes within the provisions of the foregoing section, and in case of his death or resignation the mayor, by the provisions of said section, is authorized to fill the vacancy so created by appointment.

This conclusion is in harmony with an opinion of my predecessor, Hon. Timothy S. Hogan, reported at page 1519, of Vol. II of the Annual Report of the Attorney-General for the year 1913.

I am of the opinion therefore in answer to this inquiry, that in case of the death or resignation of the president of council the vacancy thus created may be

filled by appointment by the mayor, and that the president pro tem does not, under any circumstances, succeed to the presidency of council.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1273.

APPROVAL OF CERTAIN OIL AND GAS AND COAL LEASES IN VINTON AND ATHENS COUNTIES.

COLUMBUS, OHIO, February 15, 1916.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—You have submitted to me for approval the following leases:

First. Oil and gas lease executed to T. E. Warren covering lands in section 16, township 11, range 17, Vinton county, Ohio, containing one hundred and sixty-two (162) acres more or less.

Second. Coal lease executed to J. C. Hewitt of Athens, Ohio, covering lands in section 29, township 11, range 15, Athens county, Ohio, containing thirty-six and forty-seven hundredths (36.47) acres more or less.

Third. Coal lease executed to E. P. Snyder, covering lands in section 16, township 11, range 17, Vinton county, Ohio, containing eighty (80) acres more or less.

These leases are drawn in pursuance of the provisions of sections 3209-1, G. C. (105 O. L., 6.)

I have carefully examined these leases and also considered the statements made by you relative to the advisability of executing these leases. I am returning the leases to you with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1274.

CORPORATION—FRANCHISE TAX COMPUTED UPON SUBSCRIBED BUT NOT YET ISSUED CAPITAL STOCK AND ALSO UPON ITS ISSUED CAPITAL STOCK.

The franchise tax provided in section 5498, *G. C., should be computed upon the subscribed but not yet issued or outstanding capital stock of a corporation, and also upon its issued and outstanding capital stock.*

COLUMBUS, OHIO, February 15, 1916.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your letter of February 9, 1916, requesting my opinion as follows:

> "A domestic corporation has an authorized capital stock of $100,000 of which $10,000 is issued and outstanding. It then secures subscriptions to an additional $40,000 of stock, none of which is issued and outstanding.

"What is the amount of subscribed stock?"

I assume that my opinion in this matter is desired for your guidance in determining the amount of subscribed or issued and outstanding capital stock of such corporation upon which is computed the franchise tax provided for in section 5498 of the General Code. The section of the Code just referred to defines or describes this tax as

> "* * * a fee of three-twentieths of one per cent. upon its subscribed or issued and outstanding capital stock, which fee shall not be less than ten dollars in any case. * * *"

Strictly speaking, "issued and outstanding capital stock" is of necessity subscribed stock, because all stock issued by a corporation must be issued upon subscription. The term "subscribed," however, is sometimes used to indicate the stock of a corporation which has been contracted for, but a certificate for which is not to be issued until wholly or partially paid for.

It is apparent that the legislature had in mind this latter restricted meaning of the word when section 5498 of the General Code was enacted, and in order to make sure that the tax would be computed not only upon the issued and outstanding stock, but also upon stock contracted for but not yet issued, they used the expression: "subscribed or issued and outstanding capital stock."

Directly answering your question, the corporation referred to has $50,000 of subscribed stock, $10,000 of which is issued and outstanding and $40,000 merely subscribed.

My answer to your question is in harmony with the conclusion expressed by former Attorney-General Ellis in an opinion given to the then secretary of state on June 6, 1907. I am, however, unable to agree with the statements made in the opinion of Mr. Ellis that the treasury stock of a corporation, which he concedes is issued and outstanding stock, is not subscribed stock, because, as I understand the term, "treasury stock" of a corporation is subscribed and issued stock which has later become the property of the corporation. The mere fact that this stock is an asset of and owned by the corporation itself does not take away its character as subscribed stock.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1275.

CORPORATION—WHEN INCREASING AUTHORIZED CAPITAL STOCK —NOT REQUIRED TO FILE CERTIFICATE SHOWING TEN PER CENT. OF ITS *ENTIRE* CAPITAL STOCK HAS BEEN SUBSCRIBED.

A corporation, which by proper action and the filing of a certificate with the secretary of state, increases the amount of its authorized capital stock, is not required to file a certificate showing that ten per cent. of its entire capital stock, after such increase, has been subscribed.

COLUMBUS, OHIO, February 15, 1916.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your letter of February 9, 1916, requesting my opinion as follows:

"A domestic corporation having an original authorized capital stock of $1,000, all of which is issued and outstanding, increases its authorized capital stock to $100,000.

"Is it required to increase its subscribed stock to be equal to ten per cent. of its total authorized stock?

"Your attention is respectfully directed to A. G. R., 1906, page 52."

Former Attorney-General Ellis, in an opinion rendered May 4, 1906, to the then secretary of state, which opinion is referred to in your letter, held, in substance, that a corporation increasing its capital stock must, after such increase has been effected, file a certificate showing that ten per cent. of its entire capital stock has been subscribed. This opinion was based upon no specific statutory authority, but apparently upon the general legislative policy relative to corporations.

I am unable to agree with the conclusion expressed in this opinion, and I do not believe that it is in harmony with the requirements of the General Code. Section 8633, of the General Code, requires the filing of a certificate with the secretary of state by subscribers to the articles of incorporation, or a majority of them, when ten per cent. of the capital stock of such corporation has been subscribed, applies to the organization of the corporation. Until this certificate is filed the corporate organization cannot be completed and it cannot even organize by the election of directors and officers or act as a legal entity until such certificate has been filed. It will be noted that the legislature has made effective provision to enforce the filing of this certificate by providing that it must be done before the corporation can organize or elect its officers or do any corporate act.

The situation is entirely different where a corporation increases its capital stock under sections 8698 and 8699 of the General Code. The corporation at that time must be in existence and fully organized. The section of the Code authorizing the increase of the capital stock makes no requirement that any part of such increase shall be subscribed before the increase becomes effective. The method of securing such increase is clearly defined in the law and is complete when a proper certificate to that effect is filed with the secretary of state. The fact that the organizers of a corporation might evade the requirements of the code, that ten per cent. of its capital stock must be subscribed before its organization can be completed, by organizing with a small capital stock and thereafter increasing the amount of such capital stock, does not justify reading into the section authorizing an increase of such capital stock a provision which is not there. Whether or not such provision should be in the law in order to effect a consistent legislative policy concerns the legislature of the state rather than the officers whose duty it is to interpret the law as enacted.

I am therefore of the opinion that the corporation referred to in your letter is not required to increase the amount of its subscribed stock to ten per cent. of its entire capital stock after the increase referred to.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1276.

APPROVAL OF ABSTRACT OF TITLE TO REAL ESTATE IN ATHENS COUNTY—REFORESTATION TRACTS.

COLUMBUS, OHIO, February 16, 1916.

HON. CHARLES E. THORNE, *Director Ohio Agricultural Experiment Station, Wooster, Ohio.*

DEAR SIR:—I have carefully examined the abstract of title to the premises described as follows:

> "Situate in Waterloo township, Athens county, Ohio, and in sections numbered twenty-five (25) and thirty-one (31), and the northwest quarter of said section No. 25, excepting forty (40) acres lying east of the public highway, heretofore conveyed by W. C. Foster to Julian E. White, to which reference is hereby made for a more particular description. The land hereby conveyed containing in all, two hundred twenty-one and one-half (221½) acres, more or less, and being the same premises formerly owned by Thomas Robinett."

From my examination of said abstract of title I am of the opinion that on December 11, 1915, the date of the continuation of said abstract made by R. D. Williams, abstractor, Juliet Seward was the owner in fee simple of said premises subject only to the following incumbrances:

1st. The mortgage for $1,200.00 executed by Juliet Seward and husband, Millard F. Seward, to Martin F. Morris, trustee, which mortgage is recorded in volume No. 40, page 148, record of mortgages of Athens county, Ohio.

2nd. The taxes for the year 1915, the amount of which is not stated in said abstract. However, under date of February 10, 1916, I am informed by the treasurer of Athens county that the taxes on said premises, due and payable in December, 1915, have been paid. This leaves only the taxes for the last half of 1915 payable in June, 1916, to be paid. On the same day I was advised by the recorder of Athens county that the mortgage above referred to had not yet been satisfied.

I am of the opinion that when the tax payable in June, 1916, and the mortgage above referred to are paid and discharged, that Juliet Seward and husband can, by a sufficient warranty deed, convey to the state of Ohio an estate in fee simple to said premises.

The abstract of title is herewith returned to you.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1277.

SUPERINTENDENT OF PUBLIC INSTRUCTION—VACANCY IN OFFICE —PERSON APPOINTED CONTINUES FOR FULL TERM OF FOUR YEARS—CONSTITUTIONAL PROVISION GOVERNS APPOINTMENT.

Section 4 of article VI of the constitution governs the appointment of the superintendent of public instruction, and under the provisions of said section the term of a person appointed by the governor to fill a vacancy in said office begins at the date of the appointment and qualification of said person, and continues for the full term of four years.

COLUMBUS, OHIO, February 16, 1916.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—In your letter under date of February 14, 1916, you request my opinion as follows:

> "Article VI, section 4 of the constitution of Ohio provides:
>
> "'A superintendent of public instruction to replace the state commissioner of common schools, shall be included as one of the officers of the executive department to be appointed by the governor, for the term of four years, with the powers and duties now exercised by the state commissioner of common schools until otherwise provided by law, and with such other powers as may be provided by law.'
>
> "In accordance with the above quoted provisions of the constitution, the records of this department show that Frank W. Miller was appointed and commissioned as such superintendent of public instruction for the term beginning July 29, 1913, and expiring July 28, 1917.
>
> "Section 352 of the General Code of Ohio, passed February 16, 1914, provides:
>
> "'There shall be a superintendent of public instruction, who shall be appointed by the governor. He shall hold his office for a term of four years, and until his successor is appointed and qualified, such term commencing on the second Monday of July. He shall have an office in or near the state house, in which the books and papers pertaining to his office shall be kept.'
>
> "Frank W. Miller having resigned and Frank B. Pearson having been appointed to the office of superintendent of public instruction, your official opinion is requested as to the date of expiration of the term of office of the said Frank B. Pearson, in order that the commission may be drawn properly."

The provisions of article VI, section 4 of the constitution, as quoted by you, were adopted September 3, 1912, and went into effect on the second Monday in July, 1913.

While it was evidently the intention of the legislature in amending section 352 of the General Code, as found in 104 O. L., 226, and as quoted by you, to carry into effect the provisions of said section 4 of article VI of the constitution, I am of the opinion that the governor of the state had the authority after said second Monday in July, 1913, under said provisions of said section 4, to appoint a superintendent of public instruction to take the place of the commissioner of

common schools who had been elected at the November election in 1910, for a term of two years, commencing with the second Monday in July, 1911, under the provisions of section 352, G. C., as then in force.

Said constitutional section 4 provides for the appointment of a superintendent of public instruction by the governor for a term of four years. This provision is controlling as to the length of the term for which an appointment may be made. The amendment of said section 352 does not in any way change the term so fixed, and if any provision of said amended section did undertake to make any change in this regard, it would not control. In other words, it is not within the power of the legislature to change the term of four years as fixed by section 4 of article VI of the constitution.

Neither the constitution nor the statute establishes said term to exist between fixed dates. While the statute undertakes to provide that such term shall commence on the second Monday of July, it does not specify in what year. As hereinbefore noted, it appears that at the time this statute went into effect a superintendent was serving a full term of four years, having been appointed on July 29, 1913, said appointment being made under authority of the constitutional provisions aforesaid. It follows, therefore, that no provision of statutory law could interfere with or change in any way the term of the then serving superintendent of public instruction so appointed under the provisions of the constitution. If it was the intention of the legislature in this enactment to refer to the second Monday of the first July coming after said statute went into effect, which would be in the year 1914, such provision would be wholly inoperative because of the considerations above noted. It is clear that no provision of said section 352 could affect either the plain meaning of the constitution or any appointment then existing thereunder.

No provision whatever is made, either in the constitution or by statutory law, for filling a vacancy in this office. There is no question of the right or power of the legislature to provide for filling such vacancy. This authority is conferred by section 27 of article II of the constitution. The legislature, however, has either neglected or deliberately declined to make such provisions. In either event the conclusion is inevitable that the legislature was not interested in filling vacancies in this office, and this fact alone, independent of any other consideration, is sufficient to sustain the conclusion that it was not intended that fractional terms should be served by any appointee, but only original appointments made for the full term when vacancies in this office occur.

In the case of State v. Wentworth, 55 Kansas, 298, the court commenting upon similar facts says:

> "The circumstance that where the legislature has seen fit to recognize vacant fractional terms, it has expressly provided for the filling of the places for the unexpired terms, furnishes a strong reason for holding that where they have not done so it was intended and deemed best that the officer at whatever time appointed should hold his office for the term prescribed by the statute, and that if he should vacate the place before the expiration of that time, this should not shorten the term of the next incumbent. In other words, when one goes into office by virtue of an appointment under this statute, he has a right to fill it for the prescribed period, but if he quits, his term ends and a new one begins when the appointment of his successor takes effect, and this doctrine is sustained by the great weight of authority."

However, I prefer to base my conclusions in this matter upon the fact that the constitution fixes the term of this office at four years, and that the power con-

ferred upon the governor is expressly limited to an appointment for four years and for no other term. It must also be observed in this connection that there is no other or further limitation upon nor prohibition against the exercise of this right by the governor, either in the constitution or in any section of the General Code referring to this office. The only provision therefore under which the appointment referred to in your letter may be made, is the constitutional provision aforesaid, and the question therefore to be determined is whether the language of the constitution may be so construed as to admit in any case the appointment of a superintendent for a term of less than four years as therein provided.

Similar questions have been considered by the courts of various states under constitutional provision, which, like the one under consideration, contain no provision with respect to unexpired terms.

Quoting now from the case of Ex Parte Meredith, 74 Va. 119, which the same question was considered, it is said:

> "In every instance those words have been construed as requiring an election for the full constitutional term, whether the vacancy be created by death or resignation or by expiration of a regular term. Each incumbent holds for the length of time prescribed by the constitution unless prohibited by express enactment or implication equally plain. When we see certain provisions incorporated into our constitution also found in the constitutions of other states, and these provisions have received uniformly the same construction in numerous cases, we must suppose it was intended they should be construed in like manner here. At all events it would be a little surprising if this court should now give to these provisions a construction entirely different from that given in every other state by judges of the highest respectability and learning."

This case is a well considered case, in which many authorities are cited and analyzed by the court, and the conclusion reached that in a case where the term of an office is fixed by the constitution and no provision made for appointment for an unexpired term, when a vacancy occurs in said office the appointment must be for the full term fixed by the constitution. In this connection the court says:

> "If we are to believe the attention of the men who framed the present constitution was called especially to this subject, if their purpose was that in cases of vacancy the incumbent shall hold only for the unexpired term, would they not have said so in plain and unmistakable language? Would they have left a matter of so much importance in doubt and uncertainty? * * * In the language of Judge Marcy in The People v. Greene, already cited, 'the framers of the constitution must have foreseen that such cases would happen very frequently.' It is therefore reasonable to infer that if they intended that persons elected to fill vacancies in the office of sheriff should hold for a shorter period than the general term, they would not have left that intention to be evolved by ingenious distinctions and dubious inferences."

In an advisory opinion rendered by the supreme court of Florida to the governor of said state in the matter of the tenure of office of judges of the circuit courts, precisely the same question was considered as is presented here, that is, whether in case of the resignation of an incumbent in the office of judge an appointment should be made for the unexpired term or for the full term. The court in announcing its opinion, among other things, says:

"The language of the constitution is plain and simple, 'there shall be seven circuit judges appointed by the governor and confirmed by the senate, who shall hold their office for eight years,' article VI, section 7. The remaining clause of this section provides permanent judicial subdivisions composing each circuit. There is nothing in this which limits the time of service of one appointee by reference to the time served by the previous one.. * * * Unless, therefore, there is some other provision of the constitution limiting or otherwise explaining this language, it must have its usual and ordinary effect. There is nothing here establishing a term of office to exist between dates of months or years, nor is there anything having the most remote reference to an unexpired term or to a vacancy in the office as distinct from the office itself. There is no other provision of the constitution which changes or affects this section. * * * The conclusion we reach is that a judge of the circuit court, appointed by the governor and confirmed by the senate, holds his office for eight full years, and that no part of a previous eight years during which another has held the office but who has vacated it, enters into the computation of the time for which the second appointee holds."

Many other authorities may be cited in support of the conclusions reached in the foregoing cases, but I deem it unnecessary to incumber the record by further citations. My conclusion is that under the provisions of section 4 of article VI of the constitution aforesaid, you are without any authority to appoint the person named in your inquiry for a term of less than four years, and that the term of said appointee begins at the date of his appointment and qualification, and continues for the full term of said four years.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1278.

CITY SOLICITOR—WHEN ASSISTANTS MAY BE EMPLOYED—COMPETITIVE BIDS NOT REQUIRED FOR CONTRACTS OF EMPLOYMENT OF ASSISTANTS TO SOLICITOR—COUNCIL FIXES COMPENSATION.

A city council may not employ special counsel or attorneys to assist the city solicitor in litigation to which the city is a party in the absence of refusal of the solicitor to make request for assistants.

The employment of assistants by the city solicitor is not subject to the provisions of section 3627, G. C., which requires competitive bids in certain classes of contracts therein defined.

The compensation of counsel employed to assist the city solicitor in litigation may be fixed by the council by per diem, percentage, monthly salary or lump sum, according to the judgment and discretion of the council.

COLUMBUS, OHIO, February 16, 1916.

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

GENTLEMEN:—Yours under date of February 3, 1916, reads as follows:

"We would respectfully request your written opinion upon the following questions:

"(1) If a city is involved in important litigation, or such litigation is imminent, may the council of said city employ special counsel to assist the city solicitor in the absence or refusal of said solicitor to make request for assistance?

"(2) Could the council delegate the mayor, director of service, director of safety, or the head of the department particularly interested in the matter, to contract for such service, or may the council itself select the special counsel and fix his compensation?

"(3) If there be a conflict between the city solicitor and the council, or delegated official, in the selection of such special counsel, as a matter of law which would prevail?

"(4) If the probable amount to be expended for such service is likely to exceed $500.00, must competitive bids be taken and contract entered into by the city, or would the council be required to create the position in the solicitor's department and fix the compensation?

"(5) May said compensation be fixed by per diem, percentage, monthly salary, or may it provide a lump sum for the services required in the case?

"We desire an outline of the procedure to be taken in the event that the above conditions obtain."

By the provisions of section 4303, G. C., a city solicitor is required to be elected for a term of two years, and by section 4305, G. C., such city solicitor is required to prepare all contracts, bonds and other instruments in writing, in which the city is concerned, and to serve the several directors and officers mentioned in this title as legal *counsel* and *attorney*, and under the provisions of section 4306, G. C., the city solicitor is made the prosecuting attorney of the police or mayor's court, and he is by section 4307, G. C., required to prosecute all cases brought before such court. Under section 4309 the city solicitor is required to reply orally or in writing to all questions submitted in writing to him by an officer of the corporation concerning the law in any matter before such officer. He is required by section 4311, G. C., to apply to a proper court for an order of injunction to restrain the misapplication of the funds of the corporation, or the abuse of its corporate powers, or the execution or performance of any contract in violation of law. Under section 4312 he is required to apply for the forfeiture of the specific performance of a contract granting a right or easement, or creating a public duty, when the same is being evaded or violated. Section 4313, G. C., provides that the city solicitor shall apply for a writ of mandamus in case an officer or board fails to perform any duty expressly enjoined by law or ordinance. Section 4308, G. C., provides as follows:

"When required to do so by resolution of the council, the solicitor shall prosecute or defend, as the case may be, for and in behalf of the corporation, all complaints, suits and controversies in which the corporation is a party, and such other suits, matters and controversies as he shall, by resolution or ordinance, be directed to prosecute, but shall not be required to prosecute any action before the mayor for the violation of an ordinance without first advising such action."

Thus the city solicitor is made the legal adviser, counsel and attorney of the several directors and officers of the city and the legal adviser of the council and all boards of the city and is specifically charged with the duty of prosecuting and defending for and in behalf of the corporation all complaints, suits and contro

versies in which the corporation is a party, when required so to do by a resolution of the council and such other matters and controversies as he shall, by resolution and ordinance of council, be directed to prosecute, except as to violations of city ordinances.

There is thus left to the city council the matter of determining in the first instance whether or not any suit, complaint or controversy, to which the corporation is a party, shall be prosecuted or defended, but it is made by specific provision the duty of the solicitor to prosecute or defend all such complaints, suits or controversies upon the direction of coucil so to do.

Council may, as I understand is the usual practice, by general resolution, require the city solicitor to defend all complaints, suits and controversies in which the corporation is a party.

The city solicitor is manifestly an executive officer of the city within the terms of section 4246, G. C. With reference to such officers, clerks and employes as are authorized and necessary to enable the city solicitor to fully and properly perform the duties imposed upon him, section 4247, G. C., provides as follows:

> "Subject to the limitations prescribed in this subdivision such executive officers shall have exclusive right to appoint all officers, clerks and employes in their respective departments or offices, and likewise subject to the limitations herein prescribed, shall have sole power to remove or suspend any of such officers, clerks or employes."

By force of the provisions of this section, the city solicitor is given exclusive authority and right to appoint all officers, clerks and employes in his department of the city government, subject, however, to the civil service law, and to the control of council as to number and compensation.

A careful examination of the statute fails to disclose any specific provision authorizing council or other officer of the city to employ legal counsel or attorneys other than the city solicitor, nor does there appear any general provision which contemplates such power or authority. On the contrary, the power of council is limited by the provision of section 4211, G. C., as follows:

> "The powers of council shall be legislative only, and it shall perform no administrative duties whatever, and it shall neither appoint nor confirm any officer or employe in the city government except those of its own body, except as is otherwise provided in this title. * * *"

In view of the provisions of this section and the absence of specific provision for employment of council or attorneys by the city council, it seems conclusive that no such power is lodged in that body.

In answer to your first inquiry, I am therefore of opinion that the council of a city is without authority to employ special counsel or attorneys to assist the city solicitor in litigation independent of and in the absence of a request therefor by the solicitor, and upon such request by the solicitor the exclusive power of selection or appointment rests with such solicitor.

This answer to your first question renders unnecessary a consideration of your second and third inquiries.

Your fourth and fifth inquiries may be considered together. Attention is called to the provisions of section 4214, G. C., which are as follows:

> "Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in

each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation, and the amount of bond to be given by each officer, clerk or employe in each department of the government, if any be required. Such bond shall be made by such officer, clerk or employe, with surety subject to the approval of the mayor."

It is thus specifically provided without restriction that the council shall fix the compensation of officers, clerks and employes of the department of the city solicitor, as well as of the other departments of the city government. This authority is conferred in general terms and without prescribing the amount of such compensation or the manner of the payment thereof, thus leaving the details of the exercise of such authority to the sound discretion and determination of the council.

I am, therefore, of the opinion that where special counsel is determined by the council to be necessary, it may authorize the employment of the same by the city solicitor, and may fix the amount of compensation to be paid therefor and the manner of the payment thereof at its discretion. Such special counsel would be in the employ of the solicitor and not subject to the provisions of section 3627, G. C., which provides for competitive bids in certain classes of contracts therein defined with the city, when the amount of the expenditure involved is in excess of $500.00.

Answering your fourth inquiry specifically, I am therefore of opinion that the employment of special counsel in the manner authorized by law, as above pointed out, is not subject to the statutory requirements for the acceptance of competitive bids for such services.

In answer to your fifth question I am of the opinion that council may fix the compensation for special counsel so employed by per diem, by percentage, by monthly salary or by a lump sum according to the judgment and discretion of the council.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1279.

BRIDGES AND CULVERTS—COUNTY COMMISSIONERS AND TOWNSHIP TRUSTEES ARE AUTHORIZED TO REPAIR AND MAINTAIN SAME ON TOWNSHIP ROAD—WHEN TOWNSHIP TRUSTEES MAY INCLUDE PLANS FOR CONSTRUCTION OF A BRIDGE OR CULVERT.

1. *Both the county commissioners and the township trustees are authorized to repair or maintain a bridge or culvert on a township road, but the duty of such repair or maintenance rests primarily on the trustees.*

2. *If township trustees construct or reconstruct a road under chapter III of the Cass highway law, and it is necessary or desirable, in their judgment, to include in the plans for such construction a bridge or culvert on the line of the road in question, they are authorized so to do.*

COLUMBUS, OHIO, February 16, 1916.

HON. E. E. LINDSAY, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—I have your communication of January 21, 1916, in which you call my attention to the repeal of section 7562, G. C., by the Cass highway law and request my opinion as to the present jurisdiction of township trustees over bridges and culverts, and as to what extent, if any, township trustees may now go in the construction and maintenance of bridges and in the payment of the cost thereof.

Section 7562, G.C., referred to by you, read as follows:

> "The township trustees shall cause to be built and keep in repair all bridges and culverts, except upon improved and free turnpike roads when the cost of construction does not exceed fifty dollars, and shall keep in repair all bridges constructed by the commissioners. Such repair by said trustees of a bridge in any year shall not exceed ten dollars and they may levy a tax for the payment thereof."

The repeal of the above quoted section by the Cass highway law has changed the jurisdiction of the township trustees in relation to bridges and culverts and no separate levy by the township trustees for bridge purposes is provided for by that law.

The bridge levy provided for by old section 7562, G. C., is abolished and at least a part of the duties of the township trustees as to bridges and culverts formerly conferred upon them are taken away from the trustees and lodged with the county commissioners. Inasmuch as a separate bridge levy and bridge fund were abolished by the Cass highway law, it was pointed out in opinion No. 1063, rendered by this department to Hon. Hugh F. Neuhart, on December 3, 1915, that balances in the township bridge fund not needed for bridges on account of a transfer of authority from the trustees to the commissioners might properly be transferred in the manner provided by section 2296, et seq., of the General Code. The extent of the transfer of authority and the question of whether all authority in bridge and culvert matters had been transferred to the county commissioners were not involved or considered in the opinion rendered to Mr. Neuhart. While the Cass highway law has transferred to the county commissioners much of the authority of the township trustees as to bridge and culvert matters and especially as to the repair of bridges and culverts, yet there are some duties which still devolve upon township trustees in the matter of bridges and culverts, and their expenditures in the performance of these duties are to be made from the general township road levies provided by the Cass highway law. This conclusion is supported by a number of the provisions of the Cass law cited by you in your communication to me, read in connection with certain other provision of that act.

Section 144 of the act, section 7187, G. C., contains the following provision:

> "The county highway superintendent shall, on or before April first of each year, make an annual estimate for the township trustees of each township, for the improvement, maintenance and repair of roads, bridges and culverts, or for the construction of new roads required in said township, and shall submit the same to the township trustees for their action."

Section 239 of the act, section 3298-18, G. C., provides that after the annual estimate for each township has been filed with the township trustees by the county highway superintendent and adjusted by the trustees, they shall make their levies for the purposes set forth in the estimate.

Section 150 of the act, section 7193, G. C., provides among other things that at the request of the *township trustees* or county commissioners the county highway superintendent shall inspect any highways, *bridges or culverts*, within the county at any time.

Section 160 of the act, section 7203, G. C., reads as follows:

"The county highway superintendent may, with the approval of the county commissioners or township trustees, purchase from any public institution, any road material, machinery, tools or equipment, quarried, mined, prepared or manufactured by said institution, provided the same conform to the standard specifications therefor, for highways, bridge or culvert work in said county."

Section 230 of the act, section 7214, G. C., provides, among other things, that the county commissioners or township trustees may contract for and purchase such material as is necessary for the purpose of constructing, improving, maintaining or repairing any highways, *bridges* or *culverts* within the county.

There may be other provisions in the act similar to those referred to above, but the provisions above cited are sufficient to indicate that it was the intention of the legislature that township trustees should have certain duties in regard to bridges. These duties are not specifically defined and must be gathered from a consideration of sections conferring upon township trustees general duties in relation to roads.

Section 241 of the act, section 7464, G. C., contains the following provision:

"Township roads shall include all public highways of the state other than state or county roads as hereinbefore defined, and the trustees of each township shall maintain all such roads within their respective townships and provided further, that the county commissioners shall have full power and authority to assist the township trustees in maintaining all such roads, but nothing herein shall prevent the township trustees from improving any road within their respective townships, except as otherwise provided in this act."

Under section 75 of the act, section 3370, G. C., it is made the duty of the township highway superintendent, acting under the direction of the township trustees, to keep the township roads of his district in good repair. Under sections 7464 and 3370, G. C., the duty of maintaining and repairing township roads is cast in the first instance on the township trustees. In view of this fact and the further fact that the act manifestly contemplates the performance by the township trustees of certain duties with reference to bridges and culverts and does not expressly define these duties, I am of the opinion that the township trustees are charged with the duty of maintaining and repairing bridges and culverts on township roads. While this duty is cast in the first instance on the township trustees, yet in view of the fact that the county commissioners have full power and authority to assist the township trustees in maintaining all township roads, it follows that the commissioners are also authorized to repair or maintain a bridge or culvert on a township road. In other words, both the county commissioners and the township trustees are *authorized* to repair or maintain a bridge or culvert on a township road, but the *duty* of such repair or maintenance rests primarily on the trustees.

Under chapter III of the Cass highway law, township trustees are authorized to construct or reconstruct roads and their power in this respect is not limited to township roads. For the reasons heretofore given, I am of the opinion that if township trustees proceed to construct or reconstruct a road under chapter III of the act, and it is necessary or desirable, in their judgment, to include in the plans for such construction a bridge or culvert on the line of the road in question, they are authorized so to do. No opinion is herein expressed, however, as to the right to assess against the owners of real estate any part of the cost of such bridge or culvert.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1280.

APPROVAL OF LEASE OF RESERVOIR LANDS IN LOGAN COUNTY TO THE RUSSELL POINT AMUSEMENT COMPANY.

COLUMBUS, OHIO, February 17, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of February 15, 1916, transmitting to me for examination a lease of certain reservoir lands in Logan county to the Russel Point Amusement Company.

I find this lease to be in regular form and am, therefore, returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1281.

COLLATERAL INHERITANCE TAX—CAPITAL UNIVERSITY, COLUMBUS, OHIO, EXEMPT—THE WERNLE ORPHANS' HOME, RICHMOND, INDIANA, SUBJECT TO TAX—SECTION 5332, G. C., NOT REPEALED BY IMPLICATION.

While the Capital university at Columbus, Ohio, is under the supervision and control of the Evangelical Lutheran joint synod of Ohio, the students in said institution are or may be of all denominations and there are no restrictions as to creed or nationality for admission. Said university is, therefore, a "public institution of learning" within the meaning of the provisions of section 5332, *G. C., and a bequest to said university is exempt from the collateral inheritance tax.*

The Wernle orphans' home, located at Richmond, Indiana, is a corporation organized under the laws of said state of Indiana and a bequest to said institution is subject to the collateral inheritance tax under the provisions of section 5331, *G. C., as amended in* 103 *O. L.,* 463.

The provisions of section 5332, *G. C., were not repealed by implication by the act of the general assembly amending sections* 5331 *and* 5333, *G. C., as found in* 103 *O. L.,* 463.

COLUMBUS, OHIO, February 18, 1916.

HON. ARTHUR D. DAVIS, *Probate Judge, Eaton, Ohio.*

DEAR SIR:—In your letter under date of January 31st, you state that under the will of William C. Bickel, deceased, the Capital university at Columbus, Ohio, will receive a gift of about $25,000.00, and the Wernle orphans' home at Richmond, Indiana, will receive $1,000.00; that the board of directors of the Wernle home are the same men who compose the board of directors of the Capital university of Columbus, and all reside in this state. You request my opinion on the following questions:

"1. Is Capital university an 'institution of learning' within the meaning of section 5332, G. C., such as to exempt it from the collateral inheritance tax?

"2. Is the Wernle orphans' home also exempt?

"3. Was section 5332, G. C., repealed by implication by the act of the general assembly amending sections 5331 and 5333 of the General Code as found in 103 O. L., 463?"

Section 5331, G. C., as amended provides:

"All property within the jurisdiction of this state, and any interests therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which pass by will or by the intestate laws of this state, or by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor, to a person in trust, or otherwise, other than to or for the use of the father, mother, husband, wife, lineal descendant or adopted child, shall be liable to a tax of five per cent. of its value above the sum of five hundred dollars. Fifty per cent. of such tax shall be for the use of the state; and fifty per cent. of such tax shall go to the city, village or township in which said tax originates. All administrators, executors and trustees, and any such grantee under a conveyance made during the grantor's life, shall be liable for all such taxes, with lawful interest as hereinafter provided, until they have been paid, as hereinafter directed. Such taxes shall become due and payable immediately upon the death of the decedent and shall at once become a lien upon the property and be, and remain a lien until paid."

Section 5332, G. C., provides as follows:

"The provisions of the next preceding section shall not apply to property, or interests in property, transmitted to the state of Ohio under the intestate laws of the state, or embraced in a bequest, devise, transfer or conveyance to, or for the use of the state of Ohio, or to or for the use of a municipal corporation or other political subdivision thereof for exclusively public purposes, or public institutions of learning, or to or for the use of an institution in this state for purpose only of public charity or other exclusively public purposes. The property, or interests in property so transmitted or embraced in such devise, bequest, transfer or conveyance shall be exempt from all inheritance and other taxes while used exclusively for any of such purposes."

Item 7 of the will of the said William C. Bickel, deceased, a copy of which will is enclosed with your letter, provides:

"To THE WERNLE ORPHANS' HOME, of the city of Richmond, Wayne county, Indiana, I give and bequeath the sum of ONE THOUSAND DOLLARS ($1,000.00) to be held in trust. Said sum to be safely and profitably invested by the proper officers or authorities of said ORPHANS' HOME, and the net income and profits received therefrom each year, to be used for the benefit of the inmates of said institution."

Item 11 of said will provides:

"All the rest, residue and remainder of my estate, which is left after the payment of my debts, legacies and bequests given by me in this will, and costs of administering my estate, I give, devise and bequeath to the CAP-

ITAL UNIVERSITY OF COLUMBUS, OHIO (which University is under the supervision and control of the EVANGELICAL LUTHERAN JOINT SYNOD OF OHIO) to be held in trust by the proper officers of said CAPITAL UNIVERSITY, and the income, rents, issues and profits received therefrom each year, after payment of all proper and legitimate expenses incident to the management of trust estate, shall be applied for the benefit of said CAPITAL UNIVERSITY, to such uses and purposes as said officers so mentioned may deem meet and proper."

While this university is under the supervision and control of the Evangelical Lutheran joint synod of Ohio. I am informed that the students in said institution are or may be of all denominations and that there are no restrictions as to creed or nationality for admission. I am of the opinion, therefore, that said university is a "public institution of learning" within the meaning of the above provision of section 5332, G. C., and that the bequest referred to in your first inquiry is exempt from the collateral inheritance tax.

This conclusion is in keeping with my two former opinions, one rendered to Hon. William H. Lueders, judge of the probate court of Hamilton county, under date of April 19, 1915, and the other rendered to Hon. John V. Campbell, prosecuting attorney of said county, under date of November 15, 1915. Copies of said opinions are enclosed for your consideration.

The bequest referred to in your second inquiry is one to an institution of public charity located in the state of Indiana. I am informed by the president of the Evangelical Lutheran joint synod of Ohio that the Wernle orphans' home is a corporation organized under the laws of said state of Indiana. In the case of Humphreys v. State, 70 O. S., 67, the court, at the second branch of the syllabus, held:

"Boards and societies and auxiliaries thereto, which are incorporated and organized under the laws of other states, for 'purposes of purely public charity or other exclusively public purposes,' are not 'institutions' of that class in this state within the meaning of the latter clause of section 2731-1, Revised Statutes (section 5332, G. C.); and where they are entitled to receive property within the jurisdiction of this state, by deed or gift, bequest or devise, such gift, bequest or devise is liable to a collateral inheritance tax as provided in said section, although some of the charitable work, operations and enterprises of the institutions so incorporated and organized are carried on within this state."

Numerous authorities are cited by the court in support of its conclusion in its opinion at page 84 that:

"The exemptions of charitable institutions, would relate only to domestic institutions of that class, even if the words 'in the state' had been omitted from the statute."

In view of the holding of the court in the case of Humphreys v. State, supra, I am of the opinion in answer to your second question that the bequest therein referred to is subject to the collateral inheritance tax under the provisions of section 5331, G. C., as amended in 103 O. L., 463.

In the consideration of your first and second questions it is necessarily assumed that the provisions of section 5332, G. C., were not repealed by implication by the act of the general assembly amending sections 5331 and 5333, G. C., as found in 103 O. L., 463, and that said provisions are still in force. The provisions of said

section 5332, G. C., are in no way in conflict or inconsistent with the provisions of said sections 5331 and 5333, G. C., as amended. Your third question is, therefore, answered in the negative.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1282.

APPROVAL OF TRANSCRIPT OF BOND ISSUE, BRISTOL TOWNSHIP RURAL SCHOOL DISTRICT, TRUMBULL COUNTY, OHIO.

COLUMBUS, OHIO, February 19, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Bristol township rural school district, Trumbull county, Ohio, in the sum of $30,000.00, to secure funds for the purpose of purchasing a site and the erection and equipment of a school building for the accommodation of the centralized schools of said school district, being sixty bonds of $500.00 each, dated March 1, 1916, payable two bonds every six months, beginning October 1, 1917, until paid, with interest at five per cent. per annum payable semi-annually."

I have examined the transcript of the proceedings of the board of education of Bristol township rural school district relative to the issuance of the above described bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the General Code of Ohio.

I am, therefore, of the opinion that said bonds, drawn in accordance with the form presented, when properly executed and delivered, will constitute valid and binding obligations of said township school district.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1283.

DISTRICT SUPERINTENDENT HAS AUTHORITY TO EXCUSE A CHILD FROM ATTENDING PUBLIC SCHOOL IN RURAL DISTRICT UNDER CERTAIN CONDITIONS—CLERK OF BOARD OF EDUCATION OF SAID RURAL SCHOOL DISTRICT WITHOUT SUCH AUTHORITY—PERSON TEACHING CHILD AT HOME NOT REQUIRED TO HOLD TEACHER'S CERTIFICATE OR COLLEGE DIPLOMA.

Under the provisions of section 7763, G. C., as amended in 104, O. L., 232, the authority to excuse a child, within the age limit prescribed by said section, from attendance at a public school in the rural district in which such child resides, is vested in the district superintendent in charge of such rural school district and this authority may only be exercised by such district superintendent upon a satisfactory showing either that the bodily or mental condition of such child does not permit of its attendance at such public school or that the child is being instructed at home by a person qualified, in the opinion of such district superintendent, to teach the branches named in section 7762, G. C. The clerk of the board of education of said rural school district has no authority under provision of said section 7763, G. C., as amended, to determine the qualification of said person to give such instruction.

A person teaching a child at home, under the provision of the latter part of said section 7763, G. C., as amended, is not required to hold a teacher's certificate or college diploma.

COLUMBUS, OHIO, February 21, 1916.

HON. E. A. SCOTT, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR:—In your letter of January 31st, you request my opinion as follows:

"The following are the facts on which I desire your opinion: The district superintendent and probation officer have notified 'A,' father of a girl 15 years of age, to send said girl to school; she has no certificate from physician showing bodily or mental condition but father has the clerk of the rural board of education give certificate showing that the father is teaching her at home and that said father is competent to teach said girl. Said certificate is given under section 7763 of the school laws, page 275. This girl is a pupil of what was formerly called a subdistrict which is now a part of the rural district. The father teaching his daughter does not hold a teacher's certificate and not a graduate of any school or college.

"Question. Has the clerk of rural board of education the authority to issue certificates? If so, under what conditions?

"2. Should not the person teaching said pupil be the holder of a teacher's certificate or college diploma?

"3. Should not all certificates now come from the district superintendent and not the clerk of school board?"

Section 7762, G. C., provides:

"All parents, guardians and other persons who have care of children, shall instruct them, or cause them to be instructed in reading, spelling, writing, England grammar, geography and arithmetic."

Section 7763, G. C., as amended in 104 O. L., 232, provides:

"Every parent, guardian or other person having charge of any child between the ages of eight and fifteen years of age if a male, and sixteen years of age, if a female, must send such child to a public, private or parochial school, for the full time that the school attended is in session, which shall in no case be for less than twenty-eight weeks. Such attendance must begin within the first week of the school term, unless the child is excused therefrom by the superintendent of the public schools, or by the principal of the private or parochial school, upon satisfactory showing either that the bodily or mental condition of the child does not permit of its attendance at school, or that the child is being instructed at home by a person qualified, in the opinion of such superintendent or clerk, as the case may be, to teach the branches named in the next preceding section."

The first part of section 7763, G. C., as above quoted, makes it the duty of the parent of the child referred to in your inquiry to send said child to school in compliance with said part of said section, unless such attendance is excused under the conditions provided in the latter part of said section. Inasmuch as said child has not been excused upon a satisfactory showing that her bodily or mental condition does not permit her attendance at school, the only condition under which such attendance may be excused is upon a satisfactory showing that said child is being instructed at home in the branches named in the above provision of section 7762, G. C., by a person qualified to teach said branches.

You state that the clerk of the board of education of the rural school district in which said child resides has certified that the father of said child is teaching her at home and that said father is competent to give such instruction.

You first inquire whether said clerk has authority under said statute to issue such a certificate and if so, under what conditions.

You will observe that under the above provisions of section 7763, G. C., as amended a child may be excused from attending school under the conditions provided in the latter part of said section, either by the superintendent of the public school or by the principal of the private or parochial school.

Section 7763, G. C., as in force prior to its amendment in 104 Ohio Laws, provided as follows:

"Every parent, guardian or other person having charge of any child between the ages of eight and fourteen years must send such child to a public, private or parochial school, for the full time that the school attended is in session, which shall in no case be for less than twenty-eight weeks. Such attendance must begin within the first week of the school term, *unless the child is excused therefrom by the superintendent of the public schools, in city or other districts having such superintendent, or by the clerk of the board of education in village, special and township districts not having a superintendent,* or by the principal of the private or parochial school upon satisfactory showing, either that the bodily or mental condition of the child does not permit of its attendance at school, or that the child is being instructed at home by a person qualified, in the opinion of such superintendent, or clerk as the case may be, to teach the branches named in the next preceding section."

It will be observed that under the provisions of said statute as formerly in force and as above quoted the authority to excuse a child from attendance at a public school, under the conditions provided in the latter part of said section, was vested in the superintendent of the public schools, in city or other districts having

such superintendent, and in the clerk of the board of education in village, special and township districts not having a superintendent.

Under the provisions of the statutes now in force and relating to the public schools of the state, all of said schools are now under the direct supervision of either the county, district or local superintendent.

In keeping with the changes made by the legislature in enacting the new school code, so-called, the authority formerly vested, by the provisions of said section 7763, G. C., as in force prior to its amendment in 104 O. L., in the clerk of the board of education of a village, special or township school district not having a superintendent, to excuse a child from attending a public school in such district, under the conditions provided in the latter part of said section, was taken away by the amendment to said section and is now vested in the superintendent of the public schools of such district.

In view of the change effected by the amendment of said statute, it is evident that the words "or clerk as the case may be" should have been omitted from the latter part of said amended statute, as such words read in connection with the provisions of said statute in the amended form have no force or meaning.

I am of the opinion, therefore, in answer to your first question that, under the provisions of said section 7763, G. C., as amended, the authority to excuse a child, within the age limit prescribed in said section, from attendance at a public school in the rural district in which such child resides, is vested in the district superintendent in charge of such rural school district and that this authority may only be exercised by such district superintendent upon a satisfactory showing either that the bodily or mental condition of such child does not permit of its attendance at such public school or that the child is being instructed at home by a person qualified, in the opinion of such district superintendent, to teach the branches named in section 7762, G. C., and that the clerk of the board of education of said rural school district has no authority under provision of said statute to determine the qualification of said person to give such instruction.

Inasmuch as the qualification of a person to instruct a child at home is to be determined by the superintendent of the school district in which such child resides, under provision of the latter part of said section 7763, G. C., as amended, and inasmuch as no provision of the statute requires that such person shall be the holder of a teacher's certificate or college diploma, your second question must be answered in the negative.

Your third question has been answered in determining the answer to your first question.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1284.

MUNICIPAL CIVIL SERVICE COMMISSION—MAY NOT PUNISH WITNESS FOR CONTEMPT—COMMON PLEAS COURT HAS JURISDICTION.

A municipal civil service commission may not punish a witness for contempt in refusing to obey its lawful commands. Its remedy is by application to the court of common pleas as provided by paragraph 5 *of section* 486-7, *G. C., as amended* 106 *O. L.,* 403.

COLUMBUS, OHIO, February 21, 1916.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—The following inquiry, submitted by a municipal civil service

commission of a city in this state, presents a question of sufficient interest to require an answer, and I am therefore directing my opinion thereon to your commission. The inquiry is as follows:

> "As secretary of the civil service commission for ————, Ohio, I wish to have a ruling from your department as to whether a municipal civil service commission is empowered with authority to punish for contempt a witness and other attendants at a hearing before said commission.
>
> "We desire to know if we have the same power along this line as the courts of this state."

The acts claimed by the municipal civil service commission, submitting the foregoing inquiry, to constitute the contempt complained of are not given. Reference, however, is first made to an alleged contempt by a witness. Without entering into a lengthy discussion of the matter, it is sufficient to say that the municipal civil service commissions in Ohio are not invested with any judicial powers. Their duties are administrative. They have the power to hear and determine certain matters connected with the administration of their office, including the appeals of persons who have been reduced, suspended, laid off or removed from positions in the civil service of the political subdivision they serve. This, however, is not the exercise of judicial power, and is not in contravention of any constitutional provision.

State ex rel. v. Hawkins, 44 O. S., 98.
DeCamp v. Archibald, 50 O. S., 618.

They may not, therefore, exercise any of the inherent powers of courts. Their rights in respect to the punishment of a contumacious witness in any hearing before them are such and only such as are granted by statutory law. The legislature has prescribed a special proceeding in such cases, which is found in the concluding clause of paragraph 5 of section 486-7, G. C., as amended 106 O. L., 403, as follows:

> "In case any person, in disobedience to any subpoena issued by the commission, or any of them, or their chief examiner, fails or refuses to attend and testify to any matter regarding which he may be lawfully interrogated, or produce any documentary evidence pertinent to any investigation, inquiry or hearing, it shall be the duty of the court of common pleas of any county, or any judge thereof, where such disobedience, failure or refusal occurs, upon application of the state commission, *or a municipal commission,* or any commissioner thereof, or their chief examiner, to compel obedience by attachment proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from such courts or a refusal to testify therein."

I am of the opinion that the remedy afforded a municipal civil service commission in the foregoing statute is exclusive and that it is limited to the proceeding therein described. In the absence of this direct legislation upon this matter and upon the authority of DeCamp v. Archibald, supra, I would incline to the opinion that municipal civil service commissioners are officers within the meaning of that term as used in sections 11510 and 11512, G. C., and as such officers would be authorized to act under the provisions of said last named sections. However,

as the legislature has dealt directly with this matter in section 486-7, supra, its provisions in this respect must be held to be exclusive.

Included in this inquiry is a reference to "attendants." If this refers merely to spectators and by-standers attending a hearing of any matter before a municipal civil service commission, any conduct upon their part in any way interfering with the proper dispatch of business would be a matter coming under the supervision of the police department of the city, and ample protection through this authority may be given the civil service commission at any hearing.

Answering the foregoing inquiry specifically I therefore hold that municipal civil service commissions have no authority to punish witnesses for contempt, but must apply to the court of common pleas, or judge thereof, to compel their obedience by attachment proceedings as provided in paragraph 5 of section 486-7, G. C., as amended 106 O. L., 403.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1285.

CASS HIGHWAY LAW—TEN PER CENT. ASSESSMENT DIRECTED TO BE LEVIED UPON PROPERTY *ABUTTING* ON IMPROVEMENT—WHEN ENTIRE EXPENSE OF REPAIR OF A MACADAMIZED ROAD CONSTRUCTED BY TOWNSHIP TRUSTEES MAY BE PAID BY COUNTY COMMISSIONERS.

1. *Where an inter-county highway is improved under the supervision of the state highway department, the ten per cent. assessment directed to be levied upon the property abutting on the improvement may not be levied against all the real estate lying within one mile on either side of the improvement.*

2. *County commissioners may pay from the proceeds of a levy authorized by a vote of the electors of the county for the improvement and repair of the public roads in the county, the entire expense of the repair of a macadamized road constructed by township trustees.*

COLUMBUS, OHIO, February 21, 1916.

HON. T. B. JARVIS, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR:—I have your communication of February 8, 1916, in which you submit two questions relating to the Cass highway law. Your first question may be stated as follows:

> "Where an inter-county highway is improved under the supervision of the state highway department, may the ten per cent. assessment directed to be levied upon the property abutting on the improvement be levied against all the real estate lying within one mile on either side of the improvement?"

This question is to be answered in the negative. The rule of assessment in such cases is set forth in section 1214, G. C., in the following language:

> "Ten per cent. of the cost and expense of improvement, excepting therefrom the cost and expense of bridges and culverts shall be a charge

upon the property abutting on the improvement, provided the total amount assessed against any owner of abutting property shall not exceed thirty-three per cent. of the valuation of such abutting property for the purposes of taxation."

In the absence of any statutory authority for a variation from this rule, the rule must be regarded as exclusive, and the Cass highway law contains no provision authorizing any change in the rule in question.

Where county commissioners, acting under authority of chapter 6 of the Cass highway law, relating to road construction and improvement by county commissioners, determine to improve an inter-county highway or main market road under the provisions of that chapter, and secure the approval of the chief highway engineer to the plans and specifications for the improvement, then the compensation, damages, costs and expense thereof may be apportioned and paid in any one of the several ways provided for by section 98 of the Cass highway law, section 6919, G. C. Section 98 of the act has no application, however, where the improvement is carried forward under the supervision of the state highway department, and in that case neither more nor less than ten per cent. of the cost of the improvement, exclusive of the cost of bridges and culverts, may be assessed, and such ten per cent. must be assessed only against the property abutting on the improvement.

Your second question may be phrased as follows:

"Can the county commissioners pay from the proceeds of a levy authorized by a vote of the electors of the county for the improvement and repair of the public roads in the county, the entire expense of the repair of a macadamized road constructed by the township trustees?"

Subdivision b of section 7464, G. C., reads as follows:

"County roads shall include all roads which have been or may be improved by the county by placing brick, stone, gravel or other road building material thereon, or heretofore built by the state and not a part of the inter-county or main market system of roads, together with such roads as have been or may be constructed by the township trustees to conform to the standards for county roads as fixed by the county commissioners, and all such roads shall be maintained by the county commissioners."

It is unnecessary to inquire, however, whether the township road or roads to which you refer have been built to conform to standards for county roads fixed by the county commissioners, in view of the provision of subdivision C of section 7464, G. C., to the effect that the county commissioners shall have full power and authority to assist the township trustees in maintaining all township roads.

Answering your question specifically, I therefore advise you that county commissioners are authorized to pay from the proceeds of a levy voted by the electors of a county for the improvement and repair of public roads in the county, the entire expense of repairing a macadamized road or roads constructed by a township. If such township road or roads conform to the standards for county roads, as fixed by the county commissioners, then such road or roads are county roads, and it is the duty of the county commissioners to maintain the same. If such road or roads constructed by the township do not conform to the standards for county roads, as fixed by the county commissioners, then such road or roads are township roads, and the duty of maintaining the same rests in the first instance

upon the township or townships in which such road or roads are located, but the county commissioners, while not bound to repair or maintain such roads, are authorized so to do.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1286.

COUNTY COMMISSIONERS OF PAULDING COUNTY—APPLICATION FOR INTER-COUNTY HIGHWAY FUNDS APPROVED.

An application by the county commissioners of Paulding county for inter-county highway funds, made under section 1203, *G. C., as submitted by the state highway commissioner, is in regular form.*

COLUMBUS, OHIO, February 21, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of February 2, 1916, which communication reads as follows:

> "I am attaching hereto an application of the county commissioners of Paulding county for inter-county highway funds under section 1203, G. C.
>
> "It is to be noted that the county requests the sum of $20,000.00 paid into the treasury of Paulding county from the state.
>
> "It is also to be noted that Paulding county's share of the inter-county highway fund for the year 1916 will approximate but $17,000.00. There is a balance of $5,000.00 from the 1915 apportionment to Paulding county which is subject to expenditure in Paulding county this year.
>
> "I therefore respectfully request an opinion from your office as to my duties in connection with the above mentioned application."

On November 6, 1915, this department rendered to you opinion No. 998, which opinion prescribes a form of application by county commissioners for inter-county highway funds under section 1203, G. C. I have carefully examined the application of the county commissioners of Paulding county, submitted by you, and find that the same has been made in the exact form prescribed by this department.

So much of section 1203, G. C., as is pertinent to said inquiry, reads as follows:

> "* * * whenever forty per cent. of the mileage of all the roads of any county are improved by the use of gravel, broken stone, slag, brick, cement and bituminous products or the aggregate of any of these, to a standard established by the county commissioners and approved by the county highway superintendent, and the county commissioners appropriate an equal sum for the purpose of constructing, improving, maintaining or repairing all or any part of the inter-county highways within such county, then, on request of the county commissioners, which request shall be accompanied by a certificate signed by the county highway superintendent and reciting that at least forty per cent. of the mileage of all the roads of the county have been improved, as provided herein; and a certified copy

of a resolution duly adopted by the county commissioners, which resolution shall contain an agreement upon the part of the county commissioners to expend the sum realized therefrom, and the sum appropriated by the county commissioners in accordance with plans and specifications approved by the state highway engineer, as herein provided; and a certificate signed by the county auditor and reciting that the sum appropriated by the county commissioners is in the county treasury and has not been otherwise appropriated, or has been levied, placed upon the duplicate and in process of collection, the state highway commissioner shall order the apportionment of any appropriation by the state or of any funds available for the construction, improvement, maintenance or repair of inter-county highways, due or to become due and available for such county as state aid, paid into the treasury of said county. The state highway commissioner shall issue his voucher therefor upon the auditor of state against any such fund, and the auditor shall issue his warrant therefor upon the state treasurer and deliver the same to the treasurer of such county. The sum realized therefrom shall be deposited to the credit of the road fund of said county, together with the sum appropriated by such county, and both sums shall be used by the commissioners in the construction, improvement, maintenance or repair of such inter-county highways within the county, in accordance with plans and specifications approved by the state highway engineer as herein provided."

Determination of the proper action to be taken by you in the premises must be based upon a consideration of several facts. First, there is a balance of $5,000.00 from the 1915 apportionment to Paulding county, which balance is still available for expenditure in that county. This balance represents a part of the proceeds of the August, 1915, settlement. Second, Paulding county's apportionment of inter-county highway funds for the year 1916 will approximate only $17,000.00, while the application of the county commissioners of that county is for $20,000.00. Third, the state's portion of the salary of the county highway superintendent of Paulding county is payable from the apportionment of inter-county highway funds to that county.

If the balance of the 1915 apportionment to Paulding county is to be regarded as available for payment under section 1203, then that balance, plus the 1916 apportionment to said county, will exceed the $20,000.00 applied for by said county. If the opposite conclusion be reached as to the balance of the 1915 apportionment, then the 1916 apportionment will not equal the amount applied for by the county commissioners.

It should be observed that under the present scheme of appropriation, which scheme precludes the taking of moneys from the general revenue fund to support the highway department, it is practically impossible to determine in advance the exact apportionment of inter-county highway funds to a given county for any one year, for the reason that the appropriations for the uses and purposes of the state highway department, carried by the current appropriation measure, are available for the full amounts expressed only in case such amounts come into the state treasury from the specified sources. I do not, therefore, regard as an infirmity the fact that the application of the county commissioners of Paulding county does not request the payment of the exact amount now in the state treasury or which will come into said treasury during the year 1916.

The section of the General Code, quoted above, contains a reference to the appropriation by the county commissioners of "an equal sum," but the statute leaves to inference the determination of the sum which the sum appropriated by

the county commissioners must equal. The reasonable inference in this respect is that the sum appropriated by the county commissioners must equal the sum for which application is made. The sum for which application is made may be the apportionment to the county of any funds available for the construction, improvement, maintenance or repair of inter-county highways, due or to become due, and available for such county as state aid. In view of the above provision, I am of the opinion that section 1203, G. C., applies as well to the balance of the 1915 apportionment as to the 1916 apportionment. In any event, however, the state highway commissioner, in issuing his voucher, must take into consideration the fact that the state's portion of the salary of the county highway superintendent is payable from the apportionment of the inter-county highway funds to any given county, and the amount required for this purpose is not available for expenditure as state aid on any specific improvement.

Applying the above stated principles to the state of facts presented by your inquiry, I advise you that out of the balance of $5,000.00 remaining from the 1915 apportionment to Paulding county, you should retain an amount sufficient to pay the state's portion of the salary of the county highway superintendent of that county until such time as the February, 1916, settlement will come into the state treasury, and you should issue your voucher for the remainder of said balance of $5,000.00 upon the auditor of state. After the February, 1916, settlement, you should retain from the apportionment to Paulding county, out of the proceeds of that settlement, an amount sufficient to pay the state's portion of the salary of the county highway superintendent of Paulding county until the time when the August, 1916, settlement will come into the state treasury, and should issue your voucher upon the auditor of state for the remainder of said apportionment. After the August, 1916, settlement, you should issue your voucher upon the auditor of state for the remainder of said sum of $20,000.00, applied for by the county commissioners of Paulding county, and not theretofore paid to the treasurer of that county, this statement being based on the assumption that such payment will leave in the state treasury sufficient funds to pay the state's portion of the salary of the county highway superintendent of said county until such time as the proceeds of the next ensuing semi-annual settlement will come into the state treasury. It will be the duty of the state auditor, upon receipt of your vouchers, to issue his warrants for the sums therein expressed upon the state treasurer and deliver said warrants to the treasurer of Paulding county.

I am returning herewith the application of the county commissioners of Paulding county submitted by you.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1287.

MOTHERS' PENSION LAW—THE WORDS "LEGAL RESIDENCE" IN SECTION 1683-2, G. C., 106 O. L., 436, CONSTRUED.

When a man, having a legal residence in this state, removes with his family to another state with no intention of making the latter state his home and with no intention of abandoning his residence in this state, he does not thereby lose his legal residence in this state by reason of an actual residence of four years in the state to which he removes. If, therefore, upon his death his wife and children return to their former home in this state they have the necessary qualifications as to residence required by section 1683-2, *G. C., as amended* 106 *O. L.,* 436, *providing for mothers' pensions.*

COLUMBUS, OHIO, February 21, 1916.

HON. D. FINLEY MILLS, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR:—I have your letter of February 15, 1916, bearing the following statement and inquiry:

> "Mrs. Charles Theurer, of this county, went with her husband and family to Tennessee in October, 1911. They had no intention of making that their home, and never at any time decided to abandon their residence in Ohio. Mr. Theurer was drowned in Tennessee early in 1915, and Mrs. Theurer, with her six little children, came back to Shelby county, in March 1915.
>
> "Under that state of facts, I desire to ask your opinion as to whether she is eligible at this time for a mother's pension under the provisions of section 1683-2, G. C., as amended in 106 Ohio Laws, page 436, providing that they must have a 'legal residence' in this county for two years."

The provisions of section 1683-2, G. C., as amended 106 O. L., 436, pertinent to your inquiry, are as follows:

> "For the partial support of women whose husbands are dead, or become permanently disabled by reason of physical or mental infirmity, or whose husbands are prisoners or whose husbands have deserted, and such desertion has continued for a period of three years, when such women are poor, and are the mothers of children not entitled to receive age and schooling certificate, and such mothers and children have a legal residence in any county of the state for two years, the juvenile court may make an allowance to each of such women as follows: * * *"

The requirements of the foregoing section with reference to residence are that the mother and children have a legal residence for two years in any county of this state.

Prior to his death in 1915, the legal residence of Mr. Theurer, the husband and father of the widow and children in question, was their legal residence (section 7996, G. C.). If Mr. Theurer had established a legal residence in your county prior to his removal in 1911 to Tennessee, that also established the legal residence of Mrs. Theurer and his children in said county. If Mr. Theurer by his removal to Tennessee did not change or abandon his legal residence in your county, then the legal residence of his wife and children was not abandoned or

changed, and they continued to be and were legal residents of your county during the time of their actual residence in Tennessee.

It must be remembered that a man's legal residence may not be his actual residence and vice versa. It has frequently been said by the courts that a legal residence consists of both fact and intention and that both must concur. When a legal residence is once established, it therefore requires both fact and intention to change it. These principles are incorporated in the statute law of this state providing the conditions or facts under which a legal residence may be determined with regard to the right of a person to exercise the elective franchise. It may be observed in this connection that in this state the right to vote is an infallible test of one's legal residence, and perhaps the only true test. These principles are found in section 4866, G. C., which, among other things, provides:

> "2. A person shall not be considered to have lost his residence who leaves his home, and goes into another state, or county of this state, for temporary purposes merely, with the intention of returning.
>
> "5. If a person remove to another state with an intention to make it his permanent residence, he shall be considered to have lost his residence in this state.
>
> "6. If a person remove to another state, with an intention of remaining there an indefinite time, and as a place of present residence, he shall be considered to have lost his residence in this state, notwithstanding he may entertain an intention to return at some future period.
>
> "7. The mere intention to acquire a new residence, without the fact of removal, shall avail nothing; neither shall the fact of removal without the intention.
>
> "8. If a person go into another state, and while there exercise the right of a citizen by voting, he shall be considered to have lost his residence in this state."

I am of the opinion that the foregoing provisions of law, when applied to the facts stated by you in your inquiry, warrant the conclusion that the legal residence of Mr. Theurer, established in your county prior to 1911, was never changed or abandoned by him. That is to say, that his removal to Tennessee under the facts stated by you, which are, first, that such removal was unaccompanied by any intention to remain there and make that state his home, and, second, that such removal was with no intention of abandoning his residence in Shelby county, did not change his legal residence, and that, therefore, at the time of his death he was a legal resident of Shelby county, and had so continued during his absence therefrom.

This being so, as before observed, the status of Mrs. Theurer and the children in this respect would be the same as that of the husband and father, and she and they now possess the necessary qualifications as to residence required by section 1683-2, G. C., supra.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1288.

COUNTY COMMISSIONERS—MAY VACATE PART OF AN INTER-COUNTY HIGHWAY WHEN A NEW RIGHT-OF-WAY FOR PART CHANGED HAS BEEN PROVIDED AND NEW PART OF HIGHWAY HAS BEEN CONSTRUCTED.

Where a substantial change in the line of an inter-county highway is suggested by the state highway commissioner, and the county commissioners provide a right-of-way for that part of the inter-county highway, the location of which is to be changed, and the inter-county highway improvement is constructed over the new right-of-way, that part of the old road not followed by the new improvement ceases to be an inter-county highway, and proceedings for its vacation brought under chapter I of the Cass highway law may be entertained by the county commissioners.

COLUMBUS, OHIO, February 21, 1916.

HON. CHARLES F. ADAMS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I have your communication of February 15, 1916, which communication reads as follows:

"In 1834, under the provisions of law then in force, a road was established through Lorain county running from the lake southward to Ashland county, which road extends through what is now a part of the city of Lorain, through the village of Oberlin and the village of Wellington. It was established as a state road.

"About two and one-half or three miles north of the village of Wellington this road crosses a stream known as Black river, over which a bridge has been maintained by the county commissioners. In 1913 the county commissioners condemned a strip of land lying at a little distance east of an angle in the old road, in which angle the above bridge was located. This new strip of land so condemned was opened up for the purpose of straightening out the highway and a new bridge erected over the river. At the time these proceedings were had the location of the road was designated by the state highway commissioner, Mr. Marker.

"The road prior to the opening of the new portion had been designated as inter-county road No. 144, Oberlin-Ashland, and the highway had been improved under the direction of the state highway commission, except that portion which I have termed above the angle, and which has been really replaced by the new section of road, land for which was so condemned by the county commissioners.

"The new portion of the highway was included in the improvement of the inter-county road. There no longer exists any necessity for that short stretch of the highway which was unimproved and in which is found the bridge above referred to, and it is the desire of the county commissioners that the unused portion may be closed and abandoned, and further expenditure upon that portion of the road and upon the bridge may be cut off, and that no liability may arise should accidents occur on the old bridge.

"We had in mind that the changing of the route by the commissioners, under the direction of the state highway commissioner, and the improvement of the road as changed probably made a change also on the status of that portion which the commissioners now desire to close and abandon, and that if it no longer was a portion of the inter-county highway the

commissioners could, under authority of statute, proceed to vacate and close that unused portion.

"I desire to secure your opinion as to the commissioners' authority to vacate the unused portion of the road, or if you are of opinion that they have no authority, then I would like your opinion as to how such vacation may be brought about."

I learn by an examination of the records in the office of the state highway commissioner that the new portion of the inter-county highway in question constructed over the right-of-way acquired by the county commissioners is 5218 feet in length. Of this new highway, which is almost a mile in length, 5218 feet consists of roadway and 175 feet is occupied by the Black river bridge.. A considerable portion of the new roadway lies on the opposite side of the Black river from the old highway, and at a distance of several hundred feet therefrom. The right-of-way for the new road was obtained by the county commissioners in condemnation proceedings, carried forward early in 1913, under authority of section 1195. It does not appear with certainty whether the section, as amended in 102 O. L., 333, or as amended in 103 O. L., 449, was in force at the time condemnation proceedings were had, but this question is not material in so far as the present inquiry is concerned. There can be no doubt that the change made in the course of the inter-county highway was authorized under the provisions of sections 1190 and 1195, G. C., now repealed, and that the course of the inter-county highway in question is now over the new right-of-way, and that so much of the old highway as lies to the west of the new right-of-way and between the termini thereof, has ceased to be an inter-county highway. The road in question was originally constructed as a state road, but the chapter of the General Code, relating to state roads, was repealed by the Cass highway law, 106 O. L., 574, and that act provided a new classification for the public highways of the state. Under section 241 of the act, so much of the old highway as is not followed by the new inter-county highway improvement is either a county road or a township road, probably the former, but it is immaterial to determine for the purposes of the present inquiry whether such portion of the old road is a county or a township road, for the reason that under chapter I of the Cass highway law, the power to vacate all roads other than inter-county or main market roads is lodged in the county commissioners.

While it might be argued that the deviation made in the inter-county highway, through the action of the state highway commissioner and the county commissioners, has effected a complete vacation of so much of the old highway as was not followed by the new improvement, yet in view of the possible rights of abutting land owners, I think the safer ground to take is that the deviation has only affected an abandonment of the old route as an inter-county highway, and that it still subsists as a public highway, and that the commissioners would not be authorized in closing the same until proper proceedings have been had for its vacation. Where the deviation in the line of an inter-county highway, effected under authority of the sections heretofore referred to, is slight and no rights of abutting land owners are involved, it might be safe to assume that no subsequent proceedings for the vacation of the old road are necessary or required, but I am not able to reach that conclusion under the state of facts existing in the case presented by you. It should be noted in this connection that section 1195, G. C., now repealed, while it contained complete provisions for the protection of persons whose lands might be desired for the new right-of-way, provided no method of awarding damages to persons whose rights may be affected by the vacation of the old highway. There can be no doubt, however, of the right of the county commissioners, under chapter

I of the Cass highway law, to entertain proceedings for the vacation of so much of the old highway as is not followed by the new inter-county highway improvement, for the reason that such part of the old highway has ceased to be an inter-county highway, and the authority of the county commissioners to vacate roads, now extends to all roads other than inter-county highways and main market roads.

Answering your question specifically, I therefore advise you that under chapter I of the Cass highway law, 106 O. L., 574, the commissioners have authority to vacate that portion of the old road not followed by the new inter-county highway improvement. Such vacation is to be had in the manner prescribed in the chapter in question and may, under the provisions of section 19 of the Cass highway law, section 6878, G. C., be initiated by a unanimous vote of the county commissioners and without the filing of any petition therefor.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1289.

OHIO STATE UNIVERSITY—TRUSTEES WITHOUT AUTHORITY TO PERMIT CITY OF COLUMBUS TO ERECT HOSPITAL ON CAMPUS —CONTAGIOUS DISEASES.

The trustees of the Ohio State University are not authorized, without further legislation, to permit the city of Columbus to erect a city hospital on the campus of such university.

COLUMBUS, OHIO, February 21, 1916.

HON. W. O. THOMPSON, *President Ohio State University, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of February 16th, as follows:

> "The city of Columbus recently voted for bonds to the amount of twenty-five thousand dollars for the erection of a hospital for contagious diseases. It has been suggested that it would be of mutual advantage to the city and to the university if that contagious hospital could be erected on the campus either as a part of, or near to, a general hospital proposed for the college of medicine.
>
> "I recognize that there may be legal difficulties from the standpoint of both the city and state. I am therefore, requesting from you an opinion whether the university trustees would be authorized to enter into an arrangement by which such a hospital could be erected on any portion of the land controlled by the university trustees.
>
> "I should appreciate very much a reply to this question."

Your specific question is whether the trustees of the Ohio State University would be authorized to enter into an arrangement to permit a hospital owned by the city to be erected on land controlled by the university trustees.

The statutes governing the Ohio State University are sections 7942, et seq., of the General Code. Under section 7950 the board of trustees is given "general supervision of all lands, buildings, and other property belonging to the university," and under section 7951 the board of trustees is authorized to receive and hold in trust, for the use of the university, "any grant or devise of land," to be applied to the general or special use of the university. Under section 7952 it is provided

that the title to all the university lands shall be in fee simple in the state. None of these sections, however, authorizes the board of trustees to permit to be built upon the university campus a building that is not under the supervision and control of the trustees.

This seems to have been recognized by the state legislature when it enacted section 7950-1, G. C., which authorizes the construction of a high school on the campus "upon such terms as may be agreed upon by the trustees of the Ohio State University and the board of education of the city school district of the city of Columbus, Ohio," such high school to be used "as an observation and practice school by the college of education of the Ohio State University upon the terms and conditions as agreed upon by the said board of trustees and the said board of education." Said section further provides that "At no time shall the state of Ohio be called upon to assist in defraying the expenses of conducting or repairing such school."

I do not undertake to pass upon the proposition as to whether or not the city of Columbus, being a charter city, would be authorized to donate a sum of money to the university for the purpose of erecting a hospital upon the campus of said university. Even if such city were authorized so to do, it is not the intention, as I gather from your letter, that said city should donate money for any such purpose, but only that the city itself is to erect a building, with the consent of the trustees of the Ohio State University, upon the campus of said university, to be operated by said city of Columbus. There is at present no authority to do this. If it is desirable that the building of such a hospital on the university campus be allowed, consent of the legislature will have to be first obtained, as was done relative to the high school, as disclosed by section 7950-1, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1290.

APROVAL OF RESOLUTIONS FOR ROAD IMPROVEMENTS IN DARKE, RICHLAND AND CHAMPAIGN COUNTIES.

COLUMBUS, OHIO, February 21, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of February 19, 1916, transmitting to me for examination final resolutions relating to the following road improvements:

"Dark county—Celina-Greenville rd., Pet. No. 844, I. C. H. No. 211.
"Richland county—Mansfield-Galion rd., Pet. No. 1138, I. C. H. No. 202.
"Champaign county—Urbana-Sidney rd., Pet. No. 1680, I. C. H. No. 192."

I find these resolutions to be in regular form and am, therefore, returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1291.

MUNICIPAL CORPORATION—ORDINANCE WHICH DOES NOT FIX LICENSE FEE DEFINITELY BUT LEAVES FIXING OF SUCH FEE WITHIN LIMITATIONS TO MAYOR, INVALID—COUNCIL CANNOT DELEGATE ITS LEGISLATIVE FUNCTION—VILLAGE OF OXFORD, OHIO—LICENSE TO EXHIBITORS OF SHOWS AND PERFORMANCES.

An ordinance of a municipality which does not fix a license fee definitely, but leaves the fixing of such fee, within limitations, to the mayor, is invalid as a delegation by council of a part of its legislative function.

If an ordinance authorizes the mayor to fix a different license fee for persons in the same class and condition, it is invalid.

COLUMBUS, OHIO, February 23, 1916.

HON. R. M. HUGHES, *President Miami University, Oxford, Ohio.*

DEAR SIR:—I am in receipt of your letter of February 3d, which is as follows:

> "I submit herewith a letter from Mayor J. S. Hughes, of Oxford, and a copy of the ordinance to which he refers. This ordinance has not been enforced during the last ten or fifteen years and probably more.
>
> "The entertainments given at Miami, for which fees are charged, are as follows: Football, baseball, basketball, track and tennis games; concerts by several musical clubs of students; three plays given by students; four or five numbers of a Union Lyceum course, including lectures, plays, concerts as may be determined from year to year; and a series of entertainments given in the summer for the summer school students. In none of the above entertainments is there personal profit. The receipts go to the organization giving the entertainment, and are used to meet the expenses of the organization.
>
> "It is a question in my mind whether such ordinance covers entertainments given as above, and also whether the village council has jurisdiction over entertainments of any kind given by Miami University in connection with her educational work.
>
> "Will you kindly advise me whether this ordinance applies to Miami University?"

Enclosed with your letter is a letter from Hon. J. S. Hughes, mayor of Oxford, to the following effect:

> "Please be advised that there is a village 'ordinance to license exhibitions of shows and performances' of every description, except lectures on scientific, historical and literary subjects, for which compensation or money is charged or demanded, or reward is demanded or received, the amount of said license to be fixed by the mayor, ranging from one to thirty dollars per day.
>
> "In the future, when booking entertainments, please take this matter up with the advance agent, or others concerned, so that arrangements can be made for said license."

The ordinance referred to by the mayor in his letter is as follows:

"ORDINANCE.

"An ordinance to license exhibitors of shows and performances.

"Section 1.—Be it ordained by the common council of the village of Oxford, Ohio, that it shall be unlawful to exhibit in said village, without first having secured from the mayor of said village a license therefor, any theatrical performance of any kind whatever, any circus, menagerie, pupet show, or animal show of any kind whatever, tumbling, rope or wire walking, balancing, or slight of hand, any paintings or panoramas, or any natural or artificial curiosity or deception, lecture or performance of whatever kind for which compensation or money is charged or demanded, or any reward is demanded or received, except lectures on scientific, historical or literary subjects.

"Section 2.—Every person taking out a license to exhibit as provided in the first section of this ordinance, shall pay into the village treasury therefor a sum fixed by the mayor which shall not be less than one dollar ($1.00) per day, nor more than thirty dollars ($30.00) per day, and the mayor for good cause shown may revoke any license so issued or granted by him. For every license so issued the mayor shall receive a fee of fifty cents.

"Section 3.—Any person violating the provisions of the first section of this ordinance shall, upon conviction thereof before the mayor of said village, be fined in any sum not exceeding fifty dollars ($50.00) and costs of prosecution, and the mayor, upon the conviction of any person for violation of any of the provisions of this ordinance, may make it a part of the sentence that the person so convicted shall stand committed to the prison of said village until the fine and costs of prosecution assessed against said person shall be paid, or secured to be paid, or the party discharged by due process of law.

"Section 4.—Be it further ordained that this ordinance shall take effect at the expiration of ten days after publication has been completed as required by law.

"Passed this fourteenth day of December, A. D., 1875.

"B. B. Davis,
Mayor of said village.

"James A. Kennedy,
"Clerk of said village.

"Oxford, Ohio, December 28, 1875.

"I hereby certify that the above ordinance was published according to law in the Oxford Citizen, dated December 16, A. D. 1875.

"James A. Kennedy, Clerk."

There is no doubt that the provision of section 2 of article XII of the constitution, to the effect that "laws shall be passed, taxing by a uniform rule, all moneys, etc.," does not apply as to licenses, the rule of uniformity of taxation applying only to direct taxes. It is likewise no doubt that it is an established rule of law that licenses may be required in accordance with classification, and that one class may be required to take out a license and another may not, and further, that the amount assessed for a license is within the discretion of the legislative body, provided that the same is not unreasonable or unjust; but there is a well established rule of law that there must be no discrimination between persons of the same class.

Section 3616 of the General Code provides that "all municipal corporations shall have the general powers mentioned in this chapter, and council may provide by ordinance or resolution for the exercise and enforcement of them."

In such chapter, among such general powers, is the power under section 3672 "to license exhibitors of shows or performances of any kind, not prohibited by law."

It was undoubtedly in pursuance of said power, which has been in existence for many years, that the ordinance of 1875, quoted above, was passed by the village of Oxford.

In section 1 of the ordinance above referred to it is provided that

> "it shall be unlawful to exhibit in said village, without first having secured from the mayor of said village a license therefor, any theatrical performance of any kind whatever, * * * lecture or performance of whatever kind for which compensation or money is charged or demanded, or any reward is demanded or received, except lectures on scientific, historical or literary subjects."

Section 2 of the ordinance provides that every person taking out a license to exhibit shall pay into the village treasury "a sum fixed by the mayor which shall not be less than one dollar per day, nor more than thirty dollars per day."

Council has not undertaken to fix a certain sum for the taking out of licenses by the classes above specified, but has delegated that authority, within certain limits, to the mayor. This I do not believe to be a valid exercise of the power conferred upon council.

In the case of Bills v. Goshen, 117 Ind., 221, the court, in the opinion, says:

> "It is further a well settled principle that cities cannot discriminate between citizens engaged in the same business; that if they license, they must license all alike. See Graffty v. Rushville, 107 Ind., 502, 5 West. Rep. 858; Benjamin v. Webster, 100 Ind., 15.
>
> "It is therefore material to the validity of an ordinance that a fixed and definite license fee should be named in the ordinance, which all persons engaged in like business shall pay."

In the case of State Center v. Barenstein, 66 Iowa, 249, it was held that an ordinance requiring a peddler to pay as a license "not less than one nor more than twenty-five dollars for a fixed time, in the discretion of the mayor" was void for unreasonableness. This case is not exactly in point, for the reason that the court held that the limitation of twenty-five dollars had no significance, because the time for which that sum might be charged was left wholly to the mayor, and he might fix so short a time as to be equivalent to a refusal to license at all, which the court believed was not a proper exercise of the power vested in council to regulate and license peddlers, for the reason that it was more in the nature of a delegation of their whole power to the mayor. Nevertheless, it seems to me that the case does recognize the principle that in order for a licensing ordinance to be valid council must therein fix the amount of the fee which is to be charged for the taking out of a license.

In so answering, I am not unmindful of the case of Crawford v. Sideman, 89 O. S., 260, wherein the court held as follows:

> "Under the provisions of section 6364, General Code, in the absence of an ordinance of the municipality providing therefor, the clerk or mayor

of the municipality may determine a reasonable amount to be paid by an itinerant vendor as a local license fee, and the granting of this right to the clerk or mayor is a legal exercise of legislative power and not repugnant to the constitution."

In that case, however, the legislature had provided that in the absence of an ordinance fixing the fee, the clerk or mayor shall determine the same. There is no such provision in the general powers granted to municipalities in the sections hereinbefore referred to.

The ordinance having undertaken to vest in the mayor the power of determination as to the amount that should be charged, within the limits of not less than one dollar per day nor more than thirty dollars per day, it would be possible for the mayor to charge one person of a certain class the sum of one dollar and another person of identically the same class thirty dollars for a license; or it would be possible for the mayor to charge a person of a certain class thirty dollars for one day and on the next succeeding day but one dollar, or vice versa. This, I believe, to be a discrimination, and, therefore, the ordinance is of no force and effect.

Respectfully,

EDWARD C. TURNER,
Attorney-General.

1292.

INTERPRETATION OF SECTIONS 12, 13, 14 and 15, SECTIONS 5371-4, 5406-1, 5406-2, 5406-3, G. C., PARRETT-WHITTEMORE BILL PROVIDING FOR LISTING AND VALUATION OF PROPERTY FOR PURPOSES OF TAXATION—WHETHER PROPERTY OF COMPANY MAY BE CONSIDERED AS A UNIT—WHETHER PROPERTY PERTAINING TO A BUSINESS CARRIED ON IN MORE THAN ONE POLITICAL SUBDIVISION UP TO A COUNTY MAY BE VALUED AS UNIT BY COMMISSION—WHETHER BUSINESS CARRIED ON IN MORE THAN ONE COUNTY MAY BE VALUED BY COMMISSION—CONSTRUCTION OF WORD "BUSINESS" AS FOUND IN THE LAW.

Section 13 *of the Parrett-Whittemore law,* 106 *O. L.,* 249, *does not require or authorize the valuation of the property of an incorporated company located in more than one county as a "unit" or "going concern," but merely requires the ascertainment of the aggregate value of all such property as a whole and by the same assessing officer or tribunal.*

Section 12 *of the said act does not authorize the application of the so-called "unit rule" to the valuation of property pertaining to a business carried on in one or more taxing districts or county; but the rule with respect to the ascertainment of the value of such property is the same as that respecting the valuation of the property of incorporated companies.*

When a business is carried on in more than one taxing district of a county, but entirely within a single county, the requirements of the Parrett-Whittemore law is that the value thereof shall be ascertained by a single assessing authority, and when ascertained in the aggregate such value shall be apportioned among the different taxing districts and assessed therein according to the rules applicable to the apportionment and assessment of the property of incorporated companies located in more than one taxing district of the same county. The county auditor is required by the law to make the initial ascertainment and the apportionment and assessment. The manner in which he shall discharge his duties not being specifically provided for by law, the tax commission may by general rules and regulations prescribe such machinery. There being no explicit provision for the separate return of property pertaining to a business, as such, the tax commission may in the form of return prescribed by it provide for such separate listing and return.

But where a business is carried on in more than one county of the state the intent of the law is that the tax commission shall make the initial aggregate valuation of such property and the apportionment thereof among the counties, and it is the power and duty of the commission to provide detailed machinery for carrying such intent into effect, which machinery should follow the outline of the provisions of section 13 *of the Parrett-Whittemore law relative to the valuation, apportionment and assessment of the property of incorporated companies.*

The word "business" is used in section 12 *of the Parrett-Whittemore law in its popular or restricted sense, and means and contemplates all occupations which deal with property in a commercial way, but the operations of which with respect to such property commence after it is severed from the realty. Accordingly, professions and other occupations which render services rather than deal with property are not "businesses," nor is the occupation of "farming," "mining" or "market gardening" a "business." The occupations of florists and nurserymen, however, in so far as they deal with personal property, as such, and to the extent that such dealings can be separated from the mere cultivation of the soil and the sale of the products thereof, are to be regarded as "businesses."*

COLUMBUS, OHIO, February 23, 1916.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—In your letter of January 10th, receipt whereof is acknowledged, you request my opinion upon the following questions involving the interpretation of sections 12, 13, 14 and 15 of the act of May, 1915, known as the Parrett-Whittemore bill:

"1st. In determining the value of the property of an incorporated company as required by section 13, may the commission consider the property of the company as a unit without dividing it into the separate items which are required to be listed under the provisions of section 5376 of the General Code? In the case of the Champion Coated Paper Company decided by the supreme court under the law as it existed prior to the passage of the Parrett-Whittemore bill, and with which you are familiar, it was held that the taxing authorities were without power to value the property of all incorporated company as a unit. The commission now desires to know whether the enactment of the Parrett-Whittemore bill confers that power upon it, as to such companies as have property in more than one county in the state.

"2nd. May the property pertaining to a business carried on in more than one township, city, village or county in the state by a person, firm, partnership, association or unincorporated company be valued as a unit by the commission?

"3rd. Is the property of a person, firm, partnership, association or unincorporated company pertaining to a business carried on in more than one township, city or village in the same county in this state required to be valued by the tax commission, or is the tax commission only required to value the property of such person, firm, partnership, association or unincorporated company if the business is carried on in more than one county in this state?

"In connection with this question the commission calls attention to the fact that there appears to be no provision in sections 13, 14 and 15 of the act for the tax commission to apportion the property of an incorporated company to taxing districts, neither is there any provision for the tax commission to value the property of an incorporated company unless it has property in more than one county. It also desires to call attention to the fact that it would be exceedingly difficult for the commission to determine the persons, firms, partnerships, associations or unincorporated companies which have property pertaining to a business in more than one township, city or village in the same county.

"4th. The commission desires an interpretation of the word 'business,' as used in section 12 of the act. It would seem desirable that if this section of the law is to be enforced, that there should be a uniform interpretation of this word; for example, a farmer might under certain circumstances be considered to be conducting a 'business' and his farm might be located in more than one township in the same county, or even in more than one county in the state. Is the word 'business' to be confined to persons or partnerships engaged in commercial and manufacturing lines or is it to extend to such business as that of a florist, gardener or nurseryman? In short, the commission desires to advise local taxing officials as to just what kinds of businesses are included within this term, and make preparations to have returns made to the commission for the purpose of fixing the value of property."

In answering your first question I find it necessary to quote but one of the sections to which you refer, namely, section 13—section 5406-1, G. C. (106 O. L. 249). This section provides as follows:

> "Section 13. If the property of an incorporated company is situated in more than one county, return shall be made to the county auditor of the county wherein the principal place of business of the company is located, or if the company has no principal place of business in this state, to the county auditor of any county wherein it transacts business or its property is situated. The county auditor to whom return is made shall certify the fact, together with the return and all information in his possession relating thereto, to the tax commission of Ohio, which shall ascertain and determine the *aggregate* value of the *entire* property of the company required to be listed in this state, and, from the aggregate sum so found, make the deductions provided in section fifty-four hundred and five of the General Code. The commission shall apportion the value of the property of such company, after making such deductions, among such counties in proportion to the value of the property located in each, and certify its findings to the county auditors, who shall severally apportion the amount certified to their respective counties, to the cities, villages, townships and other taxing districts, therein, in the manner prescribed in section 5405 of the General Code."

The two italicized words in the above quoted section are inconsistent, if full force is to be given to each of them. The word "entire" as modifying the word "property" as the subject of valuation has, in certain contexts, been given the effect of requiring property devoted to a given business purpose and, though physically consisting of separate articles, being organically a unit of ownership and use, to be valued as a unit. In other words, the word "entire" in an appropriate context has been regarded as the keynote of the expression of a legislative intention to impose the rule of valuation of property as a unit and a going concern. This was the case with the so-called "Nichols law" applicable to the assessment of the property of express companies. In State ex rel. v. Jones, Auditor, 51 O. S. 492, at page 510, will be found evidence, in the language of Dickman, J., of the significance attached by the supreme court of Ohio to the use of the word "entire" in that law.

In a word, it is natural to suppose that when a value is to be placed upon the "entire" property of a single owner, the inference is that the property is to be valued as an "entirety," particularly where it is all devoted to a common business purpose.

The word "aggregate," on the other hand has an opposite significance. An aggregate value is a figure which is made up by adding together separate and distinct primary values. Hence, it follows that the phrase "the aggregate value of the entire property" is meaningless if full force be given to both the adjectives. A group of different things cannot, in strict logic, be considered as an aggregation and as an entirety at the same time.

I think that the interpretation of section 13 of the Parrett-Whittemore law is made clear by the fact that it is merely supplementary to sections 5404 et seq. of the General Code, which said sections in a part of their application at least are left unaffected by the Parrett-Whittemore law.

Section 5405 of this group provides as follows:

> "Return shall be made to the several auditors of the respective counties where such property is situated, together with a statement of the amount thereof which is situated in each township, village, city, or taxing district therein. Upon receiving such returns, the auditor shall ascertain and de-

termine the value of the property of such companies, and deduct from the aggregate sum so found of each, the value as assessed for taxation of any real estate included in the return. The value of the property of each of such companies, after so deducting the value of all the real estate included in the return, shall be apportioned by the auditor to such cities, villages, townships, or taxing districts, pro rata, in proportion to the value of the real estate and fixed property included in the return, in each of such cities, villages, townships or taxing districts. * * *"

While it must be conceded that this section is modified by section 13, in so far as its application to the field common to both sections is concerned, yet it must also be conceded that section 5405 is not modified in its application where not inconsistent with section 13 of the Parrett-Whittemore law. The two sections are inconsistent only when the condition described in the first clause of section 13 exists, viz.: "If the property of an incorporated company is situated in more than one county." So that if the property of an incorporated company is situated wholly within one county of the state, section 5405 applies to that situation just as if section 13 of the Parrett-Whittemore law were not in existence.

As your letter states, section 5405 has received judicial interpretation, and your statement of the decision of the court is sufficiently accurate for the purposes of this opinion.

There is but one difference between section 5405 and section 13 of the Parrett-Whittemore law, viz.: that which arises out of the use of the word "entire" in section 13. If the word "entire" had been in section 5405 the judicial interpretation of that section might have been different; for then the statute in words would have been quite similar to the Nichols law interpreted in State v. Jones, supra. As a matter of fact it may be observed in passing, however, that section 5405 should never have received such an interpretation, the employment of the unit rule being negatived by the very fact that it required return to be made to different county auditors.

It is probably true that had what is section 5405 of the General Code and what is section 13 of the Parrett-Whittemore law been passed at the same time, as parts of a single act of legislation, what is section 13 might have been used to construe what is section 5405 and a result different from that arrived at in the case referred to by you might have been reached.

Such questions afford an interesting ground of speculation, but they are put out of the main question which you ask because of the fact that section 5405 received a well-settled judicial interpretation before section 13 was enacted, and because, too, section 13 was obviously designed as a supplement to section 5405.

Under all the circumstances, I think that the word "entire" as used in section 13 of the Parrett-Whittemore law cannot be given the significance which was attached to that word as it was found in the Nichols law. As used in section 13 it can mean nothing more than that when the property of a corporation is located in more than one county the tax commission shall assess the whole property. It is used as meaning "all" rather than as meaning "as an entirety."

Any other result would lead to the conclusion that if the property of a corporation is located entirely within one county it is, on the authority of the case referred to by you, to be valued distributively like the property of an individual, whereas, if it is located in more than one county it is to be valued as a unit and going concern. Such a result would be palpably unconstitutional because it would provide two essentially different methods of valuation for property of the same class. This is because it would have to be conceded that the mere location of property belonging to a corporation in more than one county does not give it a character

different from what it would have if it were located wholly within one county. Classification would, therefore, be arbitrary and would constitute a violation of the uniform rule enjoined by article XII, section 2 of the constitution.

Aside from the constitutional question which is thus presented, I think that as a matter of interpretation merely section 13 of the Parrett-Whittemore law must be regarded as simply an effort on the part of the general assembly to provide the administrative machinery for doing in the state at large what has always been done in the county under section 5405; that is, giving to one assessing officer or tribunal the power to assess all the property of a given corporation, instead of having the property subject to assessment by different officers and tribunals.

For all the foregoing reasons, then, I answer your first question in the negative.

The answer to this question dictates the answer to your second question.

Section 12 of the Parrett-Whittemore law provides as follows:

> "Property pertaining to a business carried on by a person, firm, partnership, association or unincorporated company shall be listed in the township, city or village in which such business is carried on. Provided, however, that if such business is carried on in more than one township, city, village or county in this state, the value thereof shall be ascertained and apportioned to and assessed in the several townships, cities, villages or counties in which such business is carried on, in the manner provided for the assessment of the property of incorporated companies by sections 13, 14 and 15 of this act."

Inasmuch as it has been determined that section 13 does not authorize unit valuation as to corporations, it necessarily follows that business property, the value of which is to be "ascertained and apportioned" in the manner described in section 12 cannot be so valued.

I might add that investigation shows that sections 12 to 15, inclusive, of the Parrett-Whittemore law are copied almost verbatim from a proposed bill constituting the "Recommendations of the tax commission of Ohio to the governor and general assembly," made on February 20, 1913 (see sections 5371-5 and 5405-2 and 5405-3 as embodied in said recommendations). That bill, however, contained a section which is not found in the Parrett-Whittemore law nor elsewhere in the enacted laws of this state. The language of the proposed section is as follows:

> "Section 5387-1. The provisions of sections 5381 and 5387, inclusive, of the General Code shall not be so construed as to prohibit the listing and valuation of a mercantile, manufacturing or other plant or any business of any kind as a unit; but every such plant or business shall be listed and valued as a unit or going concern."

This proposed legislation, which was, of course, never adopted, is not cited for the purpose of interpreting the legislation which was actually adopted (which would, of course, not be permissible), but for the purpose of showing what sort of a provision would be necessary in order to bring about the result suggested by your first two questions, the other statutes of the state remaining as they are.

For the foregoing reasons, your second question is answered in the negative.

In answering your third question regard must first be had to the provisions of section 12 of the Parrett-Whittemore law, to which you refer and which I have quoted.

The first sentence of this section lays down a rule of situs similar and supplementary to the rules laid down in section 5371 of the General Code and in sections 9, 10 and 11 of the act. While the word "personal" is not used in this sentence, nor is the word "property" followed as it is in sections 9 and 11, which may be regarded as in *pari materia,* by the words "moneys, credits, investments in bonds, stocks, joint stock companies or otherwise," yet I think it is apparent that the single word which is used in section 12 does not contemplate real estate, for the situs of real estate is fixed. It can be located nowhere excepting where it is. It will not be presumed that the general assembly intended an impossible result. The provision being one for the fixing of situs, it must be conclusively presumed, I think, to be limited in its application to movable property—property the situs of which is not fixed by its very nature.

For example, if an individual should own a factory in one township of a county and should lease a warehouse in another township in the same county, carrying on the business of manufacturing at one place and the business of selling at the other, but both being in the very nature of things merely different parts of the same single business, the rules of this section could not, I think, be so applied as to assign any of the value of the real property on which the factory is situated to the township where the selling business is carried on.

Again, this provision is an embodiment of the principle of business situs which has come to be generally recognized by the courts, but the principle as so recognized applies only to personal or movable property—never to real estate.

I reach the conclusion, therefore, that so far as the first sentence of section 12 is concerned movable property is alone contemplated and real estate is not included.

Now the second sentence of the section, on which your question arises, is to be interpreted in the light of the manifest application of the first sentence, for the only word therein referring to or defining the property to which it applies is the word "thereof," which is, of course, purely relative and necessarily refers to the word "property" with its qualifications as used in the first sentence. Inasmuch, therefore, as the word "property" contemplates movable property only, the second sentence of section 12 applies only to movable property. Paraphrased, then, the second sentence provides that if a business is carried on in more than one township, city, village or county within this state the value of the movable property pertaining thereto shall be ascertained, apportioned and assessed in the several townships, cities, villages or counties in which the business is carried on, as provided in the other sections therein referred to.

This conclusion is strengthened by consideration of the fact that the sections referred to in the second sentence of section 12 are sections 13, 14 and 15 of the Parrett-Whittemore law. Section 5404 of the General Code is not referred to therein. This point has already been mentioned. Now section 5404 of the General Code, which applies, of course, to corporations only, is the only section requiring the inclusion of any real estate in the return. Section 13, to be sure, requires the county auditor to deduct from an aggregate sum which he is to find in accordance with section 5405 of the General Code, and the deductions referred to in section 5405 of the General Code are to be made for and on account of the real estate included in the return of the corporation. But in view of the fact that no real estate is required to be listed by section 12, the conclusion is irresistible that this part of section 13 relative to deductions does not apply to business property, as such.

Looking at the second sentence of section 12 from another point of view, it is apparent that what is to be done with business property in accordance with its provisions consists of the following three steps:

(1) The ascertainment of value.

(2) The apportionment.

(3) The assessment.

All these things are to be done "in the manner provided for the assessment of the property of incorporated companies by sections 13, 14 and 15 of this act."

Taking these up in their order, the question arises as to what is the manner in which the value of movable property is to be ascertained under sections 13, 14 and 15.

The first sentence of section 13, which has been previously quoted, does not bear upon the ascertainment of value. It relates to the making of a return. The ascertainment of value is a separate step in the assessment of property which follows the listing and the making of the return. Moreover, this sentence of section 13 cannot at least apply to all the situations contemplated by the second sentence of section 12, because according to its own terms it is only applicable "if the property of an incorporated company is situated in more than one county." That is, it is not intended that return should be made "to the county auditor of the county wherein the principal place of business of the company is located, or * * * to the county auditor of any county wherein it transacts business or its property is situated," if all of the business to which the property pertains is carried on in one county.

For these two reasons, then:

> "First. Because the second sentence of section 12 does not require that business property shall be *returned* in the manner provided by sections 13, 14 and 15 of the act, but is limited in its application to the ascertainment of value, the apportionment and the assessment as therein provided for; and
>
> "Second. Because the first sentence of section 13 manifestly does not apply in case property to be returned is situated wholly within one county;"

I am of the opinion that the first sentence of section 13 is not adopted by reference in the second sentence of section 12, and that "the manner provided for the assessment of the property of incorporated companies by sections 13, 14 and 15 of this act" does not include the making of the initial return provided for in section 13.

This conclusion makes it plain that the first part of the next sentence of section 13, viz.:

> "The county auditor to whom return is made shall certify the fact, together with the return and all information in his possession relating thereto, to the tax commission of Ohio,"

does not apply to business property, as such, for this part of the sentence still deals with the machinery of the return or listing; it has nothing to do with the manner of ascertaining the value.

We come now to the provision of section 13 which does bear upon the ascertainment of value. It is as follows:

> "The tax commission of Ohio * * * shall ascertain and determine the aggregate value of the entire property of a company required to be listed in this state. * * *"

I have omitted from the second sentence of section 13 the reference to the making of the deductions provided in section 5405, G. C., for a reason already disclosed. We have, then, the provision that the tax commission shall ascertain and determine the aggregate value of the entire property, as that provision is inter-

preted in answering your first question. It is possible to separate this legislative idea into two subordinate ideas, viz.:

> "(1) The property of the class the legislature had in mind shall be considered together and valued as a whole—though not as a unit.
> "(2) The tax commission of Ohio shall make the ascertainment and determination."

Are both of these subordinate ideas included in the idea of "manner" within the contemplation of section 12? I think the answer to this question is in the negative. The manner in which a thing shall be done and the person, officer or tribunal by whom or by which it shall be done are two separate and distinct subjects of legislation. For example, section 71 of the Parrett-Whittemore law directs the tax commission from time to time to prescribe such rules and regulations, orders and instructions not inconsistent with any provision of law "as it may deem necessary respecting the manner of the exercise of the powers and discharge of the duties of any and all officers relating to the assessment of property. * *" Clearly here the authority of the commission stops short of imposing substantive duties upon officers. This provision presumes that a duty is imposed upon an officer by the law itself and not by the order of the commission, and gives to the commission the authority to regulate the manner of the discharge of that duty. The word "manner" is, therefore, used in section 71 of the law in such a way as not to include the designation of the person or officer who shall discharge a given duty. I think it must likewise be used in this way in section 12.

I am, therefore, of the opinion that the phrase "the value thereof shall be ascertained * * * in the manner provided for the assessment of the property of incorporated companies by sections 13, 14 and 15 of this act," if business is carried on in more than one township, city, village or county in this state, means that in such case the value of the property pertaining thereto shall be ascertained as an aggregate and the whole property pertaining to such business shall be considered together, though not as a unit and going concern.

How, then, do sections 13, 14 and 15 of the act provide for the manner of the *apportionment* of the value so ascertained? This question requires consideration of the next provision of section 13, which is as follows:

> "The commission shall apportion the value of the property of such company, * * * among such counties in proportion to the value of the property located in each, and certify its findings to the county auditors, who shall severally apportion the amount certified to their respective counties, to the cities, villages, townships and other taxing districts therein, in the manner prescribed in section 5405 of the General Code."

Here, again, are two ideas:

> "(1) The idea involving the identity of the officer who shall make the apportionment; and
> "(2) The idea of the manner of making the apportionment."

Indeed, the word "manner" is itself used in section 13 as applicable to the method of apportionment within the county.

For reasons similar to those above stated in discussing the manner of ascertainment of value, I reach the conclusion that all that section 12 provides for is that in case business is carried on in more than one county, and the aggregate value of

the entire property pertaining thereto is once ascertained, that value shall be distributed among the counties "in proportion to the value of the property located in each," and after such distribution is made, or in the event that the business is carried on wholly within one county, the apportionment within the county shall be further carried out "in the manner prescribed in section 5405 of the General Code."

How, then, is it provided by the sections named that property shall be "assessed?" This, it seems to me, is provided for by section 15 of the act, which provides as follows:

> "Section 15. In determining the location of property for the purpose of the two preceding sections, all moneys and credits used in or appertaining especially to a separate business transacted by an incorporated company at a particular place shall be deemed to be located at such place where the business is transacted, and moneys and credits not used in or appertaining especially to such separate business transacted at any particular place shall be deemed to be located at the principal place of business of such company."

This section, it will be observed, as applied to business property, as such, is merely an amplification of the rule embodied in the first sentence of section 12, which rule has already been discussed.

These conclusions, it must be admitted, leave the law in an imperfect condition, for as I have interpreted sections 12, 13, 14 and 15 they lack any provision as to making returns or listing property of the character under consideration, and they also lack any provision as to what officer or tribunal shall perform the several processes which the law attempts to require.

So far as the county is concerned, however, this difficulty is obviated by the second sentence of section 2 of the Parrett-Whittemore law, which provides as follows:

> "County auditors shall, under the direction and supervision of the tax commission of Ohio, be the chief supervising, assessing officers of their respective counties, and, with the local assessors selected in the manner provided in this act, shall list and value real and personal property for taxation, within and for their respective counties, except as may be otherwise provided by law."

Having just concluded that it is not "otherwise provided by law" with respect to the listing and valuation of business property located wholly within the county, I now conclude that the duty to list and value such property, where the business is carried on in more than one township or taxing district of the county, devolves by virtue of this provision upon the county auditor. The duty thus devolving upon the auditor and the machinery whereby the duty may be discharged being perhaps imperfect, the tax commission of Ohio may, under section 71 above referred to, prescribe such general and uniform rules and regulations as it may see fit "respecting the manner of the discharge of the duty." That is to say, it being the duty of the county auditor under section 2 to list and value all property within his county, the listing and valuation whereof is not otherwise provided for by law, and the listing and valuation of business property, where the business is wholly carried on within one county but in more than one taxing district thereof, not being provided for by law, it necessarily follows that the county auditor must list and value such property; and there being a lack of specific machinery for the listing and valuation of such property, and such machinery being a mere matter of administration rather

than a matter of substantive law, the tax commission of Ohio, under the section above quoted, may provide such machinery.

Other machinery is also lacking here. That is to say, there is no specific provision in section 12 requiring the separate listing of business property, so that the returns of such property can be separated from other property of the same taxpayer. This defect, however, is cured, in my opinion, by section 73 of the law, which provides as follows:

> "The tax commission of Ohio may require, in the forms for listing property, prescribed by it, the separate listing of such items of personal property, moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, subject to taxation and the furnishing of such information respecting the property owned or controlled by the person, or incorporated company required to list, as it deems necessary to secure accurate, full and honest returns and values for taxation. The commission may in such forms, require the person, or incorporated company listing property for taxation, to affix to each and every item prescribed by it therein the true value in money of the property listed thereunder, and may require such statement of total values as it may deem proper to be made."

While this section applies only to movable property, yet it is in this respect equally as broad as section 12, which, as I have held, applies solely to that kind of property. Section 73, therefore, authorizes the tax commission to prescribe appropriate forms of returns for the separate listing of business property.

The question remains as to the identity of the officer or tribunal who shall value the property pertaining to the business carried on in more than one county. I have no doubt that it was the intention of the general assembly to devolve this duty upon the tax commission, yet nowhere is it expressly so devolved. The word "manner" as used in section 12 cannot, for reasons which have been suggested, be given this force unless force be given to the conditional clause introducing section 13 of the act, viz.: "If the property of an incorporated company is situated in more than one county," and it be held that the word "manner" as used in section 12 does include the making of returns and the selection of the officer who shall assess and apportion.

This method of reasoning, while somewhat inconsistent with the reasoning previously employed, would not affect the conclusion previously reached, and would open the way to hold that section 13, but for the provision therein respecting deductions, has perfect application in all of its terms to the assessment of business property where the business is carried on in more than one county.

The same result, however, may be reached, I think, in another way. It is clear that the county auditor cannot assess property pertaining to a business carried on in more than one county under section 2, because the power therein is limited to assessments "within and for their respective counties;" whereas, the assessment which sections 12 and 13 et seq. primarily require must be made with respect to property which is not wholly "within" any one given county, and the initial process in the assessment, viz.: the ascertainment of the aggregate value of the whole property is not made "for" any one county.

The tax commission does not have express power under section 2 of the act to make such an assessment. That section provides in part as follows:

> "In addition to all other powers and duties vested in or imposed upon it by law, the tax commission of Ohio *shall direct and supervise* the assessment for taxation of all real and personal property in the state. * * *"

This sentence gives to the tax commission the power of direction and supervision, but not the power to make an assessment itself; yet the law primarily requires that the assessment shall be made, and shall be made in the first instance without reference to county lines. While the act is in some confusion on this point, I am of the opinion that the manifest intention of the legislature is that the tax commission shall assess the property pertaining to a business carried on in more than one county, and shall make the apportionment among counties.

I, therefore, conclude, in answer to your third question, that the listing and valuation of property pertaining to a business carried on in more than one taxing district, but wholly within one county, is to be made by the county auditor, and that the tax commission of Ohio has power to prescribe blank forms for the separate listing of such business property and rules and regulations governing the manner of the discharge by the county auditor of the duty thus imposed upon him, such rules and regulations not being afforded by the express provisions of the statutes themselves.

I am also of the opinion that it is the duty of the county auditor to make all apportionments of value of property pertaining to a business within his county among the proper taxing districts therein, whether he determines the aggregate value in the first instance, as is the case where business is carried on wholly within one county, or receives from the tax commission, as hereinafter stated, the values apportioned to the county as a whole, in the event that the business is carried on in more than one county.

I am also of the opinion that it is the duty of the tax commission under the law to list and value the property pertaining to a business carried on in more than one county of the state, and to apportion the aggregate value so ascertained among the counties of the state in which the business is carried on; and that while the law is far from clear on this point, the return in such case should be made in such manner and upon such blank forms as are prescribed by the tax commission of Ohio by rules and regulations, which should, however, provide that the initial return should be made to the auditor of the county wherein the principal place of business is located, if such principal place of business is located within this state, and, if not, then to the auditor of any county in which business is transacted, consistently with the first sentence of section 13 of the Parrett-Whittemore law. There is doubt, as hereinbefore suggested, as to whether or not this sentence has perfect application to the question at hand, and for that reason I recommend that the commission formally adopt rules on the subject. But because it seems to have been the legislative intention that the machinery should be of the kind just described, I am also of the opinion that the commission's rules and regulations should follow the statute.

Generally as bearing upon the third question, I am of the opinion that the property pertaining to a business to which the special rules of section 12 of the Parrett-Whittemore law apply embraces only movable property, i. e., tangible personal property, moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, pertaining to a business, and that such property does not include real estate.

Your fourth question requires an interpretation of the word "business" as used throughout the section which has been quoted, as well as the other sections such as section 10 of the law. While in its most primary and accurate meaning this term means simply occupation—that which as a customary and habitual pursuit occupies the time and attention of a person, ordinarily as a means of livelihood or gain, but not necessarily so. (See Beickler v. Guenther, 96 N. W. 895 [Iowa]; Snow v. Sheldon, 126 Mass. 332; Earle v. Commonwealth, 180 Mass. 579); and while in the statutes of this state applicable to taxation the term "business" is

sometimes used in a connection from which it is obvious that but for qualifications in the context it might have this broad meaning (see section 5407, applicable to banks; section 5416, applicable to public utilities; and sections 5432 et seq. applicable to insurance companies); yet in ordinary speech the word "business" is most often used to distinguish a certain very general class of occupations from other classes which are characterized, for example, as "professions" and from other occupations such as "farming" and "mining." We speak of "business men" and "professional men" as belonging to distinct classes.

I cannot escape the impression that the legislature used the word "business" in section 12 of the Parrett-Whittemore law rather in its restricted and popular sense than in its broader and perhaps technically more accurate meaning. This impression comes to me first from the language of section 12 itself, wherein there is at least an implied qualification or narrowing of the term in the context, which in full is:

> "A business *carried on by* a person, firm, partnership, association or unincorporated company."

The legislature certainly had in mind some limitation of the principal term here or else it would have used no qualifying language whatever. The character and extent of the qualification, however, is not, it must be admitted, apparent from section 12 itself; nor are there any other sections of the Parrett-Whittemore law in which the term is used which indicate with any certainty what the limitation is. I refer to sections 10 and 15, both of which give the notion of a limitation just as section 12 does, but which in themselves do not indicate with any certainty the character and extent thereof.

However, I think it is obvious that the most natural place in which to search for a definition of the idea which seems to be implicit in section 12 is in some statutes in *pari materia*.

Proceeding a step further away from the immediate context, and going now to the unrepealed provisions of the General Code on the subject of the taxation of property, which unrepealed sections are clearly in *pari materia* with the sections under consideration, the following uses of the term are found:

> "Sec. 5382. When a person is required by this chapter to make out and deliver to the assessor a statement of his other personal property, he shall state the value of such property appertaining to his *business* as a merchant.
>
> "Sec. 5385. A person who purchases, receives or holds personal property * * * for the purpose of adding to the value thereof by manufacturing * * * is a manufacturer, and when he is required to make and deliver to the assessor a statement of the amount of his other personal property * * * he shall include therein the average value * * * of all articles * * * held for the purpose of being used * * * in manufacturing * * * and of all articles which were at any time by him manufactured * * * which, from time to time, he has had on hand during the year * * * if he has been engaged in such manufacturing *business* so long. * * *
>
> "Sec. 5386. Such average value shall be ascertained by taking the value of all property subject to be listed * * * owned by such manufacturer, on the last *business* day of each month the manufacturer was engaged in *business* during the year, adding such monthly values together and dividing the result by the number of months the manufacturer was engaged in such *business* during the year. * * *
>
> "Sec. 5387. When a person commences *business* as a merchant or

manufacturer after the day preceding the second Monday of April in any year, * * * such person shall report to the auditor of the county the probable average value of the personal property by him intended to be employed in such *business* until the day preceding the second Monday of April thereafter."

In connection with these sections, section 5371, G. C., to which sections 10 et seq. of the Parrett-Whittemore law are to be regarded as supplementary and of which they are in a measure amendatory, provides in part as follows:

"Merchants' and manufacturers' stock, and personal property upon farms shall be listed in the township, city or village in which it is situated."

I think it may be argued that merchants and manufacturers are the only persons, excepting pawn brokers, to be regarded as engaged in business within the meaning of section 12 of the Parrett-Whittemore law. It is clear that the word "business" is not used to designate any occupation other than that of a merchant or manufacturer in the general property tax provision of the General Code as we find it prior to the adoption of the Parrett-Whittemore law.

These kinds of business were the only kinds as to which peculiar rules existed prior to the adoption of the Parrett-Whittemore law. The object of the first sentence of section 12 of the Parrett-Whittemore law is merely declaratory of the above quoted sentence of section 5371, G. C., in so far as merchants' and manufacturers' stock is concerned. So that when it is provided that property pertaining to a business shall be listed in the township in which the business is carried on, it means merely that property pertaining to the business of a merchant or manufacturer shall be so listed.

It is no answer to this suggestion to point out that the sentence in section 5371, G. C., in which reference is made to merchants' and manufacturers' stock also refers to personal property on farms. So that if section 12 is to be regarded in the broad sense as merely declaratory of the rule of section 5371, G. C., it should extend also to "farming" as a business, because that occupation is also, by inference, mentioned in section 5371. While merchants' and manufacturers' stock and personal property on farms are mentioned together in section 5371, it does not follow that all three occupations or classes of occupations thus denoted constitute "businesses." The other sections above quoted show that the occupation of a merchant and that of a manufacturer do constitute "businesses."

On the whole I think the best general definition which can be given to the term "business" as used in section 12 of the Parrett-Whittemore law might be phrased as follows:

"A 'business,' within the meaning of section 12 of the Parrett-Whittemore law, is any occupation which deals with property in a commercial way, i. e., with the object of selling or otherwise dealing with the same for gain, but the operations of which with respect to that property commence after it is severed from the realty."

This definition excludes "farming" and all related occupations, such as that of a truck gardener, on the one hand, and all occupations which do not deal with property as such and the activities of which constitute the rendition of services, such as professions, on the other hand. It must be observed that the term as I have defined it is broad enough to include occupations other than those which are

technically merchandising or manufacturing, as the other taxation statutes define those terms; but upon reflection I am contented to let the definition rest as I have framed it. Thus, under some circumstances pointed out in a recent opinion to the commission, a broker selling on commission would not be a "merchant" within the meaning of sections 5381, 5382 and 5383, G. C., but he would be engaged in a "business" within the meaning of section 12 of the Parrett-Whittemore law as I have defined that term.

As to the specified cases of nurserymen and florists, it seems to me that in so far as that portion of the activities of either of these classes of persons which deal with personal property, as such, can be separated and distinguished, they are to be regarded as "businesses" and the property pertaining to such separate and distinguishable activities is to be assessed in the manner heretofore dscribed. (See on this point the case of Miller v. Miller, 15 N. P. (n. s.) 33, and the comments of my predecessor thereon in his opinion to the commissioner under date of September 4, 1914—annual report of the attorney-general for that year, volume 2, page 1180).

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1293.

APPROVAL OF TRANSCRIPT OF BOND ISSUE, MONROE TOWNSHIP RURAL SCHOOL DISTRICT, MADISON COUNTY, OHIO.

COLUMBUS, OHIO, February 25, 1916.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Monroe township rural school district, Madison county. Ohio, in the sum of $40,000.00, bearing interest at five per cent. per annum, payable semi-annually, being eighty bonds of $500.00 each, falling due between March 1, 1917, and September 1, 1936, inclusive."

I have examined the transcript of the proceedings of the board of education of Monroe township rural school district of Madison county, Ohio, relative to the issuance of the above described bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the provisions of the General Code of Ohio.

I am, therefore, of the opinion that said bonds, drawn in accordance with the form presented, when properly executed and delivered, will constitute valid and binding obligations of said Monroe township rural school district of Madison county, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1294.

BOARD OF EDUCATION—NOT LEGAL WHEN UNDER CONTRACT WITH PARENTS TO TRANSPORT CHILDREN TO SCHOOL, TO PAY SUCH PARENTS FOR SUCH TRANSPORTATION WHEN SAME IS NOT FURNISHED BY THEM.

It is not legal for a board of education, under a contract with parents to transport their children to school, as provided by section 7731, G. C., as amended in 104 O. L., 133, to pay said parents for transporting when the same was not furnished and said children were required to walk. When payments are so made, findings for recovery may be made against said parents for the amount so paid and if the board of education allowed the same with knowledge of the fact that such transportation was not furnished, said findings may be made jointly against said board and said parents.

COLUMBUS, OHIO, February 25, 1916.

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

GENTLEMEN:—I have your letter of February 3, 1916, submitting the following inquiries:

> "(1) Is it legal for a board of education to disburse the school funds directly to parents of children entitled in law to transportation service to and from the public schools, notwithstanding that said children, for the whole or a part of the time, were not transported by a conveyance but walked?
>
> "(2) If our examiner establishes the proportionate number of times that such transportation was effected by the use of the pedal extremities of the pupils instead of by sled or wheeled conveyance, would the law require a proportionate reduction of the contract price for the transportation of said pupils, and would findings for recovery against the members of the board of education obtain if it is found full payment of said contract price had been made although the pupils had walked?"

The section under which your foregoing inquiries arise, being section 7731, G. C., as amended 104 O. L., 133, provides as follows:

> "In all rural and village school districts where pupils live more than two miles from the nearest school the board of education shall provide transportation for such pupils to and from such school. The transportation for pupils living less than two miles from the school house, by the most direct public highway shall be optional with the board of education. When transportation of pupils is provided, the conveyance must pass within one-half mile of the respective residences of all pupils, except when such residences are situated more than one-half mile from the public road. When local boards of education neglect or refuse to provide transportation for pupils, the county board of education shall provide such transportation and the cost thereof shall be charged against the local school district."

This law was enacted for the benefit and protection of children coming within its provisions. It was not intended to inure to the financial benefit of the parents of such children. While there is nothing in its provisions prohibiting a board of education from contracting with parents to transport their own children to school,

yet such contracts should not be encouraged and should not be made except in cases where it is impracticable to make other arrangements without involving greater expense to the public. Other things being equal, contracts provided for under this section should be made with persons having no parental control over the children to be transported. If this is done it removes all opportunities and inducements to evade the provisions of the contract, either by compelling the children to walk, as in the case stated, or upon some excuse or pretext keeping them out of school entirely when they should be in attendance. However, when such contracts are made the parents stand in relation to the same as entire strangers. They are not permitted to exercise any parental authority over their children in the matter of the performance of such contracts and are required by law to do and perform all the conditions of such contracts on their part to be performed or there is no consideration to support the same. When, therefore, said parents fail to furnish transportation as required by their contract they have no legal claim of compensation therefor and to the extent payment is made to them under such circumstances, for transportation which was not furnished as required by the contract, such payment is an unlawful expenditure of public funds.

Answering your first inquiry specifically, I must advise that it is not legal for a board of education, under a contract with parents to transport their children to school, to pay said parents for such transportation when the same is not furnished by them.

Referring now to your second inquiry: If it is possible to ascertain with reasonable certainty what proportion of the time covered by said contracts transportation was not furnished by said parents, findings should be made against them for the proportionate amount of the consideration provided for by said contract which was paid for the time during which no transportation was furnished. If said payments were made by a board of education with knowledge of the fact that such transportation was not furnished, findings should be made against said board jointly with said parents. If the board, however, made said payments in good faith believing said contracts had been faithfully performed, findings for a recovery as aforesaid should be confined to the parents.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1295.

TOWNSHIP TRUSTEES—WHEN TOWNSHIP HALL MAY BE SOLD.

Township trustees may sell a township hall if such hall is not needed for township purposes, the sale to be made in the manner provided by section 3281, *G. C.*

COLUMBUS, OHIO, February 28, 1916.

HON. IRVING CARPENTER, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—I have your communication of January 29, 1916, in which you state that one of the townships of Huron county owns a township hall, which township hall consists of the second story of a building, the first story of which is owned by two other persons. The use of the township hall has been forbidden unless extensive improvements are made and the township trustees desire to sell the hall and you inquire as to their authority so to do.

This matter is regulated by section 3281, G. C., which provides in part as follows:

> "When the township has real estate or buildings which it does not need, for township purposes, the trustees may sell and convey any such real estate or buildings. Such sale must be by public auction and upon thirty days' notice thereof in a newspaper published, or of general circulation in such township."

Under the above quoted provision the township trustees of the township in question may sell the township hall, if such hall is not needed for township purposes, the sale to be made in the manner pointed out in the section in question.

This opinion is based on the assumption that the township in question has a fee simple title to the property, and that the deed to the township does not contain a clause providing that the property shall revert to the grantor in case it is not used for township purposes.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1296.

BOARD OF ADMINISTRATION—WITHOUT AUTHORITY TO DEED REAL ESTATE WITHOUT LEGISLATIVE CONSENT.

The board of administration is without authority to deed real estate belonging to the state without legislative consent.

COLUMBUS, OHIO, February 28, 1916.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—Under date of December 30, 1915, you wrote me for an opinion as to the power in your board to again modify the contract originally made between the board of trustees of the Massillon State Hospital (of which your board is the successor) and The Wheeling & Lake Erie Railroad Company, in regard to the building and operating of a spur track between the main line of said railroad company and the Massillon State Hospital, and I advised your board under date of January 21, 1916, that there was ample authority in your board to modify the contract, if your board should deem it advisable for the best interests of the state to do so.

Under date of February 11, 1916, you submit for my consideration a form of contract to be signed by the receiver of The Wheeling & Lake Erie Railroad Company, as such, and your board, which contract is to be a modification of the former contract as modified, and request me to advise you whether, in my opinion, it is a fair one for the state.

When I was considering the matter in my former opinion of January 21, 1916, I carefully examined the contract entered into by the trustees of the Massillon State Hospital with The Wheeling & Lake Erie Railroad Company under date of September 24, 1904, and noted that it was the duty of the trustees of the Massillon State Hospital to procure the necessary right-of-way and do deed the same to the railroad company by good and sufficient warranty deed, and the second clause of

said contract provided that when such right-of-way *shall have been so deeded* the railroad company should proceed to prepare and construct a suitable grade, etc.

While I noted that in your letter of December 30, 1915, you stated that the present receiver suggests

> "in order to clean the matter up for all time to come, that they take over the track and right-of-way, and agree to keep up repairs and deliver all our freight at a switching rate of $1.50 per car"

my attention was not particularly drawn to the fact that the title to the right-of-way still remained in the state and the reason that my attention was not so drawn was because the contract of September 24, 1904, specifically stated that the right-of-way should be first deeded before the road-bed and track were constructed, and I assumed, therefore, that the right-of-way acquired by the state had long since been deeded to the railroad company, for the reason that the railroad company was not to construct anything until it had received a deed to the right-of-way.

In the contract which you submit for my advice as to its fairness it is stated as one of the preambles that the trustees of the Massillon State Hospital have "failed or neglected to deed to said railroad company the right-of-way," and the first clause of the agreement provides that your board "will forthwith convey or cause to be conveyed to the first party (the receiver), or to The Wheeling & Lake Erie Railroad Company, the right-of-way as described and provided for in section 1 of said contract of September 24, 1904."

As stated to you in my opinion of January 21, 1916, the only authority for the building of this track that I have been able to find is the appropriation found in 97 Ohio Laws, page 588, wherein there was appropriated the sum of $25,000 to the Massillon State Hospital for "railroad switch," and I am totally unable to find any authority of law which would authorize your board to make a deed to the railroad company for the right-of-way purchased from state funds, and until such authority is acquired from the legislature there would be no such authority. Consequently, the first clause of the contract could not be carried out until legislative authority has been obtained.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1297.

APPROVAL OF ARTICLES OF INCORPORATION OF THE UNDERWRITERS LIFE INSURANCE COMPANY.

COLUMBUS, OHIO, February 28, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of February 18, 1916, enclosing proposed articles of incorporation of The Underwriters Life Insurance Company, with attached check for one hundred dollars, and requesting my approval thereof as required by section 9341 of the General Code.

I have examined said proposed articles of incorporation, and herewith return the same with my certificate of approval endorsed thereon.

I return the check for one hundred dollars herewith.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1298.

COUNTY TREASURER—COURT COSTS—FOR COLLECTION OF PERSONAL TAXES WHEN JUDGMENT SECURED AND EXECUTION IS ISSUED, BUT NO PROPERTY FOUND—ALLOWANCE MUST BE MADE BY COUNTY COMMISSIONERS TO PAY SUCH COSTS.

Court costs adjudged against a county treasurer in a suit instituted by him for the collection of personal taxes as provided by section 5697, G. C., must be presented to the county commissioners for allowance, and when allowed by them may be paid from the county treasury.

COLUMBUS, OHIO, February 28, 1916

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

GENTLEMEN:—I have your favor of February 11, 1916, submitting the following inquiry:

> "A county treasurer brings suit for the collection of delinquent personal tax under the provisions of section 5697, General Code. He secures a judgment for the tax, but when an execution is issued same is returned not satisfied because of nothing to levy upon. How is the justice of the peace and constable to be paid their fees and costs in a case of this kind? Is the county liable for the costs in this case; or, if the county is not liable, who shall pay these costs?"

The section to which you refer provides in part as follows:

> "When personal taxes stand charged against a person, and are not paid within the time prescribed by law for the payment of such taxes, the treasurer of such county, in addition to any other remedy provided by law for the collection of personal taxes, shall enforce the collection thereof by a civil action in the name of such treasurer against such person for the recovery of such unpaid taxes."

While the foregoing provisions of said section in respect to the collection of personal taxes seem to be mandatory, I am not prepared to say that they make it the imperative duty of the county treasurer to institute suit in every instance where personal taxes are not paid. In very many instances it is well known that any attempt to collect taxes in this way would be futile because no property could be found upon which to levy. It would, therefore, seem to be more in keeping with sound business methods to interpret this statute to mean that the treasurer should exercise some judgment and discretion in these matters, and when it is apparent that no judgment when recovered may be collected, suit should not be instituted.

This conclusion is further strengthened by the fact that when the delinquent has goods and chattels within the county the treasurer may distrain the same as provided by section 2658, G. C., and thus avoid any delay and the uncertainty of litigation. The proceedings thus authorized by said section 2658, are intended to and do furnish a complete and expeditious method of collecting delinquent personal taxes, and unless there are special circumstances in a case they should be followed by the treasurer in preference to the suit provided by the statute under consideration. When, however, the treasurer in good faith determines it to be his

duty to institute suit under the provisions of said section 5697, the authority so to do conferred upon him therein carries with it the implied power to incur all legal and necessary expenses connected with such suit. This necessarily includes a liability for costs if the suit, when instituted, should be determined adversely to the claim of the treasurer. The costs of the case under such circumstances would necessarily be adjudged against the treasurer, and would therefore certainly become a claim against the county which it would be the duty of the county commissioners to allow and order paid from the county treasury. The same rule would apply in the cases submitted in your inquiry if proper care was exercised by the treasurer in instituting suits in said cases. If the treasurer acted in good faith he should be protected in the same manner as he would be protected if from no fault of his the judgment of the court should be adverse to the claim of the county as in the cases first specified.

I am of the opinion, therefore, in answer to your question, that in the cases named in your inquiry if the treasurer acted in good faith the fees and costs in the cases specified are claims against the county which should be presented to the county commissioners for allowance as required by the provisions of section 2460, G. C., and when allowed by them may be paid from the county treasury.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1299.

BOARD OF EDUCATION—BOARDS OF ADJOINING COUNTY SCHOOL DISTRICTS MAY NOT ACT UNDER AUTHORITY OF SECTION 4696, G. C., 106 O. L., 397, ON PETITION TO TRANSFER TERRITORY FROM A RURAL SCHOOL DISTRICT IN ONE OF SAID COUNTY SCHOOL DISTRICTS TO A LOCAL DISTRICT IN SAID ADJOINING COUNTY SCHOOL DISTRICT, *AFTER* PROCEEDINGS HAVE BEEN COMMENCED TO CENTRALIZE SCHOOLS IN SAID RURAL SCHOOL DISTRICT—MADISON COUNTY.

Where the board of education of a county school district, acting under authority of section 4692, *G. C., as amended,* 106 *O. L.,* 397, *transfers a part or all of a school district of the county school district to an adjoining district of said county school district, and the board of education of the local school district, as enlarged by said transfer of territory, acting under authority of section* 4726, *G. C., as amended,* 104 *O. L.,* 139, *and section* 7625, *G. C., submits to the electors of said local district the questions of centralizing the schools of said district and of issuing bonds of said district for the purposes authorized by the provisions of said sections* 4726 *and* 7625, *G. C., and said local board of education, by virtue of the authority conferred upon it by a vote of the electors of said district in favor of said centralization and bond issue, proceeds to take the necessary steps to centralize said schools, said county board of education and the board of education of an adjoining exempted village school district, or city school district, or another county school district, may not, after said centralization proceedings have been commenced and before same are completed, act jointly, under provision of section* 4696, *G. C., as amended in* 106 *O. L.,* 397, *on a petition of the electors of said territory or part thereof, transferred as aforesaid, filed with said county board of education under provision of said section* 4696, *G. C., as amended, and praying for the transfer of said territory, or part thereof, to said adjoining exempted village school district or city or county school district.*

COLUMBUS, OHIO, February 28, 1916.

HON. FRANK B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—I am in receipt of a letter from Hon. Frank W. Miller, your predecessor in office, under date of February 10, 1916, requesting my opinion as follows:

> "A part of Somerford township, Madison county, Ohio, was transferred to Monroe township rural school district in Madison county. This section of Somerford township petitioned to be transferred to Mechanicsburg village school district of Champaign county, Ohio. The board of education of Madison county ignored said petition on a technicality.
>
> "Subsequently Monroe township rural school district voted on centralization and bond issue, both of which carried.
>
> "Every elector in said section of Somerford township now petitions the board of education of Madison county to be transferred to Champaign county school district.
>
> *"Query:* Can the board of education of Madison county legally make said transfer after a vote for centralization and bond issue carried?"

I am in receipt of a letter from Hon. C. C. Crabbe, prosecuting attorney of Madison county, under date of February 14th, submitting the same inquiry presented by Mr. Miller. Mr. Crabbe states that the question of centralizing the schools of said Monroe township rural school district, and of issuing bonds to provide funds to erect the necessary buildings for said purpose, was submitted to the electors of said district on the 24th of January, 1916, the vote being 169 for and 16 against; that a few months prior to said election the county board of education had attached certain territory from the Somerford township rural school district to the Monroe township rural school district, and that said territory was a part of said Monroe township rural school district at the time of said election; that a short time before the election a petition was filed with the county board, asking said board to transfer a part of the territory that had been recently added to the Monroe township rural school district, Madison county, Ohio, to Champaign county; that no action was taken on said petition, and that said petitioners are now insisting that said territory be transferred to said Champaign county school district.

I have just been informed, however, by Mr. Crabbe, that the aforesaid petition prayed for the transfer of said territory therein described from said Somerford township rural school district to the said Mechanicsburg village school district.

It will be observed that Mr. Crabbe's statement of facts in connection with said inquiry is practically the same as the statement made by Mr. Miller.

The authority of the board of education of Madison county school district to transfer a part of the Somerford township rural school district to Monroe township rural school district in said county school district is found in section 4692, G. C., 106 O. L., 397, which provides in part as follows:

> "The county board of education may transfer a part or all of a school district of the county school district to an adjoining district or districts of the county school district. Such transfer shall not take effect until a map is filed with the auditor of the county in which the transferred territory is situated, showing the boundaries of the territory transferred, and a notice of such proposed transfer has been posted in three conspicuous places in the district or districts proposed to be transferred, or printed in

a paper of general circulation in said county, for ten days; nor shall such transfer take effect if a majority of the qualified electors residing in the territory to be transferred, shall, within thirty days after the filing of such map, file with the county board of education a written remonstrance against such proposed transfer."

After this transfer was made and after the board of education of said Monroe township rural school district determined to submit to the electors of said district, as enlarged by the addition of the territory transferred to said district by said county board of education, the question of centralization, but after the election was held, it appears that the electors of a part of the territory, transferred as aforesaid, petitioned said county board of education to transfer said part of said territory to the Mechanicsburg village school district located in Champaign county school district.

This petition was filed with said board of education under section 4696, G. C., 106 O. L., 397, which provides as follows:

"A county board of education may transfer a part or all of a school district of the county school district to an adjoining exempted village school district or city school district, or to another county school district, provided at least fifty per centum of the electors of the territory to be transferred petition for such transfer. Provided, however, that if at least seventy-five per cent. of the electors of the territory petition for such transfer, the county board of education shall make such transfer. No such transfer shall be in effect until the county board of education and the board of education to which the territory is to be transferred, each pass resolutions by a majority vote of the full membership of each board, and until an equitable division of the funds or indebtedness be decided upon by the boards of education acting in the transfer; also a map shall be filed with the auditor or auditors of the county or counties affected by such transfer."

I am informed by Mr. Crabbe that the Mechanicsburg village school district is not exempt from county supervision, and is a part of Champaign county school district and that, while the aforesaid petition was signed by at least seventy-five per cent. of the electors of said territory, petitioning for such transfer, the board of education of Madison county school district refused to act on said petition on the ground that it was without authority, under the above provision of section 4696, G. C., as amended, to proceed under said provision of said statute to take the necessary steps in co-operation with the board of education of said Mechanicsburg village school district to effect the transfer prayed for in said petition.

While it is clear that the board of education of Mechanicsburg village school district was without authority, under the provisions of said section 4696, G. C., as amended, to act on the transfer proposed in said petition, I am of the opinion that said transfer might have been effected under said provisions of said statute by the boards of education of the respective county school districts, above referred to; first, taking the necessary steps under said provisions of said statute to transfer the territory in question from said Somerford township rural school district to the Champaign county school district, and the board of education of said Champaign county school district could then have annexed said territory as a part of said Champaign county school district to the Mechanicsburg village school district, under authority of the provisions of section 4692, G. C., as above quoted.

However, in order to effect said transfer, it would have been necessary (1),

that the board of education of Madison county school district should have secured the consent of the board of education of Champaign county school district to the transfer of the territory in question, and for this purpose it would have been necessary for each of said boards to pass a resolution indicating the action taken and definitely describing the territory to be transferred, the passage of such resolution requiring a majority vote of the full membership of each board by yea and nay vote, entered on the records of such boards; (2) that a map showing the boundaries of the territory transferred should have been placed upon the records of said boards, and that copies of said resolutions, certified to by the president and clerk of each board, together with a copy of said map, should have been filed with the auditors of said counties; (3) that at the time of said transfer the boards of education of said county school districts should have agreed upon an equitable division of funds or indebtedness of the local district from which said territory was to be transferred.

No such action was taken. While it appears that at least seventy-five per cent. of the electors in said territory petitioned for said transfer, and, assuming that said petition gave said county board of education jurisdiction to act under said section 4696, G. C., it might be argued that the provision of said section, that "if at least seventy-five per cent. of the electors of the territory petition for such transfer, the county board of education *shall* make such transfer" is mandatory. I have already held in opinion No. 903 of this department, rendered to Hon. Milton Haines, prosecuting attorney of Union county, under date of October 8, 1915, that in view of the further provision of said section 4696, G. C., as amended, that "no such transfer shall be in effect until the county board of education and the board of education, to which the territory is to be transferred, each pass resolutions by a majority vote of the full membership of each board, and until an equitable division of the funds or indebtedness be decided upon by the board of education, acting in the transfer," said provision is directory rather than mandatory. It follows that said county boards of education could not have been compelled to act on said petition, and could not now be compelled to act on the petition filed with the board of education of Madison county school district since the question of centralization was submitted to the electors of said Monroe township rural school district, as enlarged by the aforesaid transfer of territory.

The board of education of said Monroe township rural school district, having submitted to the electors of said district the proposition to centralize the schools of said district, under authority of section 4626, G. C., as amended in 104 O. L., 139, and at the same election the proposition to issue bonds under authority of section 7625, G. C., for the purpose of providing the necessary funds to erect a suitable building or buildings on the site which I am informed has been donated for this purpose by one of the residents of said district, and 169 of the 185 electors voting on said proposition having voted in favor of the same, Mr. Miller inquires whether the board of education of Madison county school district can legally make the aforesaid transfer of territory to the Champaign county school district.

I am further informed by Mr. Crabbe that the board of education of Monroe township rural school district, acting in pursuance of the authority conferred upon it by the vote of the electors of said district, and in compliance with the requirements of said sections 4726 and 7625 of the General Code, have, by resolution, accepted the site donated as aforesaid, on which to erect the necessary buildings for the aforesaid purpose, and are proceeding to take the necessary steps to issue the bonds of said district to provide the necessary funds for the erection of said buildings, and that said bonds have been presented to the Industrial Commission of Ohio in compliance with the requirement of section 1465-58, G. C., as amended in 103 O. L., 76.

While it is true that the centralization of the schools of said district is not yet completed, and cannot be until the necessary buildings will have been constructed and ready for use, inasmuch as the electors of said district, as enlarged, have decisively expressed themselves in favor of centralization, and inasmuch as the board of education of said district has proceeded with diligence to carry out the will of said electors, and to comply with the requirements of sections 4726 and 7625 of the General Code, I am of the opinion that said schools may be considered as centralized within the meaning of section 4727, G. C., as amended, 104 O. L., 139, which provides in part that "when the schools of a rural school district have been centralized, such centralization shall not be discontinued within three years and then only by petition and election, as provided in said section 4726."

In support of this conclusion, I call your attention to the holding of the court in the case of Fulks et al., v. Wright, 72 O. S., 547. From the statement of facts in that case it appears that the board of education of Washington township, Coshocton county, at a regular meeting of the board, held January 23, 1905, decided by resolution to submit to the electors of said township at an election to be held February 14, 1905, the question of centralization of the schools of said township, under section 3927-2, R. S., which provided that:

> "A township board of education may submit the question of centralization, and upon the petition of not less than one-fourth of the qualified electors of such township district must submit such question to a vote of the qualified electors of such township district."

Notice was given as provided by law, and such election was duly held on said February 14th, and at a meeting of the board held on February 27, 1905, the board canvassed the vote and entered upon its record the result, which was in favor of such election, with a vote of 76 for and 63 against. On the 13th day of February, 1905, the day preceding the day said election was held, the defendants in error, as petitioners, filed their petition in the probate court of Coshocton county for the establishment of a special school district, comprising, with other territory, about one-fourth of Washington township within the boundaries of said district. The plaintiffs in error, male electors residing in Washington township, on March 15th, filed in said probate court a remonstrance against including part of Washington township in said special school district. A hearing was had in said court, and on March 22, 1905, the probate judge ordered that the district, as petitioned for, be established.

The remonstrators prosecuted error in the court of common pleas where the order of the probate judge was reversed, and on error in the circuit court the judgment of the common pleas court was reversed, and the order of the probate judge was affirmed, and error was prosecuted to the supreme court by said remonstrators. It will be observed that the provision of section 3927-2, R. S., was practically the same as the provision now found in the first part of section 4626, G. C. Said section 3927-2, R. S., contained the further provision that:

> "When the schools of a township have been centralized, such centralization shall not be discontinued within three years thereafter, and then only by petition and election as required herein."

This latter provision of said section of the Revised Statutes is almost identically the same as the provision of section 4727 of the General Code, as above quoted. The court held that, proceedings having been commenced for the centralization of the schools of the township prior to the filing of the petition in the

probate court for the establishment of the special school district, the territory of Washington township, pending those proceedings, was not subject to be taken for a special school district, and the probate judge was without jurisdiction to include in the special school district any part of the territory of said Washington township school district.

While it may be argued that the authority of the county boards of education, under provision of said section 4696, G. C., as amended, to act on the aforesaid petition, filed with the board of education of Madison county school district since the commencement of the proceedings in Monroe township rural school district to centralize the schools of said district, is in no way limited by the provisions of section 4726, G. C., as amended, and that said county boards, in the exercise of their discretion, may ignore the fact that said proceedings have been commenced and are being prosecuted under provisions of said sections 4726 and 7625, G. C., and may proceed to exercise the authority conferred upon them by the provisions of said section 4696, G. C., I think such action on the part of said county boards of education at this time would be clearly in conflict with the holding of the court in the case of Fulks et al., v. Wright, supra.

I am of the opinion, therefore, in answer to Mr. Miller's question, that the boards of education of Madison and Champaign county school districts are without authority to act, under provision of said section 4696, G. C., as amended, on said petition filed with said board of education of said Madison county school district since the commencement of the aforesaid centralization proceedings.

A copy of this opinion will be sent to Mr. Crabbe.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1300.

GARNISHMENT—IN AN ACTION TO COLLECT DEBT FROM A STATE EMPLOYE—STATE MAY NOT BE MADE A GARNISHEE.

The state may not be made a garnishee in an action before a justice of the peace against an employe of the state for the purpose of subjecting money owing by the state to the employe to the payment of a judgment against the employe.

COLUMBUS, OHIO, February 28, 1916.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—In a communication under date of February 11, 1916, Hon. T. E. Davey, of your board, requests my opinion upon the legality of making the state a garnishee in an action before a justice of the peace against a state employe for the collection of a debt of such employe.

Your inquiry and the proceedings in garnishment assume that the state is or may be indebted to the employe, the defendant in an action before a justice of the peace. Garnishment before justices of the peace is an ancillary statutory proceeding in actions for the recovery of money governed by the provisions of sections 10265, G. C., et seq. This being a purely statutory proceeding, it must be strictly pursued. Said section 10265, G. C., provides as follows:

> "When the plaintiff, his agent or attorney, makes oath in writing that he has good reason to believe, and does believe, that any person, partner-

ship or corporation in the affidavit named, has property of the defendant in his possession, describing it, if the officer cannot get possession of such property, he shall leave with such garnishee a copy of the order of attachment, with a written notice that he appear before the justice, at the return of the order and answer as provided in this chapter."

Section 10266, G. C., makes provision for the service of the order and notice upon persons, partnerships and corporations, but no provision is made for the service of such order and notice upon the state. Nor is there found any authority in law for serving such notice and order upon any officer or agent of the state. It will be further noted that section 10265, supra, includes within its terms only persons, partnerships and corporations.

By section 10267, G. C., the garnishee is required to appear before the justice and disclose the amount, if any, owing by the garnishee to the defendant in the action, whether due or not. If the garnishee (that is to say the assumed debtor of the defendant) in the action does not appear, it is provided by section 10274, G. C., that the justice may proceed against him for contempt. If the garnishee appears, fails to appear, or fails to comply with the order of the justice to deliver property or to pay money owing to the defendant into court, the plaintiff may proceed against him in an action as in other cases (section 10276, G. C.). From this it appears that no purpose can be served by the service of the notice, order and answer of the garnishee, except the same be made the foundation of the order for the payment of money, or the delivery of property owing or belonging to the defendant, into court.

It would not be contended that the state would be subject to punishment by a justice of the peace for failure to appear, as for contempt, and no remedy for failure or refusal to obey an order to pay any money or deliver property may be had except by action against the garnishee in his own name. That is to say, the enforcement of any order against the garnishee would necessitate bringing a suit.

It is well settled in law that prior to the amendment of section 16 of article I of the constitution, September, 1912, the state could not be sued without its consent.

Cunningham v. Railroad Co., 109 U. S., 446, 27 L. Ed., 992.
State ex rel. v. Bd. of Public Works, 36 O. S., 409.
Ley v. Kirtley, 5 N. P. (n. s.), 529.
Meirs v. Turnpike Co., 11 Ohio, 273.

It is said in Cunningham v. Railroad Co., supra, that:

"Whenever it can be clearly seen that the state is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction."

The above rule applies where the state is not named as a party, if the state is the real party in interest.

In the case of Ley v. Kirtley, the court said:

"The approved rule now appears to be that though the United States or a state is not named as a defendant, but is the real party against which relief is asked and upon whom the judgment will operate, that the suit or action is really against the government, and the same cannot be maintained without its consent."

Re Ayers, 123 U. S., 443, 31 L. Ed., 216.

Fitts v. McGee, 172 U. S., 516, 43 L. Ed., 535.
Minnesota v. Hitchcock, 185 U. S., 373, 46 L. Ed., 954.
Oregon v. Hitchcock, 202 U. S., 59, 50 L. Ed., 934.

It is held in Secor v. Witter, 39 O. S., 218, that a garnishee is not a party to the original action, but is the party defendant in an action under section 10276, G. C., upon an order to pay money or deliver property into court. Any order of attachment against an officer or agent of the state in such action as is here under consideration could not in effect be otherwise than an action against the state. The state would, of necessity, be the real party against which any judgment therein would operate. Hence the court would be without jurisdiction in such action. It therefore follows that though an officer or agent of the state answer to an order of attachment, no action could be maintained upon an order to pay into court, founded upon such answer, and the same would therefore be unenforcible. The rule that the state cannot be sued without its consent is doubtless broader in its import and operation than the language in which it is stated might at first suggest. It is conceived that the meaning of this rule is that the state is not in any way subject to the jurisdiction or authority of the courts, and hence a justice's court is without power to serve notice or order of attachment upon an officer or agent of the state, as such, in a proceeding where the real party sought to be affected thereby is the state.

Although section 16 of article I of the constitution of this state, was amended September, 1912, to provide that:

> "Suits may be brought against the state, in such courts and in such manner, as may be provided by law."

the same does not operate to in any way modify the rules applicable to actions against the state above referred to. This provision of the constitution is not self executing, and the legislature of the state has not as yet seen fit to make statutory provision for the manner in which suits may be brought against the state, nor to designate courts in which such actions may be maintained.

I am therefore of opinion, in answer to your inquiry, that neither the state nor any officer or agent thereof, as such, may be made a garnishee in an action before a justice of the peace against an employe of the state wherein it is sought to subject money or credits owing by the state to such employe to the payment of such judgment as may be recovered against the employe in such action.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1301.

TAXES AND TAXATION—TAX LIEN ON REAL PROPERTY OF PUBLIC UTILITY ACCRUES SECOND MONDAY IN APRIL—DATE PERSONAL PROPERTY OF SAID PUBLIC UTILITY BECOMES LIABLE IS FIRST DAY OF JANUARY OF SAID YEAR.

By provision of section 5671, G. C., the day when the tax lien on the real property, of a public utility, engaged in the business of supplying electricity for light, heat and power purposes to consumers within this state, accrues for any year, is the day preceding the second Monday in April of said year.

The date as of which the owner of the personal property of said public utility becomes liable for the taxes on said personal property for any year is the first day of January of said year.

COLUMBUS, OHIO, February 28, 1916.

HON. HENRY W. CHERRINGTON, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—In your letter under date of January 13, 1916, you submit the following facts for my consideration:

> "On January 15, 1914, all of the property of The Gallipolis Gas and Coke Company, of Gallipolis, Ohio, was sold by the sheriff of this county on foreclosure to W. R. Tanner, trustee. On February 13, 1914, Tanner, trustee, sold this property to one L. B. Harrington. * * * The property consisted of real estate on which was situated the power plant of the company; a franchise to erect poles and wires on the streets of the city of Gallipolis, and poles and wires, etc., located on the streets of the city of Gallipolis. The taxes have gone delinquent. * * * The valuation of this property was fixed in the first instance for taxation by the tax commission of Ohio, it being a public utility corporation."

Upon the facts as above stated, you ask to be advised as to who is liable for the taxes for the year 1914, upon the property formerly owned by The Gallipolis Gas and Coke Company.

In answering your question it is necessary to determine the day in said year as of which the property referred to in your inquiry, or the owner thereof, became liable for the taxes for said year.

Section 6 of the Warnes law (section 5584, G. C. as originally enacted by the general assembly of Ohio on April 18, 1913, 103 O. L., 788, provided as follows:

> "Whenever any property is by any existing provision of law required to be listed or returned for taxation at any time between the second Monday of April and the third Monday of May, in any year, such property shall be listed or returned between the first Monday of February and the first Monday of June, annually; whenever any property is by any existing provision of law required to be valued as of the day preceding the second Monday of April, in any year, such property shall be valued as of the day preceding the first Monday of February, annually; and whenever the liability of any person or of any property to taxation is by an existing provision of law to be determined by reference to the day preceding the second Monday of April, said liability shall be determined by reference to the day preceding the first Monday of February; provided, that the provisions of

this section shall not apply in any case where property is by any existing provision of law required to be returned for taxation, or to be valued by, the tax commission of Ohio; nor in any case where the liability of any person or of any property to taxation is by any existing provision of law required to be originally determined by the tax commission."

This section of said law was amended in 104 O. L., 253, and as amended became effective June 9, 1914. Said section as amended provided as follows:

"Whenever any property is by any existing provision of law required to be listed or returned for taxation at any time between the second Monday of April and the third Monday of May, in any year, such property shall be listed or returned between the first Monday of April and the first Monday of June, annually; whenever any property is by any existing provision of law required to be valued as of the day preceding the second Monday of April, in any year, such property shall be valued as of the day preceding the first Monday of April, annually; and whenever the liability of any person or of any property to taxation is by any existing provision of law to be determined by reference to the day preceding the second Monday of April, said liability shall be determined by reference to the day preceding the first Monday of April; provided, that the provisions of this section shall not apply in any case where property is by any existing provision of law required to be returned for taxation to, or to be valued by, the tax commission of Ohio; nor in any case where the liability of any person or of any property to taxation is by any existing provision of law required to be originally determined by the tax commission."

It will be observed that the provisions of said section, fixing the time, generally speaking, when property should be listed or returned, and when liability should attach, as originally enacted or as changed by the amendment, are immaterial for the purpose of determining the answer to your question, for the reason that from your statement of facts it appears that the valuation of the property referred to in your inquiry was fixed in the first instance by the state tax commission for taxation, and the latter part of said section, as originally enacted, as well as in the amended form, provided that the provisions of said section should not apply in any case where property was by any existing provision of law required to be returned for taxation or to be valued by the tax commission of Ohio; or in any case where the liability of any person or any property to taxation was, by any existing provision of law, so required to be originally determined by the tax commission.

The day as of which the property of said public utility, or the owner thereof, became liable for the said year of 1914, must, therefore, be determined by reference to the provisions of other statutes then in force and fixing said liability.

Section 5671, G. C., which has been in force since 1862, reads as follows:

"The lien of the state for taxes levied for all purposes, in each year, shall attach to all real property subject to such taxes on the day preceding the second Monday of April, annually, and continue until such taxes, with any penalties accruing thereon, are paid. All personal property subject to taxation shall be liable to be seized and sold for taxes. The personal property of a deceased person shall be liable in the hands of an

executor or administrator, for any tax due on it from the testator or intestate."

As stated in opinion No. 71 of this department, rendered to the senate of the 81st general assembly under date of February 8, 1915, a copy of which was enclosed to you, this is the only statute that I have been able to find which fixes the time for the attaching of a lien for taxes. A distinction was made in said opinion between the word "lien" as used in said section 5671, G. C., and the word "liability" as used in section 5584, G. C., as above quoted. It was observed in said opinion that "generally speaking, all property real and personal is liable for taxation, but a lien attaches only to real property that is subject (liable) to taxes." It was further observed that "while the term 'lien' may include the term 'liability,' the term 'liability' by no means necessarily includes the term 'lien'."

Inasmuch as the third clause of section 5584, G. C., as above quoted, provided the general rule for liability of any person or of any property, and did not distinguish between property and persons, while on the other hand section 5671, G. C., clearly distinguishes between a lien upon real estate and the liability of personal property, subject to taxation, to be seized and sold, under familiar rules of statutory construction, I held that the two statutes were reconcilable, and that the day when the tax lien on real property would accrue for the year 1915 would be the day preceding the second Monday in April of said year, under the provisions of section 5671, G. C.

In keeping with said opinion, I now hold that, generally speaking, the day when the tax lien on real property accrued for the year 1914 was the day preceding the second Monday of April of said year. It follows that unless the provision of some other statute fixed the day as of which the tax lien on the real property referred to in your inquiry would accrue for said year 1914, said day would be the day preceding the second Monday of April of said year.

From your statement of facts, it appears that The Gallipolis Gas and Coke Company was a public utility as defined by sections 5415 and 5416, G. C., and that the valuation of its property was fixed in the first instance by the state tax commission. It further appears that said company owned only such real property as was necessary for the daily operations of said public utility.

Section 5419, G. C., provides that:

"The property owned or operated by a public utility, required to make return to the commission of its property to be assessed for taxation by the commission, shall be deemed and held to include such utility's plant or plants, and all real estate necessary to the daily operations of the public utility and all other property, moneys and credits owned or operated, or both, by it wholly or in part within this state, used in connection with or as incidental to the operation of the public utility, whether the same be held in common or by the individuals operating such public utility. * * *"

Said section further provides that

"in the case of incorporated companies, all the real estate, personal property, moneys and credits owned and held by such corporation within this state in the exercise of its corporate powers, or as incidental thereto, whether such property, or any portion thereof, is used in connection with such public utility business or not, shall be conclusively deemed and held to be the property of such public utility."

Sections 5420 and 5421, of the General Code, make it the duty of each public utility, except telegraph and telephone companies, to make and deliver to the tax commission of Ohio, on or before the first day of March of each year, in such form as the commission may prescribe, a sworn statement with respect to such utility's plant or plants and all property owned or operated, or both, by it wholly or in part within this state.

Section 5422, G. C., provides that said statement shall contain:

"* * * (8) A detailed statement of the real estate owned by the company in this state, where situated, and the value thereof as assessed for taxation, making separate statements of that part used in connection with the daily operations of the company, and that part used otherwise, if any such there be.

"(9) An inventory of the personal property, including moneys, investments and credits, owned by the company, in this state, *on the first day of the month of January in which the state was made*, where situated, and the value thereof, making separate statements of that part used in connection with the daily operations of the company, and that part used otherwise if any such there be."

Section 5425, G. C., provides that the property of such public utilities to be so assessed by the commission shall be all the property thereof, as defined in section 5419, G. C. This includes all the property of The Gallipolis Gas and Coke Company referred to in your inquiry.

Section 5428, G. C., provides:

"The commission shall deduct from the total value of the property of each of such public utilities in this state, as assessed by it, the value of the real property owned by such public utilities, if any there be, *as otherwise assessed for taxation in this state*, and shall justly and equitably equalize the relative value thereof."

Section 5446, G. C., requires the tax commission to apportion the value of the property of all public utilities, other than street, suburban or interurban railroad companies, as assessed by said commission, in the manner provided in said section. Subdivision (a) of said section provides that when all the property of such public utility is located within the limits of a county, the assessed value thereof shall be apportioned by the commission between the several taxing districts therein, in the proportion which the property located within the taxing district in question bears to the entire value of the property of such public utility, as ascertained and valued by the tax commission, so that, to each taxing district there shall be apportioned such part of such valuation as will fairly equalize the relative value of the property therein located, to the whole value thereof.

Section 5447, G. C., provides:

"On the second Monday of July, the commission shall certify such apportionment to the auditor of each county in which any of the property of the public utility is located."

I understand from your statement of facts that all of the property of the

public utility referred to in your inquiry is located within Gallia county. The above provisions of subdivision (a) of section 5446, G. C., would, therefore, apply in the apportionment of the value of said property if the same is located in more than one taxing district in said county.

Section 5448, G. C., provides:

> "The county auditor shall place the apportioned value on the tax list and duplicate, and taxes shall be levied and collected thereon, *in the same manner and at the same rate, as other personal property in the taxing district in question.*"

While under the provision of section 5425, G. C., as above quoted, the tax commision was charged with the duty of assessing all of the property of the public utility in question, as defined in section 5419, G. C., and this included said public utility's plant and all real estate owned by it and necessary to its daily operation, as well as all other property, moneys and credits owned or operated, or both, by it wholly or in part within this state, used in connection with or as incidental to its operation, whether the same was held in common or by the individuals operating such public utility, section 5428, G. C., made it the duty of the tax commission to deduct from the total value of the property of said public utility, as assessed by it, the value of the real property owned by said public utility and assessed for taxation by the legal authorities of the taxing district or taxing districts in which said real property is located.

This deduction having been made, and the fair valuation of the remainder of said property having been determined and apportioned by the tax commission, in compliance with the provision of subdivision (a) of section 5446, G. C., and having been certified to the auditor of Gallia county in compliance with the requirement of section 5447, G. C., it was the duty of said county auditor to place said valuation, as apportioned by said tax commission, on the tax list and duplicate of the district or districts in which said property was located, and taxes should have been levied and collected on said property "in the same manner and at the same rate as other personal property" in said taxing district or districts.

Upon a careful examination of all the statutes governing the taxing of the property of public utilities, I find no provision which in any way excepts the real property of the public utility in question from the operation of the provisions of section 5671, G. C. By the plain terms of section 5428, G. C., the tax commission is required to deduct from the total value of the property of said public utility, as assessed by it, the value of the real property owned by said public utility and assessed for taxation by the local authorities of the county in which such real property is located. I am of the opinion, therefore, that under the provisions of said section 5671, G. C., the day when the tax lien on the real property referred to in your inquiry accrued for the year 1914, was the day preceding the second Monday in April of said year.

Said taxes not having been paid and being delinquent, it follows that said lien may be enforced and said taxes on said real property may be collected by your county treasurer in the manner authorized by law for their collection.

Coming now to a consideration of the question as to the date as of which the owner of the personal property of said public utility became liable for the taxes on said personal property for said year 1914, consideration must be given to the provisions of sections 5420 and 5421 of the General Code, taken in connection with the provisions of subdivision 9 of section 5422, G. C., as above quoted.

From an examination of these provisions of the statutes, it is evident that inasmuch as the sworn statement which the public utility in question was required

to file with the tax commission on or before the first day of March of said year 1914, showed an inventory of the personal property, including moneys, investments and credits owned by said The Gallipolis Gas and Coke Company, on the 1st day of January of said year, and upon this information taken in connection with the other information contained in said statement and furnished by said company in compliance with the other provisions of said section 5422, G. C., the tax commission determined the total value of all the property of said public utility, the value of the property remaining after the deduction by the tax commission of the value of the real estate of said public utility in compliance with the requirement of said section 5428, G. C., was the value of the personal property owned by said company on the 1st day of January of said year, and this was the value certified by the tax commission to the auditor of Gallia county in compliance with the requirement of section 5447, G. C.

The personal property of said public utility, as well as the ownership thereof, must have been determined by the tax commission as of said date of January 1, 1914, and so certified to said county auditor. I am of the opinion therefore that the date as of which the owner of said personal property was liable for the taxes on said personal property for said year 1914, was the 1st day of January of said year.

No provision of the statutes makes said taxes on said personal property a lien on the property of said public utility, and I am of the opinion that the said L. B. Harrington, who purchased said property on February 13, 1914, and who has been the owner of said property since said date, cannot be required to pay said personal property taxes in the absence of an agreement to that effect.

It follows that unless the Gallipolis Gas and Coke Company, or its successors or assigns, can be required to pay said personal property taxes, your county treasurer has no other recourse in law for their collection.

In reaching this conclusion I am not unmindful of the provisions of section 5506, G. C. This section provides as follows:

> "The fees, taxes and penalties, required to be paid by this act, shall be the first and best lien on all property of the public utility or corporation, whether such property is employed by the public utility or corporation in the prosecution of its business, or is in the hands of an assignee, trustee or receiver for the benefit of the creditors and stockholders thereof."

Upon an examination of the various sections of the act, mentioned in said section 5506, G. C., as found in 102 O. L., 224-262, it will be observed that the taxes therein referred to are the excise and franchise taxes provided for in said act. The provisions of said section 5506, G. C., have therefore no application to the taxes on the personal property of the public utility referred to in your inquiry.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1302.

APPROVAL OF BOND ISSUE FOR BALLVILLE TOWNSHIP ROAD DISTRICT, BALLVILLE TOWNSHIP, SANDUSKY COUNTY, OHIO.

COLUMBUS, OHIO, February 28, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Ballville township road district, Ballville township, Sandusky county, Ohio, to the amount of $20,000.00 for improving the public ways of said Ballville township road district, being forty bonds of $500.00 each, dated March 1, 1916, and payable at stated periods from March 15, 1928, to September 15, 1934, inclusive."

I have examined the transcript of the proceedings of the township trustees of Ballville township, Sandusky county, Ohio, relative to the issuance of the above bonds: also, the bond and coupon form attached thereto, and I find the same regular and in conformity with the General Code.

I am therefore of the opinion that said bonds, drawn in accordance with the form presented, when properly executed and delivered, will constitute valid and binding obligations of said township road district.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1303.

CORPORATION—MAY REDUCE ITS CAPITAL STOCK WITHOUT PROPORTIONATELY REDUCING PAR VALUE OF ALL ITS SHARES OF CAPITAL STOCK—THE TIMKEN-DETROIT AXLE COMPANY—SECTION 8700, G. C., INTERPRETED.

A corporation may reduce its capital stock without proportionately reducing the par value of all its shares of capital stock, section 8700, *G. C.*

COLUMBUS, OHIO, February 29, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of February 25, 1916, in which you request my opinion as follows:

"We are herewith enclosing for your opinion a certificate of decrease of capital stock of "The Timken-Detroit Axle Company," which was presented to this department by the firm of Lynch, Day and Fimple, attorneys at law, Canton, Ohio, for filing and recording.

"We have refused to file the said certificate for the reason that under a former opinion of yours it was held that before a certificate of reduction of capital stock can be filed, the nominal value of the shares thereof must be reduced accordingly.

"We would like an early opinion on the question as to whether or not the capital stock of a corporation can be reduced without the par value of the shares thereof being reduced accordingly."

Your letter directly presents the question: "Must a corporation reduce the nominal value of all its shares into which its capital stock is divided in order to secure a reduction of its capital stock, or may it accomplish the same result by reducing the number of its shares?"

In my opinion to you under date of November 11, 1915, referred to in your letter, the certificate of stock reduction presented to you for record, and upon which I advised you, disclosed upon its face that the corporation, in order to secure a reduction of its capital stock, was buying in some of its outstanding common stock and of necessity thereby impairing its assets. That fact alone was sufficient to justify the conclusion I then expressed to you, and the question you now present was not given the careful and full consideration warranted by its importance, but was answered in view of the disclosure in the certificate of decrease above mentioned, and in accordance with the ruling of my predecessor, Hon. Timothy S. Hogan, in a carefully prepared opinion addressed to your predecessor in office on February 28, 1914, the conclusion of which was that:

> "A corporation, in reducing its capital stock, may not decrease the number of shares into which the same is divided."

I have since had occasion to give much time and study to the question presented, and after full and careful consideration of the language of section 8700, of the General Code, which authorizes a corporation to reduce its capital stock, and also in view of the practice which prevailed for many years prior to the ruling above referred to, I find myself unable to concur in the conclusion expressed by my predecessor, and to the extent hereinafter stated I desire to modify the language in my own opinion, to which you referred in your letter.

Section 8700 of the General Code, under which the authority to reduce capital stock of a corporation is conferred, is as follows:

> "With the written consent of the persons in whose names a majority of the shares of the capital stock thereof stands on its books, the board of directors of such a corporation may reduce the amount of its capital stock and the nominal value of all the shares thereof, and issue certificates therefor. The rights of creditors shall not be affected thereby; and a certificate of such action shall be filed with the secretary of state."

My predecessor based his opinion of February 28, 1914, upon the meaning attributed by him to the word "and" as used in the phrase in section 8700 of the General Code: "may reduce the amount of its capital stock *and* the nominal value of all the shares thereof." He held that the word "and" inseparably connected the two actions, viz.: the reduction of the capital stock and the reduction of the nominal value of all its shares, so that the one might not be done without the concurrent doing of the other.

In other words, he gave to this phrase a meaning which might much more clearly have been expresed by the legislature in the following language:

> "May reduce the amount of its capital stock BY the reduction of the nominal value of all the shares thereof."

or,

> "May reduce the amount of its capital stock if it proportionately reduces the nominal value of all the shares thereof."

or,

> "May reduce the nominal value of all its shares of stock and thereby reduce the amount of its capital stock."

I am unable to agree that the word "and" was used by the legislature with this restricted meaning. I understand it simply to connect in one sentence language which confers two powers which may be exercised either separately or in unison. If the following language had been used: "the board of directors of such a corporation may reduce the amount of its capital stock and may reduce the nominal value of all the shares thereof," the meaning I now attribute to the sentence as worded would be clear and unquestioned, and yet it would be difficult to state wherein the sentence is changed in meaning by including or omitting the inserted words.

To my mind, the word "and" is more properly used to convey the meaning that both or either power may be exercised than is the word "or," which carries with it the meaning that either may be done separately, and not that both powers may be exercised concurrently. It is, however, a well recognized rule of construction that "and" is often read "or," and "or" read "and." I therefore do not attribute great significance to the fact that in section 8698, of the General Code, which provides that a corporation, under certain conditions and restrictions, "may increase its capital stock *or* the number of shares into which it is divided," the word *"or"* is used. Under a very technical construction of this last section, a corporation could increase either its capital stock or the number of shares into which its capital stock is divided, but could never do both concurrently, which was obviously not the legislative intent.

I am informed that prior to the opinion of my predecessor, referred to, it had always been the practice to permit a reduction in the capital stock of a corporation without reducing the nominal value of the stock shares, but by simply reducing the number of shares. This practice was in keeping with the natural interpretation of the language of the code and prior statutes, and it worked no hardship or wrong upon any stockholder, it impaired the rights of no creditor, and affected no credits of the public. If the rule followed by the 1914 opinion is followed it cannot fail to produce absurd and rediculous situations. The resulting reduced stock of a corporation may have a par value of fractional dollars, or even fractional cents, which would injure, if not destroy, its market value and complicate the bookkeeping of the corporation.

The most numerous instances of stock reduction are those where the corporation has unissued stock and for various reasons desires to make a reduction to that extent in its authorized stock. If a corporation must reduce the nominal value of all its shares it is no nearer a solution of its problem after filing a certificate of reduction than before, because it still has its unissued stock with a reduction of the nominal value. In order, then, to get rid of all its unissued stock, the corporation would be obliged to reduce its capital stock by one hundred per cent. This construction of law, therefore, produces an unworkable rule in most instances where a reduction of the capital stock is desired. If, on the other hand, a construction be adopted which permits a reduction of the number of shares as an incident to the separate power to reduce the authorized capital stock, no difficulty is experienced in applying the law. If the amount by which its capital stock is reduced equals the amount of its unissued capital stock, which is the case in a majority of instances, it simply pushes out of existence such unissued stock. If a reduction is made which affects the issued stock, certificates showing fractional shares may be issued; or certificates showing shares of decreased valuation may be issued, at the option of the corporation.

I am not unmindful of the rule that merely because a provision of law is unworkable, or produces results not contemplated, by no means justifies a disregard of its plain meaning. Where an uncertainty exists as to the proper meaning of the language used by the legislature it is proper to consider and give weight to results and consequences which will follow each of the several possible constructions to which it is susceptible.

For the foregoing reasons I am, therefore, of the opinion that a corporation may reduce its capital stock without proportionately reducing the par value of all its shares of capital stock.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1304.

COUNTY COMMISSIONERS—COMPENSATION OF BUILDING COMMISSION FOR NEW COURT HOUSE—ALSO ARCHITECTS AND OTHER EMPLOYES—FROM WHAT FUND PAID—WHEN EXPENSES OF SAID COMMISSION ARE PAID FROM GENERAL COUNTY FUND AND WHEN FROM BUILDING FUND.

The compensation of a building commission as provided by section 2334, G. C., and all architects and other employes employed by said commission under provisions of section 2339, G. C., is payable from the building fund. The expenses of said commission, specified in section 2335, G. C., may be paid from the general county fund until said building commission fund becomes available for their payment, when they also should be paid from said building fund.

COLUMBUS, OHIO, February 29, 1916.

HON. P. A. SAYLOR, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—I have your letter of February 16, 1916, bearing the following statement and inquiry:

> "Preble county has voted on the question of issuing bonds in the amount of $250,000.00 for the erection of a new court house and jail. The building commission has been appointed under section 2333 of the General Code of Ohio. Section 2334 provides for the compensation of the commission. Section 2339 of the General Code vests the power in the commission of employing architects, superintendents, and other necessary employes. Section 2335 of the General Code provides for the expenses of the commission. The county commissioners have raised this question 'out of what fund is the building commission and the services of the architects paid? ' Also 'out of what fund is the expenses of this commission paid?' We have been unable to find any authority upon this proposition and therefore ask that we may have your opinion upon the same at your very earliest convenience."

There are no express provisions of law directing from what specific fund the different expenses to which you refer in your foregoing inquiry shall be paid.

It is provided in section 2334, G. C., that the compensation of the persons appointed on the building commission shall be fixed by the court of common pleas

and paid on its approval from the county treasury. No other or further provisions are made with respect to the payment of said compensation.

It is provided in section 2335, G. C., that the necessary expenses for stationery, postage, correspondence and travel out of the county required in the discharge of the duties of the commission shall be paid from the county treasury on the order of the county commissioners. There are no other provisions of law relating in any way to the payment of the expenses specified in this section.

By the provisions of section 2341, G. C., it is provided that when signed by five members of the commission, the county auditor shall draw his warrant on the county treasurer for the payment of all bills and estimates of such commission.

The foregoing sections contain the only provisions of law relating in any way to the matters submitted by you in your inquiry.

The only method by which any conclusion may be reached, therefore, in respect to the fund from which the payment of these various expenses may be made is to deduce from the purpose of the law generally the probable intention of the legislature in this regard. It is not the purpose of the laws relating to the erection of court houses and other county buildings specified in section 2333, G. C., that the board of county commissioners, as such board, shall have any control or supervision of the fund provided by said section for the erection of such buildings. It is manifest from the general provisions of the law that the control of said fund is in the hands of the building commission. For this reason alone, if no other existed, we could safely conclude that all expenses and bills payable on the allowance and order of the building commission should be paid from the building fund. However, the expenses named in section 2335, supra, are paid upon the order of the county commissioners, and as to these expenses this conclusion will not apply. The expenses specified in this section may be, and in most cases are, preliminary expenses, and are ordinarily incurred prior to the sale of bonds. This is so because under the provisions of section 2333 a building commission may be appointed immediately after the election authorizing the issuing of bonds. This section expressly provides that application for their appointment shall be made within thirty days after said election. Whether this provision may be construed as strictly mandatory or not, is not material here, for its requirements must be assumed to be followed in every instance, and in consequence thereof said building commissions should be appointed and begin their work within the time limit named.

It is evident then that the expenses named in said section 2335 will also begin with the work of the commission, and that the building fund will not be available for the payment of such expenses until some time after they are incurred. For this reason it has therefore generally been considered that the legislature intended the expenses named in said section 2335 to be those incurred by the commission in its preliminary work, and before any building fund is available for their payment. To that extent, therefore, payments of such expenses have been made from the general county fund, and I am not prepared to except to this practice, but the payment of any expenses of the commission from the general county fund should not continue after the building fund is in the treasury.

I therefore hold that the expenses named in section 2335, supra, which are incurred prior to the sale of bonds, may be paid from the general county fund, but as to all other bills, claims, estimates and expenses, including the services of the architect, allowed and ordered paid by the commission, it is manifestly the intention of the law that such be paid from the building fund. This will also include the compensation of the commission as fixed and ordered paid by the court of common pleas; their compensation and the compensation of all other persons employed in and about the erection of said building by the commission are naturally and properly a part of the cost of said building, as contemplated by section

2333, G. C., and are included in the amount submitted to the voters for their approval under the provisions of said section.

Answering your inquiry specifically, I must advise that the compensation of the building commission and all of its expenses after the building fund becomes available for the payment therefor, and the compensation of architects employed by said commission are payable from the building fund, and that the expenses of the commission specified in section 2335, supra, which are incurred prior to the creation of the building fund from the sale of bonds may be paid from the general county fund.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1305.

APPROVAL OF ABSTRACT OF TITLE AND DEED TO REAL ESTATE IN COSHOCTON COUNTY TO STATE OF OHIO—GRANTORS, GILBERT J. McKEE AND WIFE.

COLUMBUS, OHIO, March 1, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—Some time since you submitted to me for examination an abstract of title to the following described premises:

"Situated in the 3d quarter of Bethlehem township, county of Coshocton, state of Ohio, being all the land in the southwest part of a tract of land sold to Gilbert J. McKee by Wm. Coffman and wife as recorded in volume 116, page 439, in the records of Coshocton county.

"Located in lot No. 6 of the Rathbone section in the 3d quarter of the 6th township and 7th range. Being all that land now owned by Gilbert J. McKee lying between the following described line and the Walhonding river and east of the west line of lot No. 6. Said line beginning at a stake in the west line of lot No. 6, 1215 ft. south of the center of the Warsaw and Coshocton road, and on the line between the lands of Matthew Crawford and Gilbert J. McKee. Thence east 14 ft. to a concrete monument from which a maple tree 14" in diameter bears S. 76° E. a distance of 77.9 ft. and a concrete monument bears S. 23° 00" W. a distance of 49.9 ft. Thence S. 49° 45' E. 1437.1 ft. to a concrete monument; thence N. 88° 25' E. 133.6 ft. to a concrete monument on the east line of said lot No. 6 on the line between Samuel Hamilton and Gilbert J. McKee. Thence with said east line S. 3° 3' W. 231 ft. to the Walhonding river at the west end of a retaining wall to the Six Mile dam.

"This tract also includes all of tract No. 1, of the abandoned Walhonding canal lands, being the same lands deeded by state of Ohio to John G. Frederick by deed February 21, 1898, beginning at the west line, extended, of said lot No. 6, which point is station 904+45 of E. J. Olney's survey of the Walhonding canal in the year 1896 and running eastward the full width of the abandoned Walhonding canal and its embankments 1,000 ft. to station 914+45 of said Olney's survey which is at the upper end of lock No. 5 as numbered on the Walhonding canal from Roscoe, O.

"The total to be conveyed is estimated to contain 22.3 acres more or less of which there now is approximately 4.5 acres cultivated land, 12.3

acres sanded and covered with gravel, 5.5 acres covered with water.

"Also a right-of-way 14 ft. wide extending along the west line of lot No. 6, from the above described tract 1215 ft. north to the Warsaw-Coshocton road, also the privilege of a temporary camp on the lands of Gilbert J. McKee to be removed after the completion of the levee now under construction."

This abstract under date of August 4, 1915, was prepared by Solomon Mercer, abstractor of Coshocton, Ohio. Since the date of said abstract I have also had submitted an additional certificate of Mr. Mercer under date of September 17, 1915.

In addition to the abstract and the certificate referred to above, on February 11, 1916, I received a certificate from the treasurer of Coshocton county, Ohio, and certificate from the recorder of Coshocton county, Ohio, and on February 28, 1916, an additional certificate from the recorder of Coshocton county, Ohio.

From my examination of the abstract and the various certificates above referred to, I am of the opinion that Gilbert J. McKee and wife were on the 28th day of February, 1916, seized of an estate in fee simple to the premises described above, free from all encumbrances whatsoever.

I have also examined the deed submitted by you which was executed by Gilbert J. McKee and Myrta A. McKee, his wife, to the state of Ohio under date of February 7, 1914.

This deed is in proper form and in my opinion will convey to the state of Ohio an estate in fee simple to said premises. The abstract of title and various certificates attached thereto and the deed are herewith returned to you.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1306.

AMENDMENT TO ARTICLES OF INCORPORATION ADOPTED BY UNANIMOUS CONSENT OF STOCKHOLDERS CHANGING UNISSUED COMMON STOCK TO PREFERRED STOCK OR UNISSUED PREFERRED STOCK TO COMMON STOCK, APPROVED—THE RADIUM-ACTIV COMPANY.

The secretary of state may permit the filing of amendment to articles of incorporation adopted by the unanimous consent of the stockholders changing unissued common stock to preferred stock or unissued preferred stock to common stock.

COLUMBUS, OHIO, March 1, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of February 25, 1916, with enclosures, in which you request my opinion as follows:

"We are enclosing for your opinion an amendment to the charter of 'THE RADIUM-ACTIV COMPANY.'

"We have not filed the said amendment for the reason that under a former opinion of yours it was held that preferred stock cannot be changed into common stock by amendment.

"We are withdrawing the request for an opinion asked for in our communication of February 16, 1916."

Upon examination of the charter of the Radium-Activ Company I find that it has at present a total authorized capital stock of $300,000.00, $100,000.00 of which is common stock divided into one thousand shares of the par value of one hundred dollars each, and $200,000.00 of which is preferred stock divided into two thousand shares of the par value of one hundred dollars each.

The company seeks to amend its articles of incorporation by changing $100,000.00 of its authorized but unissued preferred stock to common stock, and to change its resulting $200,000.00 common stock to forty thousand shares of the par value of $5.00 each.

The following is a copy of a letter written to you under date of February 19, 1916, by Mr. B. W. Coffland, manager of the Radium-Activ Company, which you have turned over to me for consideration:

"Supplementing our interview with the assistant secretary and your chief clerk of the 16th instant, I wish to state that the proposed amendment to the articles of this company does not contemplate any change in any outstanding preferred stock as the present authorized issue is two hundred ($200,000.00) thousand dollars; the proposed amendment changes one hundred thousand of this to common, but there is at present only thirty-six shares, representing thirty-six hundred ($3,600.00) dollars of this stock subscribed for or issued."

The question raised and upon which you desire my opinion is as to whether or not the Radium-Activ Company may, with the written consent of all its stockholders, by amendment to its articles of incorporation, change $100,000 of its unissued preferred stock to common stock.

I have recently advised you in opinion No. 989, dated October 30, 1915, in opinion No. 1160, dated January 11, 1916, and in opinion No. 1244, dated February 7, 1916, which were based upon the particular facts presented in each case, that the corporations there under consideration might by amendment authorized by the unanimous consent of all stockholders change unissued common stock to preferred stock.

I am not unmindful of an earlier opinion referred to in your letter in which I advised you that a corporation was not authorized to change preferred stock to common stock by amendment, nor have I yet been able to find in the General Code any specific provision authorizing such an amendment. In view, however, of the practice which has long existed under the ruling of your department, and of which I was not fully aware at the time my former opinion was prepared, of permitting amendments to articles of incorporation changing the character of corporate stock, particularly common stock to preferred stock, and in view of the advice given you in the three opinions above referred to relative to the changing by amendment unissued common stock to preferred stock with the unanimous written consent of all stockholders, I am of the opinion that you should file and record the certificate of amendment presented to you by the Radium-Activ Company. The rights of neither creditors nor stockholders can in any way be affected or prejudiced by permitting this change, as all the stockholders have consented thereto in writing, and the assets of the corporation and the liabilities of its stockholders, in so far as creditors are concerned, are in nowise impaired.

For your future guidance in this connection, I may add that it is my opinion that you should file and record certificates of amendment to articles of incorpora-

tion, adopted by the unanimous consent of all the corporation's stockholders, changing unissued common stock to preferred stock, or unissued preferred stock to common stock.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1307.

MOTHERS' PENSION LAW—GRANTEE INELIGIBLE TO RECEIVE PENSION AFTER REMARRIAGE—STEPFATHER NOT LIABLE FOR SUPPORT OF STEPCHILDREN.

Grantee of mothers' pension under section 1683-2, *G. C., as amended, is ineligible to receive the same after remarriage, while her husband is alive, not permanently disabled or a prisoner or has not deserted and continued such desertion for a period of three years.*

Stepfather not subject to prosecution under the provisions of section 13008, *G. C., for failure to support children of his wife by a former marriage, unless he has taken some action towards the adoption of her children.*

COLUMBUS, OHIO, March 1, 1916.

HON. MEEKER TERWILLIGER, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—Permit me to acknowledge the receipt of your request for an opinion concerning mothers' pensions which is as follows:

"The juvenile court of this county has referred a question to me relating to mothers' pensions and as the question has never been passed upon by any court of this state, that I am able to find, I am constrained to refer the matter to your department for the purpose of obtaining an opinion on the question as probably the same question has been referred to you before. The facts are these:

"Mr. and Mrs. James Curry were the parents of six children; Mr. Curry died two years ago leaving a widow and the six children surviving him, none of the children being entitled to an age and schooling certificate. The juvenile court allowed Mrs. Curry a mothers' pension for the partial support of herself and her six children. About two months ago, Mrs. Curry, being yet a young woman, married a Mr. Stebleton, and they are now living together as man and wife and have some of her children by her first husband living with them. Mr. Stebleton is a poor man, living upon his daily earnings and does not want to support the Curry children as he claims he is not able to do so, but he wants his wife, the former Mrs. Curry, to live with him. Mrs. Stebleton insists that the mothers' pension be continued for the partial support of her children.

"Her present husband, Mr. Stebleton, is not permanently disabled by reason of physical or mental infirmities, but works when the weather permits and when he can get work.

"Is Mrs. Stebleton entitled to a mothers' pension under section 1683-2 of the General Code?

"Is Mr. Stebleton liable under section 13008 of the General Code of Ohio for the support of the Curry children, now his stepchildren?

"If you have already passed upon these questions I would thank you for a copy of the opinion, and if you have not I would thank you to give me your opinion at your earliest convenience."

The authority for the granting or allowance of mothers' pensions is to be found in the juvenile court act, sections 1683-2, and 1683-3, as amended, 106 Ohio L., 436, the same being, in part, as follows:

"Section 1683-2. For the partial support of women whose husbands are dead, or become permanently disabled by reason of physical or mental infirmity, or whose husbands are prisoners, or whose husbands have deserted, and such desertion has continued for a period of three years, when such women are poor, and are the mothers of children not entitled to receive age and schooling certificate, and such mothers and children have a legal residence in any county of the state for two years, the juvenile court may make an allowance to each of such women as follows: * * *

"Section 1683-3. Such allowance may be made by the juvenile court, only upon the following conditions: First, the child or children for whose benefit the allowance is made must be living with the mother of such child or children; second, the allowance shall be made only when in the absence of such allowance, the mother would be required to work regularly away from her home and children, and when by means of such allowance she will be able to remain at home with her children, except that she may be absent for work for such time as the court deems advisable; third, the mother must in the judgment of the juvenile court be a proper person, morally, physically and mentally for the bringing up of her children; fourth, such allowance shall in the judgment of the court be necessary to save the child or children from neglect and to avoid the breaking up of the home of such woman; fifth, it must appear to be for the benefit of the child to remain with such mother; sixth, a careful preliminary examination of the home of such mother must first have been made under the direction of the court by the probation officer, the agent of an associated charities organization or humane society, or in the absence of such probation officer, society or organization in any county, the sheriff of such county shall make such investigations as the court may direct, and a written report of the result of such examination or investigation shall be filed with the juvenile court, for the guidance of the court in making or withholding such allowance."

From a reading of the sections quoted it will be noted that to make a woman eligible to receive a mothers' pension she must be either a widow, the wife of a man who is permanently disabled by reason of physical or mental infirmity, the wife of a prisoner who does not support his child or children, or of a man who has deserted herself and her children for a period of three years. If the woman is poor and the mother of children under the stipulated age, the juvenile court has jurisdiction to allow a mothers' pension if one or more of the conditions recited above are present.

In the case of Mrs. Stebleton the jurisdictional requisites are lacking as Mrs. Stebleton, the applicant, does not appear before the court under either of the conditions outlined by the statutes.

I am not unmindful of the provisions of section 1683 of the General Code, which direct that a liberal construction be given to the juvenile court act to the end that proper guardianship may be provided for the child, but notwithstanding the

unfortunate conditions which command close attention in the case under consideration the most liberal construction which might be given to the mothers' pension act would not remove the barriers which exclude Mrs. Stebleton from its benefits.

It is my opinion, in answer to your first question, that under the conditions outlined by you, Mrs. Stebleton is not eligible to receive a mothers' pension under the provisions of section 1683-2 of the General Code, as amended, supra.

The second question in your letter is as to whether or not Mr. Stebleton is liable under section 13008 of the General Code of Ohio for the support of the Curry children, now his stepchildren. Section 13008 of the General Code is as follows:

> "Whoever, being the father, or when charged by law with the maintenance thereof, the mother, of a legitimate child under sixteen years of age, or the husband of a pregnant woman, living in this state, being able by reason of property, or by labor or earnings, to provide such child or such woman with necessary or proper home, care, food and clothing, neglects or refuses so to do, shall be imprisoned in a jail or workhouse at hard labor not less than six months nor more than one year, or in the penitentiary not less than one year nor more than three years."

There is only one decision in the state of Ohio on this subject, and that is the case of Trustees of Bloomfield v. Trustees of Chagrin, 5 Ohio R., page 315. In that case it was held by the court that:

> "The second husband has no legal control over his wife's children by former marriage. He has no right to their services, and is not bound to support them, consequently they can derive no settlement from him."

In the case of Frank Kraft v. Herman Wolf, 3 Ohio N. P. (N. S.), 105, which was a case of homestead and family exemption in the common pleas court of Cuyahoga county, the court, at page 107, makes the following observation:

> "Sections 3137-a and 3139, Revised Statutes, throw some light upon whether or not a stepdaughter is a child, not by what they say, but by what they involve and by what they exclude.
>
> "The first named section provides, in substance, that any inhabitant of the state being the husband of any woman who has a child by a former husband may file a petition in the probate court, etc., for a change of name of such stepchild.
>
> "Section 3139 provides that when this provision has been complied with, when he has made the application and had a change of name, when all these things have been done, the probate court shall declare on its order that from that date such child is, to all legal intents and purposes, the child of the petitioner. The court shall make that declaration after all these things be done. I think a fair construction of that is to say that the legislature has fairly said that up to that time the child is not the child of the petitioner. There is only one decision in this state on that subject, and that is in 5 Ohio, 315. The fact that it was never modified in any way indicates that it is a settled rule. It was held in that case that a stepfather has no right to the services of a stepchild. The court is, therefore, of opinion that, although this man is a widower and that his child is unmarried, she is not his daughter."

The doctrine announced in the case of Trustees of Bloomfield v. Trustees of Chagrin is the law of the state, it never having been altered, modifid or reversed, and it is my opinion, therefore, that unless Mr. Stebleton has taken some positive steps towards the adoption of the children of his wife by her former marriage he could not be successfully prosecuted under the provisions of section 13008 of the General Code.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1308.

DISAPPROVAL, BOND ISSUE OF DOVER TOWNSHIP RURAL SCHOOL DISTRICT, TUSCARAWAS COUNTY, OHIO.

COLUMBUS, OHIO, March 2, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Dover township rural school district to the amount of $30,000.00 accepted by the industrial commission by resolution dated February 10, 1916, being sixty bonds of $500.00 each, bearing interest at the rate of five per cent. per annum, payable semi-annually."

Upon examination of the transacript of the proceedings of the board of education of Dover township rural school district relative to the issuance of the above bonds I find that such school district is not authorized to issue bonds to the amount of $30,000.00 under the provisions of section 7629 of the General Code, as the tax duplicate of said school district amount to only $3,119,980.00, and the total amount of the bonds which may be issued by a vote of the board under said section cannot exceed the aggregate of a tax at the rate of two mills upon the said tax valuation.

I am in receipt of a letter from Hon. E. E. Lindsey, prosecuting attorney of Tuscarawas county, advising me that the board of education of Dover township rural school district will call a special election to authorize the issuance of bonds in the amount of $30,000, and that they will again be offered to your commission as soon as proceedings relative thereto have been completed.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1309.

SECTION 5660, G. C., APPLICABLE TO CONTRACT FOR ERECTION OF NEW COURT HOUSE—BONDS MUST BE SOLD AND IN PROCESS OF DELIVERY—BONDS FOR ERECTION OF COURT HOUSE MUST BE OFFERED TO INDUSTRIAL COMMISSION BEFORE ADVERTISING SAID BONDS FOR SALE.

When money for the erection of a court house is to be derived from the sale of bonds, no legal contract may be made for the erection of such building until sufficient bonds are sold and in process of delivery to pay the cost of erection, as provided in said contract.

The provisions of section 1465-58, *G. C., as amended,* 103 *O. L.,* 76, *referring to the taking of bonds by trustees of the sinking fund of the taxing district issuing said bonds, do not apply to bonds issued by a county for the erection of a court house, but such bonds shall be directly offered in writing to the Industrial Commission before the same are advertised for sale.*

COLUMBUS, OHIO, March 3, 1916.

HON. P. A. SAYLOR, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—I have your letter of February 29, 1916, bearing the following statement and inquiry:

> "Sometime since I wrote you with reference to the building of our court house and the payment of the commission and the architect. Since then the auditor of our county has raised the question about the certificate required when the contract is let that the funds are in the treasury for the payment of the obligation of the contract. We are about to advertise for bids for contracts to erect the court house, and the auditor's question involves in construing section 5660 of the G. C. of Ohio. Section 5660 is as follows:
>
> " 'The commissioners of a county, the trustees of a township and the board of education of a school district, shall not enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of money, unless the auditor or clerk thereof, respectively, first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund for which it is to be drawn or has been levied and placed on the duplicate, and in process of collection and not appropriated for any other purpose; money to be derived from lawfully authorized bonds sold and in process of delivery shall, for the purpose of this section, be deemed in the treasury and in the appropriate fund. Such certificate shall be filed and forthwith recorded, and the sums so certified shall not thereafter be considered unappropriated until the county, township or board of education, is fully discharged from the contract, agreement or obligation, or as long as the order or resolution is in force.'
>
> "We voted on selling bonds in the amount of $250,000.00, and the advisability of selling all these bonds at one time was questioned by the county commissioners. It might be a saving to the county to sell these bonds at different times, as the work progressed, and the commission needed the money.
>
> "The contract for the court house will probably be in the neighbor-

hood of $200,000.00. Would we have to sell bonds to the amount of $200,000.00 so that the auditor could make the certificate required in section 5660, or are the bonds after they have been once authorized by a vote of the people, considered in the process of collection whether they have been advertised for sale or not?

"We would like to hear from you in reference to this matter as well as our preceding questions contained in former letter, at your earliest convenience.

"The act creating the state liability board of awards, 103 Ohio laws, page 76, provides:

"'And it shall be the duty of the boards or officers of the several taxing districts of the state in the issuance and sale of bonds of their respective taxing districts, to offer in writing to the state liability board of awards, prior to advertising the same for sale, all such issues as may not have been taken by the trustees of the sinking fund of the taxing district so issuing such bonds.'

"This raises the question 'Is there a board of commissioners of the sinking fund for the county?' If there be such a board, how was it appointed or selected?"

The provisions of section 5660, G. C., quoted by you in your foregoing inquiry, have been repeatedly held by the courts of this state to be mandatory. They apply to the contract for the erection of your new court house. They require that the money necessary to complete any contract made for its erection shall be in the treasury at the time said contract is consummated. If, however, the money for building a court house is to be derived from the sale of bonds (as in your case), it is sufficient that said bonds are lawfully authorized to be sold, and are sold and in process of delivery. It is, therefore, not sufficient, as suggested by you, that said bonds are authorized by a vote of the people. They must be sold and in process of delivery. This is the plain requirement of the law aforesaid, and it may not be evaded. Your board of county commissioners cannot make a legal contract for the erection of your court house until sufficient bonds are sold and in process of delivery to pay the cost of building as provided by the contract.

Referring to your second inquiry, there is no county sinking fund and, therefore, no statutory provisions for the appointment of trustees or commissioners thereof. The provisions of the law, quoted in this inquiry, do not apply to county bonds, except to require that county commissioners shall offer, in writing, all bonds issued by the county to the Industrial Commission of Ohio before advertising said bonds for sale. It will be necessary, therefore, in your case that all bonds which your county commissioners determine to sell shall, first, be offered in writing to said Industrial Commission of Ohio, and if not accepted by them, as provided by law, may then be advertised by your commissioners.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1310.

MUNICIPAL CORPORATION—COUNCIL HAS DISCRETION TO FURNISH LAW BOOKS TO MAYOR—MAYOR HAS NO CONTROL OF BOOKS FURNISHED ANY OTHER DEPARTMENT OF VILLAGE.

The matter of furnishing law books, including a set of the General Code of Ohio, for use in the office of mayor of any village rests in the discretion of the council of said village. If said council neglects or declines to furnish said books the mayor is without any recourse, nor has he any control of said books if furnished by council for use in any other department of the village.

COLUMBUS, OHIO, March 3, 1916.

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

GENTLEMEN:—I have your letter of February 25, 1916, submitting the following inquiries:

> "FIRST. If the council of a village refuses to provide the General Code of Ohio for the use of the mayor's office of said village, is there any recourse left to the mayor by means of which he can provide such equipment for his office at the expense of the village?
>
> "SECOND. If said village is owner of a set of Page & Adams Annotated General Code of Ohio, may the council of said village place said books with their legal counsel instead of with the mayor or clerk of the village?"

The furnishing of law books for use in a mayor's office in a village is a matter which rests in the discretion of council. The only statute which refers to the matter of furnishing an office for the mayor of a municipality is section 4550, G. C., which provides as follows:

> "He shall keep a docket, and shall be entitled to receive the same fees allowed justices of the peace for similar services. He shall keep an office at a convenient place in the corporation, to be provided by the council, and shall be furnished by the council with the corporate seal of the corporation, in the center of which shall be the words, 'Mayor of the city of_____,' 'Mayor of the village of_____,' as the case may be.

This section confers upon council the authority to provide an office for the mayor of its municipality. The right to provide an office includes the power to furnish and equip said office with everything reasonably necessary for the use of the mayor while occupying it as an official of the municipality. This includes the furnishing of law books and the books in question, but it is not a duty specifically imposed upon council and for that reason may not be enforced by mandamus. This being so, if council declines to furnish the books named, the mayor is without any recourse, nor has he any control of any books which council may procure for its legal counsel and by its orders placed in the office of such counsel.

Your first inquiry, therefore, is answered in the negative and your second in the affirmative.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1311.

COUNTY AUDITOR—PETITION AND BOND FILED WITH COUNTY AUDITOR UNDER SECTION 6447, G. C.—AUDITOR MUST GIVE NOTICES REQUIRED BY SECTIONS 6448 TO 6451, G. C.

When a petition and bond are filed with the county auditor in all respects in accordance with the provisions of section 6447, G. C., it becomes the duty of the county auditor to give the notices as required by sections 6448, 6449, 6450 and 6451, G. C., and of the county commissioners to determine the necessity of the proposed improvement in the manner prescribed by section 6451, G. C.

COLUMBUS, OHIO, March 3, 1916.

HON. PERRY SMITH, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—Yours under date of February 5, 1916, is as follows:

> "There seems to be some controversy in reference to a private ditch that was built in Falls township this county by private individuals. The trustees nor the county commissioners did not in any way have anything to do with the so-called private drain or ditch. I have advised the commissioners that under the circumstances they have no right to interfere in any way in the adjustment of the conditions between the private owners and this ditch and Mr. Haines representing the petitioners who filed a petition with the auditor of our county asking the commissioners to adjust the conditions between the property owners and figuring the assessments that each should pay and I can see no reason why under the section of the statutes referred to by Mr. Haines where the commissioners have any right legally or otherwise, statutory or otherwise, to comply with the request of these petitioning creditors. I am sending you the letter that was handed to me by Mr. Haines, attorney, and also a map of his drawing."

It appears from the accompanying plat and correspondence that in the township named and near the city of Zanesville there was constructed along a natural water course, other than a living stream, some 18 years ago, a tiled drain about 1,000 feet in length, for the purpose of draining the surrounding lots and land and carrying away the water which would follow the natural water course and in time of storm overflow the surrounding lots and land. Some three hundred feet of this tiled drain or water course has so collapsed as to render it ineffective in carrying away the water and causing the same to overflow and percolate the surrounding land and lots to the damage and inconvenience of the owners thereof. It is stated that it is desired by surrounding lot and land owners to have this drain, ditch or water course repaired or improved in such manner as to effectively and properly drain the lots and land adjacent thereto and so flooded by reason of the present condition of the water course in question. It is stated by you also that there has been filed with the county auditor a petition "asking the commissioners to adjust the conditions between the property owners." No copy of such petition is submitted and its sufficiency cannot, therefore, be considered, nor is any question asked which you request that I undertake to answer or express an opinion upon. I shall, however, call your attention to the provisions of section 6443, G. C., which are as follows:

> "The board of county commissioners, at a regular or called session,

when necessary to drain any lots, lands, public or corporate road or railroad, and it will be conducive to public health, convenience or welfare, in the manner provided in this chapter, may cause to be located and constructed, straightened, widened, altered, deepened, boxed, or tiled, a ditch, drain or water course, or box or tile part thereof, or cause the channel of a river, creek or run, or part thereof, within such county, to be improved by straightening, widening, deepening, or changing it, or by removing from adjacent lands timber, brush, trees, or other substance liable to obstruct it. The commissioners may change either terminus of a ditch before its final location, if the object of the improvement will be better accomplished thereby."

Section 6446, G. C., provides that application for such improvement shall be made to the commissioners of the county, signed by one or more owners of lots or lands which will be drained or benefited thereby, or to other public authorities therein named.

Section 6447, G. C., provides:

"A petition shall be filed with the county auditor setting forth the necessity and benefits of the improvement and describing the beginning, route and termini thereof. It shall also contain the names of the persons and corporations, public or private, who, in the opinion of the petitioner or petitioners are in any way affected or benefited thereby. There shall be filed therewith a bond, subject to the approval of said auditor, payable to the state of Ohio, with at least two sufficient sureties, in not less than two hundred dollars, conditioned for the payment of all costs if the prayer of the petition is not granted or is dismissed for any cause. If the name of a person or corporation, either public or private, in any way affected by the proposed improvement, is omitted from the petition, the county commissioners, upon discovering that such omission has been made, shall supply such name and cause notice to be served as herein provided."

Sections 6448, 6449, 6450 and 6451 prescribe the manner of giving notice of the filing of the petition, the time for a hearing, a view of the proposed improvement and requires that the commissioners determine the necessity thereof. If the commissioners find for the improvement, the machinery for the appropriation of land necessary, the fixing of damage therefor and making assessment of the cost of the improvement is provided in subsequent sections.

The only question I am able to gather from the correspondence submitted is whether the county commissioners have jurisdiction to proceed to effect such improvement upon the petition of a lot or land owner for same. If the petition and bond are in all respects in conformity with the provisions of section 6447, G. C., supra, it then becomes the duty of the county auditor to give notice thereof according to the provision of sections 6448, 6449 and 6450, G. C. Upon the day stated in said notice for the hearing on said petition, it is the duty of the county commissioners to go over and along the line of the proposed improvement and view the same and to determine whether or not it will be conducive to public health, convenience or welfare. If it is found by the commissioners that such proposed improvement will be so conducive to the public health, convenience or welfare, the commissioners are then authorized to proceed, pursuant to the provision of said section 6451, G. C., et seq., supra, to the establishment or construction of such improvement as may be found to be authorized by said section 6443, G. C., supra.

The question of jurisdiction in the first instance in these matters depends solely upon the petition and bond required by section 6447, G. C., supra, independent of any other fact pertinent to the necessity of such improvement. The facts pertinent to the necessity of the improvement are matters for consideration in connection with the view and the determination on the part of the commissioners of the question of whether the same will be conducive to the public health, convenience and welfare, and may not be taken into consideration in determining the sufficiency of the petition and bond to give jurisdiction to the commissioners to proceed to give notice, hear, view and determine the necessity of the improvement.

In the case of Chesbrough v. Commissioners, 37 O. S., 508, it was held:

> "4. It is the public health, convenience or welfare of the community to be affected by the proposed ditch, and not that of the public at large, that is to be regarded in the construction of a ditch. Hence, if it appears that the proposed ditch will be 'conducive to the public health, convenience and welfare of the neighborhood' through which it will pass, the commissioners are authorized to construct the same."

So that it is not essential that the commissioners find that the proposed improvement will be conducive to the general public health, convenience and welfare, but it is sufficient if it be found that the proposed improvement will be conducive to the *public* health, convenience and welfare of the surrounding community or the neighborhood, as it was put in this case. This may not be taken, however, to authorize the commissioners to order such improvement established or constructed merely for the personal benefit of the lot and land owners interested therein, but it must be found necessary to the *public* health, convenience and welfare. That is to say, the benefits to be derived therefrom must go beyond the mere improvement of the land and property affected thereby.

Attention is called to the first branch of the syllabus of the case of Commissioners v. Gates, 83 O. S., 19, in reference to the proceedings under section 4447, R. S., which were incorporated in the General Code as section 6443, et seq., and which is as follows:

> "2. The county commissioners, sitting as a board, in hearing an application on the part of land owners for the establishment of a ditch, as provided by section 4447, and following, of the Revised Statutes, represent the land owners, petitioners, and not the county, where it is found that the improvement is of local interest only, and that the cost and expense should be assessed wholly against the lands benefited. Where the finding is that the improvement is of sufficient importance to the public to justify the payment of damages and compensation, in whole or in part, out of the county treasury, the board may so order, and in such condition the board represents the county, and not exclusively the petitioners."

From this it conclusively appears that the action of the county commissioners is fully authorized, although the interest in the improvement proposed is local in its nature and the benefits to be derived therefrom confined to a particular community or locality, and that in case the benefits of such proposed improvement are restricted to such narrow limits, the commissioners act in their official capacity as representatives of the parties to such proposed improvement.

As stated above, if the petition and bond are regular, it is not for the commissioners to anticipate what the pertinent facts to the necessity of the improvement

may demand and refuse to recognize the petition. The jurisdictional matter in the first instance must be sought in the bond and petition alone.

In view of the indefinite character of your inquiry, I am unable to advise you further than to say that in my opinion if the petition and bond are regular and sufficient in law, it is the duty of the county auditor to proceed to give the notice required by statute and of the commissioners to proceed to give a hearing thereon on the date fixed in said notice, to view the line of the proposed improvement and then to determine its necessity. Whether further proceedings shall be had thereon must be determined by the finding of the commissioners on the question whether said improvement will be conducive to the public health, convenience and welfare.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1312.

MUNICIPAL CORPORATION—CITY ENGINEER IS WITHIN CLASSIFIED CIVIL SERVICE—PERSON IN CLASSIFIED CIVIL SERVICE PROHIBITED FROM BEING AN ACTIVE CANDIDATE FOR AN ELECTIVE POLITICAL OFFICE.

1. *A city engineer holding the regular and permanent appointment as such in the department of public service in a city is within the classified civil service of said city.*

2. *The provisions of section* 486-23, *G. C., as amended* 106 *O. L.,* 416, *prohibit a person who is holding a position in the classified civil service from being an active candidate for an elective political office.*

COLUMBUS, OHIO, March 3, 1916.

HON. E. E. LINDSAY, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—I have your letter of February 25, 1916, submitting the following inquiries:

> "1. Does the appointment of an engineer or surveyor in cities and villages come within the classified service of the civil service laws of the state?
> "2. May a person holding a position under the classified service of the civil service laws of the state be an active candidate for an elective office while holding such position?"

By the express provisions of paragraph 1 of section 486-1, G. C., as amended 106 O. L., 400, the civil service law of this state applies only to "all offices and positions of trust or employment in the service of the state and the counties, cities and city school districts thereof." It does not, therefore apply to villages and your first inquiry in respect to the appointment of an engineer or surveyor in a village must be answered in the negative.

A city engineer is the head of a subdepartment of the department of public service in a city. Section 4327, G. C. He is, therefore, in the classified civil service as only the heads of departments are exempted under the provisions of paragraph 3 of section 486-8, G. C., which provides:

> "And the members of all boards and commissions and all heads of departments appointed by the mayor, or if there be no mayor such other similar chief appointing authority of any city or city school district."

Referring now to your second inquiry: It is provided among other things in section 486-23, G. C.

> "Nor shall any officer or employe in the classified service of the state, the several counties, cities and city school districts thereof be an officer in any political organization or take part in politics other than to vote as he pleases and to express freely his political opinions."

The prohibitions in this statute are intended to prevent persons in the classified service from engaging in any conduct which is incompatible with an independent and wholly disinterested service to the state. The legislature has the absolute right to determine upon what conditions any citizen shall hold a public office or employment. As one of the conditions for holding an office or employment in the classified service it is prescribed, as above noted, that the incumbent thereof shall not take part in politics. These conditions, therefore, prohibit an officer or employe in the classified service from engaging in any act or conduct which may be said to be taking a part in politics. It does not require an argument to sustain the contention that an active candidate for an elective office is taking a part in politics because the things for which a candidate stands under such circumstances and upon which he seeks support are of the very essence of politics and this is so whether such candidate represents a party in his campaign for such office or stands upon a platform of his own.

I am of the opinion, therefore, that an active candidate for an elective office is taking a part in politics within the prohibition of the statute quoted and that if he is at the same time holding an office or employment in the classified civil service he should resign therefrom or he would be subject to prosecution as provided by section 486-28, G. C., as amended 106 O. L., 417.

It must be noted in conclusion that the observations herein made regarding the appointment of a city engineer apply only to the regular and permanent appointment of a city engineer and not to the appointment or employment of a consulting engineer.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1313.

STATE HIGHWAY COMMISSIONER—MAIN MARKET ROAD AND INTERCOUNTY HIGHWAY FUNDS—HOW DISBURSED—FORMER CANNOT BE PAID TO COUNTY AND DISBURSED BY IT—SECTION 1203, G. C., GOVERNS INTERCOUNTY HIGHWAY FUNDS.

The state highway commissioner is not authorized to pay main market road funds to a county for disbursements. Payments of intercounty highway funds to a county can only be made in accordance with the provisions of section 1203, *G. C.*

COLUMBUS, OHIO, March 3, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of February 24, 1916, which communication reads as follows:

"I am attaching hereto copy of letter from the board of county commissioners of Ashtabula county, requesting that this department pay to that county $35,000 from the intercounty and main market road appropriations in order that a greater assessment may be made against the abutting property owners.

"I respectfully request an opinion from your office as to the proper answer to be given by me to the commissioners' inquiry."

The copy of the letter from the board of county commissioners of Ashtabula county, attached to your communication, and which was dated February 1, 1916, reads as follows:

"Owing to the shortage of funds for the construction of main market road No. 1 in Ashtabula county, we, the commissioners and engineer of said county, desire to place before you the following proposition, and beg you to give the matter careful consideration:

"The section of main market road extending from Ashtabula to Geneva is six and one-half miles in length and is estimated to cost, in round figures, $150,000.00. Under the state aid law the property's share would be 10 per cent. or $15,000.00, the township's share would be 15 per cent. or $22,500.00, plus the state's share, $35,000.00, making a total of $72,500.00, which would leave a balance of $77,500.00 to be paid by Ashtabula county. What we request is as follows:

"Allow the county commissioners to proceed under the county aid law and we could build from Ashtabula to the county line, a distance of eight and one-half miles. This eight and one-half miles is estimated to cost approximately $200,000.00.

"Under the county aid law, the property's share is 20 per cent. or $40,000.00, the township's share 30 per cent. or $60,000.00, together with the state's share of $35,000.00, making a total of $135,000.00, leaving a balance of $65,000.00, to be paid by Ashtabula county, which would show a saving of $12,500.00 to the said county, and two miles more of road could be constructed without more funds from the state highway department.

"In asking for this $35,000.00 to be paid to the county, we do not ask the state highway department to waive any supervision or inspection that would otherwise fall on them should we build under the state aid law. In fact, we desire the state supervision and would be glad to have your department exercise the same authority over this road whether it is constructed under the state aid or county aid law.

"Under the county aid law, we propose to assess the property within one mile on each side of this improvement which is the same method carried out in the construction of our county roads, and we believe the method to be as fair to the property owners along the main market road as it is to property less valuable further back in the county.

"One other argument in favor of the county aid law is that the assessment bonds can run ten years instead of five years under the state aid method.

"We do not feel that further comment is necessary upon this request as the same clearly speaks for itself, and we are ready and willing to cooperate with the department in the construction of roads in our county, and we also want the funds applied to road improvement to go as far as possible and in making this request, we feel the county will save at least $12,000.00 and at the same time we will construct the entire mileage of main

market road between Ashtabula and the county line and not leave the two miles west of Geneva for future improvement."

It appears from the above quoted communication that your inquiry relates both to intercounty and to main market road funds. The payment to counties of state funds appropriated for highway construction is governed by section 196 of the Cass highway law, section 1203, G. C., and so much of the section as is pertinent reads as follows:

> "* * * whenever forty per cent. of the mileage of all the roads of any county are improved by the use of gravel, broken stone, slag, brick, cement and bituminous products or the aggregate of any of these, to a standard established by the county commissioners and approved by the county highway superintendent, and the county commissioners appropriate an equal sum for the purpose of constructing, improving, maintaining or repairing all or any part of the intercounty highways within such county, then, on request of the county commissioners, which request shall be accompanied by a certificate signed by the county highway superintendent and reciting that at least forty per cent. of the mileage of all the roads of the county have been improved, as provided herein; and a certified copy of a resolution duly adopted by the county commissioners, which resolution shall contain an agreement upon the part of the county commissioners to expend the sum realized therefrom, and the sum appropriated by the county commissioners in accordance with plans and specifications approved by the state highway engineer, as herein provided; and a certificate signed by the county auditor and reciting that the sum appropriated by the county commissioners is in the county treasury and has not been otherwise appropriated, or has been levied, placed upon the duplicate and is in process of collection, the state highway commissioner shall order the apportionment of any appropriation by the state or of any funds available for the construction, improvement, maintenance or repair of intercounty highways, due or to become due and available for such county as state aid, paid into the treasury of said county. The state highway commissioner shall issue his voucher therefor upon the auditor of state against any such fund and the auditor shall issue his warrant therefor upon the state treasurer and deliver the same to the treasurer of such county. The sum realized therefrom shall be deposited to the credit of the road fund of said county, together with the sum appropriated by such county and both sums shall be used by the commissioners in the construction, improvement, maintenance or repair of such intercounty highways within the county, in accordance with plans and specifications approved by the state highway engineer as herein provided."

You will note that the operation of the above section is by its terms limited to the apportionment of any appropriation by the state or of any funds available for the construction, improvement, maintenance or repair of intercounty highways due or to become due and available for any given county as state aid. The only fund that is apportioned to the several counties of the state is the three-fourths part of the state highway improvement fund appropriated for the construction, improvement, maintenance or repair of intercounty highways. That part of section 1203, G. C., quoted above, does not by its own terms apply to main market road funds and in so far as your inquiry involves the proper handling of main market road funds, I advise you that you are without any authority whatever to pay such funds

to the authorities of any county. Main market road funds must remain in the state treasury and be disbursed by you in the manner provided in chapter 8 of the Cass highway law relating to the construction, improvement, maintenance and repair of roads and bridges by the state highway department. You, therefore, have no authority whatever to comply with the request of the county commissioners of Ashtabula county in so far as the same relates to main market road funds. In so far as any intercounty highway funds apportioned to Ashtabula county and against which no contingent liabilities have been created are involved, you are to be governed by the provisions of section 1203, G. C., quoted above.

On November 6, 1915, this department rendered to you opinion No. 998, which opinion prescribes a form of application by county commissioners for intercounty highway funds under section 1203, G. C. On February 21, 1916, a further opinion was rendered to you relating to the method of payment of intercounty highway funds where an application in due form had been filed with you. I, therefore, advise you that you are authorized to issue your voucher for the apportionment of any appropriation by the state or of any funds available for the construction, improvement, maintenance or repair of intercounty highways due or to become due and available for Ashtabula county as state aid, but such voucher may be issued only after the county commissioners have complied with the provisions of section 1203, G. C., and have made an application substantially in the form suggested in opinion No. 998 referred to above. Your voucher for such funds may be issued, as pointed out in opinion No. 1286, referred to above, only after such funds have come into the state treasury and in every instance a sufficient portion of the apportionment to the county in question must be reserved to pay the state's porion of the salary of the county highway superintendent of the county in question until such time as the next semi-annual installment of taxes will come into the state treasury.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1314.

TREASURER OF STATE—NOT AUTHORIZED TO ACCEPT *WARRANTS* AS PART OF DEPOSIT REQUIRED OF TRUST COMPANIES.

The treasurer of state is not authorized to accept warrants issued by a county in another state as a part of the deposit required of trust companies under section 9778, G. C.

COLUMBUS, OHIO, March 3, 1916.

HON. R. W. ARCHER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of February 25, 1916, in which you request my opinion as follows:

> "We herewith beg to enclose a communication from the Security Savings Bank and Trust Company, of Cleveland, Ohio.
>
> "This company has $100,000.00 of bonds on deposit in this department. They desire me to withdraw $34,000.00 of Portland, Oregon, improvement bonds, and substitute an equal amount of Atascosa county, Texas, six per cent. road and bridge coupon warrants.
>
> "Would the treasurer of state be permitted to accept these warrants in lieu of the above $34,000.00 in bonds? A prompt reply will be appre-

ciated. We are also enclosing a transcript of these warrants and have one of the original warrants in this department, which we would be glad to have you look over.

"Your early decision will be appreciated."

Section 9778 of the General Code, relative to the deposit required of trust companies before accepting trusts in Ohio, is as follows:

"No such corporation either foreign or domestic shall accept trusts which may be vested in, transferred or committed to it by an individual, or court, until its paid in capital is at least one hundred thousand dollars, and until such corporation has deposited with the treasurer of state in cash fifty thousand dollars if its capital is two hundred thousand dollars or less, and one hundred thousand dollars if its capital is more than two hundred thousand dollars, except that, the full amount of such deposit by such corporation may be *in bonds of the United States, or of this state, or any municipality or county therein, or in any other state,* or in the first mortgage bonds of any railroad corporation that for five years last past paid dividends of at least three per cent. on its common stock."

The question raised by your enquiry is whether the Atascosa county, Texas, road and bridge coupon warrants are bonds of a county of another state.

The distinction between warrant and bonds is very clearly defined in the case of Shelly v. St. Charles County Court, 21 Fed. 699, as follows:

"Warrants are general orders, payable when funds are found, and there is propriety in the rule providing that they shall be paid in the order of presentation; the time of presentation to be endorsed by the treasurer on the warrants; they are thus distinguished from bonds which are obligations payable at a definite time running through a series of years, and payable when the time of their maturity arrives, independent of any presentation."

Although the coupon warrants of Atascosa county, Texas, a copy of one of which is attached hereto, have been given many of the distinguishing characteristics of a bond and, in my opinion, constitute valid obligations of the county, yet I do not believe that they are bonds within the meaning of section 9778, of the General Code, above quoted.

In the statement of the Security Savings Bank and Trust Company, of Cleveland, relative to said warrants, which is attached to your letter, I find the following language:

"We are also advised that the attorney-general of Texas, under date of February 13, 1910, rendered an opinion upholding the validity of these warrants. Under the statutes, the attorney-general is not obliged to approve warrant issues as he is in the case of bonds, but there is no question concerning the legal authority for the issuance of these warrants."

Apparently from this statement there is a distinction between bonds and warrants which is recognized by Texas law. Whatever this distinction is, and whether or not it materially affects the character of the two classes of obligations, it is at least sufficient to cause the enactment of the following legislation by the

Texas legislature, article 619, Vol. 1, of Vernon's Sayles' Texas Civil Statutes, 1914, at page 319:

> "Conditions precedent to the issuances of bonds; examination by attorney-general, etc. Any county, city, or town in the state of Texas, desiring to issue bonds as authorized by the constitution and laws of this state, shall, before such bonds are offered for sale, forward to the attorney-general the bonds to be issued, a certified copy of the order, or ordinance, levying the tax to pay interest and provide a sinking fund, with a statement of the total bonded indebtedness of such county, city, or town, including the series of bonds proposed, and the assessed value of property for purposes of taxation, as shown by the last official assessment, of such county, city or town, together with such other information as the attorney-general may require; whereupon it shall be the duty of the attorney-general to carefully examine said bonds in connection with the facts and the constitution and laws on the subject of the execution of such bonds, and if, as the result of such examination, the attorney-general shall find that such bonds were issued in conformity with the constitution and laws, and that they are valid and binding obligations upon such county, city, or town, by which they are executed, he shall so officially certify."

I believe that the provisions of section 9778 of the General Code, authorizing you to accept bonds of municipalities or counties of another state in lieu of cash, should be strictly construed, and I advise you therefore that you should not accept the road and bridge county warrants of Atascosa county, Texas, which the Security Savings and Trust Company, of Cleveland, Ohio, desires to substitute for $34,000.00 of Portland, Oregon, improvement bonds, which it now has on deposit with you.

In so advising you I do not wish to be understood as in any way reflecting upon the security or the validity of the warrants above referred to, as I believe they are valid obligations of Atascosa county, Texas. My opinion is given only upon the language of section 9778 of the General Code.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1315.

COUNTY COMMISSIONERS—RABIES—PERSON PRESENTING BILL TO COMMISSIONERS MUST BE BITTEN OR INJURED BY AN ANIMAL AFFLICTED WITH RABIES.

County commissioners may not allow a bill for Pasteur treatment rendered a person not bitten by an animal afflicted with rabies, but exposed thereto, unless such person was injured by such animal.

County commissioners may not allow such a bill rendered by person not bitten or injured by an animal afflicted with rabies, but who only attended a person suffering with rabies.

COLUMBUS, OHIO, March 3, 1916.

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

GENTLEMEN:—I am in receipt of your letter of February 23d, wherein you submit for my opinion the following inquiry:

"May the county commissioners legally allow a bill for Pasteur treatment rendered to a person not bitten by an animal, but exposed to same in handling an animal afflicted with rabies, or in attending a person suffering with rabies; or does section 5851, General Code, limit such payments for treatment to persons actually bitten?"

Section 5851 of the General Code provides as follows:

"A person bitten or injured by a dog, cat or other animal afflicted with rabies, if such injury has caused him to employ medical or surgical treatment or required the expenditure of money, within four months after such injury, and at a regular meeting of the county commissioners of the county where such injury was received, may present an itemized account of the expenses incurred and amount paid by him for medical and surgical attendance, verified by his own affidavit or that of his attending physician; or the administrator or executor of a deceased person may present such claim and make such affidavit. If the person so bitten or injured is a minor such affidavit may be made by his parent or guardian."

It is to be noted that it is not only a person who has been bitten by an animal afflicted with the rabies to whom the commissioners may allow an itemized account of expenses paid for medical and surgical attendance, but also a person who has been injured by any such animal. The statute is permissive in form and not mandatory.

If a person has been exposed to an animal afflicted with the rabies in handling said animal and has been injured thereby, and the commissioners deem it proper that his expenses shall be paid, they are authorized to allow the same.

If a person has not been injured in handling an animal afflicted with the rabies, he would not, under section 5851, G. C., be entitled to reimbursement for expenses.

There is nothing in the statute that authorizes the county commissioners to allow a bill for expenses incurred by a person in attending a person suffering with the rabies. The statute is specific in that the person to whom the commissioners are authorized to allow expenses must either have been bitten or injured by an animal afflicted with the rabies.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1316.

TOWNSHIP TRUSTEES—COMPENSATION OF TOWNSHIP HIGHWAY SUPERINTENDENT MUST BE FIXED ON A PER DIEM OR PER HOUR BASIS—NO AUTHORITY TO FIX AT A STATED SUM PER MONTH.

Township trustees are not authorized to fix the compensation of township highway superintendents at a stated sum per month or per year, but such compensation must be fixed on a per diem or per hour basis.

COLUMBUS, OHIO, March 4, 1916.

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

GENTLEMEN:—I have your communication of February 24, 1916, in which you submit the following question:

"May the township trustees, under section 78 of the Cass highway law, fix the compensation of the township highway superintendents on a salary basis; for instance, at $800.00 per year, payable monthly, or does the phraseology of said section imply and require that the compensation of said superintendents be fixed on a per diem, or per hour, basis?"

Section 78 of the Cass highway law, section 3373, G. C., reads as follows:

"The township trustees shall fix the compensation of the township highway superintendent for time actually employed in the discharge of his duties, which compensation shall be paid from the township road fund. The compensation and all proper and necessary expenses, when approved by the township trustees, shall be paid by the township treasurer upon warrant of the township clerk."

Neither the section above quoted nor any other section of the Cass highway law contains any express provision that the compensation of the township highway superintendent shall be fixed on a per diem or per hour basis. It is provided, however, that the compensation shall be fixed for the time actually employed by the township highway superintendent in the discharge of his duties. This language warrants the inference that it was not in the mind of the legislature that the official duties of a township highway superintendent would require all the time of that official, and an examination of the statutes relating to the duties of the township highway superintendent warrants the conclusion that a situation which would, in any given township, require the highway superintendent to devote all his time to his duties, would be very unusual. I think the language of section 3373, G. C., and the nature of the duties of the township highway superintendent are such as to fully warrant the conclusion that it was the intention of the legislature that the compensation of the township highway superintendent should be fixed on some basis which would give him full compensation for the time actually employed in the discharge of his duties, and no compensation when not actually employed about the duties of his office.

I therefore advise you, in answer to your specific question, that township trustees are not authorized to fix the compensation of township highway superintendents at a stated sum per month or per year, but that such compensation must be fixed on a per diem or per hour basis in order to insure the carrying out of the legislative intent, to the effect that the township highway superintendent should receive compensation from the public treasury for the time actually employed in the discharge of his duties, and should not receive any compensation from the public treasury when not engaged in the performance of the duties of his position.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1317.

COUNTY COMMISSIONERS—FORMS OF APPLICATION FOR STATE AID ON HIGHWAYS WITHIN VILLAGES.

Prescribed forms of applications by county commissioners for state aid on highways within villages, which highways are continuations of inter-county highways or main market roads.

COLUMBUS, OHIO, March 4, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of December 10, 1915, which communication reads as follows:

"The county highway superintendent of Cuyahoga county, Mr. W. A. Stinchcomb, has written us the following letter:

"'Our board of county commissioners has referred to me the forms of resolutions, together with your letter of November 23rd, submitting those resolutions asking for state aid to the commissioners. In reading your letter the fourth paragraph stipulates that

"'"These resolutions should be signed without any alterations in the description or in the inter-county mileage."

"'On going over the resolutions as prepared we find that I. C. H. No. 2, No. 31 and No. 3 are entirely omitted, and we also find that the mileage on several is not correct. We find the description referring to I. C. H. No. 34 describes it as intersecting with I. C. H. No. 32 instead of No. 2. Of course I believe that it is the intention of your department to have these resolutions first cover all the inter-county highways of the county, and second that the descriptions and mileage therein be correct. If I am right in this, before submitting these resolutions to the board with my approval, I desire to have your concurrence and approval in making such modifications or alterations as might be necessary to make these resolutions correct, and also to include the three which are omitted. To that end it might be advisable to either have the omitted three roads included in resolutions prepared in your office, or, if you will submit the blank forms I will have the same done here, ask our board to approve them, and submit them to you when finally approved by the commissioners.'

"In connection with the above letter, it is to be noted that inter-county highways Nos. 2, 3 and 31 extend up to the Cuyahoga county line, and from there on in Cuyahoga county their courses lie within the corporate limits of various municipalities. This is the reason that inter-county highways Nos. 2, 3 and 31 were 'entirely omitted' from the resolutions sent to the board of county commissioners of Cuyahoga, and also the reason for Mr. Stinchcomb's statement that the mileage on the several more is not correct.

"I am submitting herewith, copies of the forms of resolutions forwarded to the board of county commissioners of Cuyahoga county, also two letters to the above named board—one for the withdrawal of applications made under the old law which had not been acted upon by this department, and the other suggesting the filling out of the blanks mentioned.

"As I am not clear as to the duties of this department with respect to co-operation with municipalities in the improvement of extensions of inter-

county highways and main market roads, I respectfully request an opinion from your office as to the procedure which would authorize this department to so co-operate with such municipalities."

Authority for the co-operation of the state highway department with county commissioners or township trustees in the improvement of highways within villages is found in section 186 of the Cass highway law, section 1193, G. C., the first sentence of which reads as follows:

> "Each application for state aid in the construction, improvement, maintenance or repair of inter-county or main market roads, shall be accompanied by a properly certified resolution of the county commissioners or township trustees stating that the public interest demands the improvement of the inter-county or main market roads therein described, which may include any portion of a highway in the limits of any village, when the same is a continuation of the proposed improvement, and the consent of the village has been first obtained."

I note that the forms of resolutions forwarded to the board of commissioners of Cuyahoga county are drawn in accordance with the suggestions made in opinion No. 998 of this department, rendered to you on the 6th day of November, 1915. Where a part of an inter-county highway lies within a county and the county commissioners desire to apply for state aid not only on said part of inter-county highway but also on a portion of a highway in the limits of a village in said county, which portion of highway is a continuation of the inter-county highway which it is proposed to improve, such fact should be taken into account in the preparation of the resolution of the county commissioners applying for state aid. I suggest that under such circumstances there be inserted in the resolution of the county commissioners applying for state aid, drawn in accordance with the form prescribed in opinion No. 998, referred to above, and between the first and second paragraphs thereof and following the language "in _____ township___, in all a distance of _____ miles, and be it further" the following language:

> "RESOLVED, That the public interest also demands the improvement, under the provisions of sections 1178 to 1231-4, inclusive, of the General Code of Ohio, of the following described highway in the village of_____ _____in said county, to wit:_____ _____ _____ _____ in all a distance of _____ miles, said highway being a continuation of that part of inter-county highway No. _____ above described, and said village having consented to the making of this application and to the improvement of said highway within its limits, under the provisions of the General Code of Ohio, above referred to, by an ordinance duly passed by the council of said village on the _____ day of _____, 191__, and be it further"

In case the application is made for state aid in the construction, improvement, maintenance or repair of a main market road, rather than an inter-county highway, the proper changes to be made in the above suggested language will readily suggest themselves to you, and this is also true in case the application should be made by the township trustees rather than the county commissioners.

As indicated in my letter to you under date of December 24th, replying to

your letter of December 10th, quoted above, the matter upon which you request my opinion is one of special interest to Cuyahoga county, and I therefore deemed it proper to communicate with the prosecuting attorney of that county and give him an opportunity to express his views before preparing an opinion. I have only recently had the benefit of an informal conference with a representative of the prosecuting attorney of Cuyahoga county, and the preparation of this opinion has been delayed for that reason. The unusual situation existing in Cuyahoga county, and which makes the proper application of the law a matter of some doubt in that county, grows out of the fact that all of the territory in Cuyahoga county bordering on the lake has been incorporated and is now included within the limits of the several cities and villages lying along the lake. Inter-county highways Nos. 2, 3 and 31 are situated near Lake Erie and, in a general way, run parallel to the lake shore, and no part of either of these three inter-county highways is situated within Cuyahoga county. The inter-county highways in question extend up to the county line, and at that point their course intersects the corporate limits of villages lying within Cuyahoga county. While no part of any of these three inter-county highways is situated within Cuyahoga county, yet as to each inter-county highway there is within Cuyahoga county a highway lying within the limits of a village or villages, which highway is an extension of the inter-county highway. The embarrassment arises from the language of section 1193, G. C., to the effect that each application for state aid shall be accompanied by a resolution stating that the public interest demands the improvement of the inter-county or main market road therein described, and that there may be included any portion of a highway in the limits of any village when the same is a continuation of the proposed improvement and the consent of the village has been first obtained. If this language is to be given its literal interpretation, it would be impossible for county commissioners or township trustees to apply for state aid on a highway within the limits of a village, which highway is a continuation of an inter-county highway or main market road, unless in the same application the commissioners or trustees also ask for state aid on the inter-county highway or main market road of which the highway within the village is an extension. Such an interpretation would, however, if carried to its logical conclusion, produce ridiculous results. As an illustration, county commissioners who had already applied for and secured state aid on all that part of an inter-county highway lying within their county, would be precluded from thereafter applying for and securing state aid on a highway within a village, which highway was a continuation of the inter-county highway already improved, for the reason that there would be no unimproved portion of the inter-county highway which might be included in the application.

I think it may safely be assumed that the legislature, in using the language in question, intended to provide only that the highway within a village, upon which state aid is sought, must be a continuation of an inter-county highway or main market road, and that the consent of the village must be first obtained.

As an illustration, it was clearly not the intention of the legislature to preclude the county commissioners of Cuyahoga county from applying for state aid in the construction, improvement, maintenance or repair of any highway, beginning at the east line of Cuyahoga county and extending through the village of Euclid of the said county, and which highway within said village is a continuation of an inter-county highway or main market road, merely because such inter-county highway or main market road ends at the east line of Cuyahoga county, and no part thereof lies within said county. Under the circumstances such as I have referred to above,—that is to say, where an inter-county highway or main market road runs to a county line and there stops for the reason that the territory across the county line is incorporated as a village—I advise that the county commissioners

of the county in which the village is located are authorized, under the provisions of section 1193, G. C., to apply for state aid on a highway within the village in question, provided said highway is a continuation of the inter-county highway or main market road in question, and the consent of the village has been first obtained, and I suggest the following as a proper form for the body of the resolution of the county commissioners applying for state aid under such circumstances:

> BE IT RESOLVED by the board of commissioners of _____ county, Ohio, that the public interest demands the improvement under the provisions of sections 1178 to 1231-4, inclusive, of the General Code of Ohio, of the following described highway in the village of _____ in said county, to wit:_____
> _____
> _____
> _____
> said highway being a continuation of (inter-county highway, main market road) No. _____, in _____ county, and said village having consented to the making of this application and to the improvement of said highway within its limits, under the provisions of the General Code of Ohio, above referred to, by an ordinance duly passed by the council of said village, on the _____ day of _____, 191__, and be it further
>
> RESOLVED, That we, the commissioners of said county, do hereby make application to the state highway commissioner for aid from any appropriation by the state from any funds available for the (construction, improvement, maintenance, repair) of (inter-county highways, main market roads) for the improvement of said highway above described and lying within said village, and we do hereby agree, for and on behalf of said county, to pay in the first instance from the funds of said county one-half of the cost and expense of surveys and other expenses preliminary to the (construction, improvement, maintenance, repair) of said highway.

I have so far referred to the proper form of application where county commissioners co-operate with the state highway department in the construction, improvement, maintenance or repair of a highway within the limits of a village, when such highway is a continuation of an inter-county highway or main market road. The necessary modifications in the suggested forms, where township trustees make the application, will, I think, suggest themselves to you.

In all cases where county commissioners or township trustees apply for state aid on a highway within a village, the application should be accompanied by a properly certified copy of the village ordinance consenting to the application and improvement.

The statute is silent as to the subsequent procedure, and I therefore conclude that all steps subsequent to the application are to be taken in the same manner as though the projected improvement were situated outside a village.

The state highway commissioner is also authorized to co-operate directly with the authorities of a village, and to agree with such authorities as to the division of cost, but I understand that you are not at the present interested in the procedure under such circumstances. Authority for direct operation is conferred by section 1231-3, G. C., being section 229 of the Cass highway law, and should you deem it expedient at any time to exercise the authority conferred by this section, I will be glad to advise you as to the proper course of procedure.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1318.

BOARD OF EDUCATION—FORM OF HYPOTHECATION OF BONDS AS COLLATERAL SECURITY FOR DEPOSIT OF FUNDS OF A SCHOOL DISTRICT IN BANK DULY DESIGNATED AS DEPOSITORY FOR SUCH FUNDS.

Prescribed form of hypothecation of bonds as collateral security for the deposit of funds of a school district in a bank duly designated as a depository for such funds under provisions of sections 7604 to 7609, inclusive, G. C.

COLUMBUS, OHIO, March 4, 1916.

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

GENTLEMEN:—I have your letter under date of February 3, 1916, which is as follows:

"We enclose herewith form of hypothecation of securities offered by a depositary bank as surety for the deposit of school funds in said bank, and we would ask that you pass upon the legality of same. As this question is of such vital importance, we believe it to be advisable for your department to give definite instructions that outline the form of resolution and procedure which should be taken by a board of education in the hypothecation of securities. Many school officials believe that the mere handing over by a depositary bank (national, state or private), of state, county, municipal, township or school bonds of the state of Ohio, to the clerk of the board of education, without any endorsement or written assignment of such securities, is a legal hypothecation of same, and we respectfully ask your instruction in said matter."

The form of hypothecation enclosed in your letter is as follows:

"RECEIPT AND AGREEMENT FOR DEPOSITORY BONDS.

"Norwood, Ohio, February 1, 1916.

"Whereas the Norwood Board of Education has designated the First National Bank of Norwood to act as depository of all its funds, not exceeding $200,000.00, for a period of two years from Feb. 1, 1916, and

"Whereas the First National Bank of Norwood has agreed to receive and care for all deposits and pay all warrants on these funds drawn by the Board of Education, paying in addition interest at the rate of 3-30-100% per annum on daily balances, payable monthly.

"Therefore, and in consideration thereof, the First National Bank of Norwood hereby transfers to the Norwood Board of Education the bonds listed herein, to be held by said board on deposit under the terms of section 7605 of the General Code, as security for the custody, with the understanding that all coupons maturing while bonds are held in deposit may be removed and retained by the said First National Bank.

"If the First National Bank fails to perform any of its functions as bank of deposit as set forth herein, causing any financial loss to the said Board of Education, the said Board may sell sufficient bonds to reimburse it for said loss, and may appropriate and retain the proceeds of said sale to the amount mentioned.

"If, however, the bank performs all its functions as bank of deposit under its contract and under the law, and pays over to the Board of Education all its funds on demand, then this transfer becomes null and void, and the ownership and custody of these bonds will revert to the First National Bank aforesaid.

"_____

"_____

"_____

"Under the conditions hereof, the Board of Education of Norwood accepts receipt of the following bonds:—"

The provisions of the statutes governing the designation of depositories for school funds by boards of education are found in sections 7604 to 7609, both inclusive, of the General Code, sections 7604, 7605 and 7609 being amended in 106 O. L., 328.

Section 7605, G. C., as amended provides in part as follows:

"Such bank or banks (having been designated as depositories) shall give a good and sufficient bond, or shall deposit bonds of the United States, the state of Ohio, or county, municipal, township or school bonds issued by the authority of the state of Ohio, at the option of the board of education, in a sum not less than the amount deposited. The treasurer of the school district must see that a greater sum than that contained in the bond is not deposited in such bank or banks, and he and his bondsmen shall be liable for any loss occasioned by deposits in excess of such bond."

Care should be exercised by the board of education of a school district, in accepting bonds as collateral, to see that they come within the class prescribed by the above provision of section 7605, G. C. Proper evidence should be submitted to show that they are a valid issue, having been issued in conformity to law, and that there will be no question as to their salability. Said board of education should also require a certified copy of the resolution of the directors of a bank, designated as depository, authorizing the president and cashier of said bank to hypothecate such bonds, and should see that all legal steps have been complied with in order to make a legal and binding assignment of such bonds.

The form of hypothecation as submitted by you is not complete in some of the foregoing respects, and I therefore prescribe the following form which, in my opinion, meets the aforesaid requirements:

HYPOTHECATION OF BONDS.

WHEREAS, the Board of Education of_____School District, _____County, Ohio, did on the_____day of_____, 19__, designate the_____Bank of_____,Ohio, as depository for the money of said _____ School District in any sum not exceeding_____Dollars, in and by virtue of the provisions of sections 7604 to 7609, both inclusive, of the General Code of Ohio, and

WHEREAS, at a legal meeting of the board of directors of said bank, held on the _____day of _____, 19__, a resolution was duly adopted authorizing _____, as president, and_____,

as cashier of said bank, to enter into a good and sufficient undertaking payable to the Board of Education of said_____School District, or to hypothecate securities, owned by said bank, hereinafter described, as collateral security, or both, in such sum not less than the maximum amount above mentioned, as such Board of Education may direct, conditioned for the receipt, safe-keeping and payment over of all the money of said school district, deposited with said bank with the interest thereon at the rate specified in the proposal, and for the faithful performance of all duties imposed by law upon depositories of money of said school district, a certified copy of which resolution is hereto attached and made a part hereof, and

WHEREAS, at a legal meeting of said Board of Education of said _____ School District a resolution was duly adopted authorizing_____, the president, and _____, the clerk of said board, to accept said securities, owned by said bank and hereinafter described, as collateral security for a sum not to exceed _____Dollars, to be deposited with said bank according to the terms of the aforesaid proposal and designation, now, therefore,

WITNESSETH: That the undersigned as said officers of said bank hereby transfer and have this day duly pledged and delivered to the Board of Education of said _____ School District, as collateral security as aforesaid for the faithful performance of said contract so awarded and the faithful performance of the duties imposed by law upon depositories of school funds, the following described securities:

(Here describe the bonds under the following heads: Number, Bonds Issued by, Serial Numbers, Date of Issue, Date Due, Rate of Interest, Face Value, Estimated Market Value.)

All of the above described securities shall be the property of the Board of Education of said _____ School District, in case of any default upon the part of said bank in its capacity as depository. The above described securities may be negotiated or released only by a resolution of the Board of Education of said _____ School District, authorizing such negotiation or release, passed by a majority vote of the full membership thereof, at a regular meeting or at a special meeting called for that purpose.

IN WITNESS WHEREOF, the said_____Bank has hereunto subscribed its name and affixed its corporate seal, by and through its president and cashier, being thereunto duly authorized, this _____ day of_____ A. D., 19__.

_____ Bank,

(SEAL) By _____President,

Attest: _____Cashier.

The above bonds are hereby accepted as collateral security for the deposit in any sum not to exceed $_____.

THE BOARD OF EDUCATION OF

_____SCHOOL DISTRICT,

By _____President,

Attest: _____Clerk.

(In case the cashier of the depository bank is designated by some other title, such title should be substituted for the word "cashier" wherever the same appears in the above prescribed form.)

In prescribing the form of hypothecation as above set forth I do not desire to be understood as holding that this formality is, as a matter of law, necessary to the valid assignment of bonds as collateral security for the deposit of school funds. On the contrary, I think the delivery of bonds as collateral security for the deposit of such funds in a bank duly designated by the board of education of a school district as a depository of the funds of such district, by the officer or officers of said bank duly authorized to make such delivery, and the acceptance of said bonds as such collateral security by said board of education, would constitute a valid assignment of the same for said purpose.

I am of the opinion, however, that the exacting of said formal hypothecation by said board of education is in keeping with sound public policy and the best interests of said school district.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1319.

MUNICIPAL CORPORATION—CHARTER PROVISION FIXING DIFFERENT STANDARD OF MILK FROM STATE LAW—NEVERTHELESS STATE LAW MAY BE ENFORCED—CLEVELAND, OHIO.

Legislation by a municipality which had adopted a charter, fixing a standard of milk different from that fixed by state law, does not abrogate the provisions of the state law but same may be enforced without regard to said municipal legislation or any prosecution which may have been instituted thereunder.

COLUMBUS, OHIO, March 4, 1916.

The Board of Agriculture, Dairy and Food Division, Columbus, Ohio.

GENTLEMEN:—Your letter of February 1, 1916, requesting my opinion received and is as follows:

> "Will you kindly give me an opinion whether municipalities have the authority and power to make rules allowing the per cent. of solids in milk to be lower than that required by the state law, or the water or fluids containing a larger per cent. than provided by the laws?
>
> "My attention has been called to rules adopted by the city of Cleveland in which this is done and it seems to me it conflicts with the Ohio laws."

Section 3 of article XVIII of the constitution of Ohio provides as follows:

> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

Section 7 of article XVIII of the constitution of Ohio provides as follows:

> "Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government."

It will be noted that the powers of municipal corporations to adopt and enforce within their limits local police, sanitary and other similar regulations are limited to such provisions as are not in conflict with general laws. While there has been no specific judicial interpretation since the adoption of the above provisions of the constitution, as amended, as to what is included in the phrase "local police, sanitary and other similar regulations," some language is found in the case of Fitzgerald v. Cleveland, 88 O. S., at page 338, which, while it may be said to be obiter in that case, indicates the conception entertained by the court as to what is embraced therein. The court at page 359 of the opinion said:

> "Concerning the provision in section 3, article XVIII (may adopt such local police, sanitary and other similar regulations as are not in conflict with general laws), the general laws referred to are obviously such as relate to police, sanitary and other similar regulations, and which apply uniformly throughout the state. They involve the concern of the state for the peace, health and safety of all of its people, wholly separate and distinct from, and without reference to, any of its political subdivisions—such as regulate the morals of the people, the purity of their food, the protection of the streams, the safety of buildings and similar matters.
>
> "Manifestly, therefore, it was necessary, when the constitutional convention was conferring all powers of local self-government on cities, to provide that, in the adoption of such regulations by any city for itself (police, sanitary and similar ones), they should not conflict with general laws on the subject."

Section 12716 of the General Code fixes the standard of milk in the state and provides:

> "In all prosecutions under this chapter, if milk is shown upon analysis to contain more than eighty-eight per cent. of watery fluid, or to contain less than twelve per cent. of solids or three per cent. of fats, it shall be deemed to be adulterated."

This section of the law is a general provision, and in accordance with the statement of the court in Fitzgerald v. Cleveland, supra, may be safely said to be one of the general provisions of law which cannot be abrogated by municipal legislation in a charter city.

It is not necessary, for the purposes of this question, to discuss the constitutionality of a municipal ordinance enacted by a charter city which fixes a lower standard for milk than that contained in section 12716, G. C., supra, but it is sufficient to say that such an ordinance does not prevent the state from enforcing its laws with reference to the sale of adulterated milk in a charter city. That is to say, the state laws with reference to the sale of adulterated milk are in full force and effect throughout the state and even though a prosecution has been instituted and a person punished, for the sale of such milk, under a municipal ordinance, the state is not barred from instituting another prosecution for the same offense under the state law. This was settled by the case of Koch v. State, 53 O. S., 433, the syllabus of which is as follows:

> "A former conviction before a mayor for the violation of an ordinance is not a bar to the prosecution of an information charging the same act as a violation of a statute."

You are, therefore, advised that the passage of an ordinance in the city of Cleveland fixing a lower standard for milk than that fixed by section 12716, G. C., supra, does not operate to abrogate the provisions of state laws with reference to the sale of adulterated milk, and said state laws may be enforced without regard to said municipal ordinance or any prosecution which may have been instituted thereunder.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1320.

BOARD OF STATE CHARITIES—TUBERCULAR PATIENTS AT STATE SANATORIUM OR TUBERCULOSIS HOSPITAL, CITY OR COUNTY—WHEN COUNTY COMMISSIONERS ARE LIABLE FOR SUPPORT OF SUCH PATIENTS AT EITHER OF ABOVE INSTITUTIONS—AUTHORITY OF BOARD OF STATE CHARITIES WITH RESPECT TO STATE SANATORIUM.

When the commissioners of a county, which does not maintain a tuberculosis hospital, provide for the care and treatment of the resident tubercular patients of said county under a contract with the director of public safety of a city located in said county and maintaining a tuberculosis hospital, said contract being made under authority of section 3143, *G. C., as amended* 103 *O. L.*, 492, *and in compliance with the provision of section* 1815-15, *G. C.*, 106 *O. L.*, 559, *the board of state charities cannot charge to said county commissioners the support of indigent tubercular patients, residents of said county, who are being cared for and treated in the state sanatorium. Said county commissioners may, however, in the exercise of the discretion vested in them by provision of the latter part of said section* 1815-15, *G. C., enter into an agreement with said board of state charities to support or aid in the support of said patients at said state sanatorium.*

If, however, the commissioners of said county refuse to pay for the support, at the state sanatorium, of a tubercular patient, resident of said county and of said city within said county, the amount which the board of state charities, acting under authority and in compliance with the requirements of sections 1815-13 *and* 1815-14, *G. C.*, 106 *O. L.*, 559, *finds that said patient or the persons legally liable for his support, under provision of section* 1815-9, *G. C., are unable to pay, said board of state charities is without authority in law to continue to care for said patient at the state sanatorium and it is the duty of said board to return said patient, resident of said county and of said city within said county, to said county to be cared for in the local institution of said city or by the county commissioners under their contract with said city.*

COLUMBUS, OHIO, March 4, 1916.

Board of State Charities, Columbus, Ohio.

GENTLEMEN:—I am in receipt of a letter from your secretary, Mr. H. H. Shirer, requesting my opinion as follows:

"In our efforts to carry out some of the provisions of H. B. 154 (O. L. 106, page 558), we have encountered a certain condition which causes doubt in our minds as to the proper procedure.

"Section 1815-15 sets forth the idea that no county that is maintaining a county tuberculosis hospital or had joined in the maintenance of a dis-

trict hospital or has contracted with the authorities of a county, district or municipal hospital shall be compelled to support patients in the state sanatorium.

"The entire act does not seem to clearly provide a method of adjustment of conditions as they exist in Hamilton county. In that county the poor fund referred to in section 1815-14 arises from a portion of the Dow tax upon saloons located outside of Cincinnati. If this is not sufficient, a tax may be made against taxable property located outside of Cincinnati.

"The city of Cincinnati has erected and maintains a municipal institution for tubercular patients known as the Branch hospital.

"There are a number of patients in the state sanatorium who, prior to the date this act went into effect, were supported by private organizations. An investigation of the patients and legally liable relatives shows that they are in destitute circumstances. The private organizations feel that because of section 1815-15 they should not be expected to continue this support.

"On May 24, 1914, a contract was entered into by the commissioners of Hamilton county and the director of public safety of the city of Cincinnati whereby the county would pay the city of Cincinnati one dollar per day for care and treatment at the Branch hospital of tubercular persons who are residents of Hamilton county, but outside of the municipalities thereof. This contract was made for one year and has not been formally renewed, although payments have been made since the expiration of contract including the month of December, 1915. There are still a few patients at the Branch hospital for whom the county expects to pay.

"Under these circumstances, we submit the following:

"1. Can the board of state charities charge to the county commissioners of Hamilton county the support for patients now at the state sanatorium who are personally unable to pay or any legally liable relatives for them?

"2. Has the superintendent of the state sanatorium power to accept patients without personal payment of the five-dollars-per-day (week) fee who are residents of the municipality of Cincinnati, as is done in certain counties where no public institution exists for the treatment of tubercular patients or any provision made in the manner set forth in H. B. 154?

"In this connection I desire to state that a somewhat similar situation exists in Cuyahoga county.

"The commissioners of Hamilton county insist that they will not pay for patients at Mt. Vernon from their county."

By the act of the General Assembly, known as H. B. No. 154 (as found in 106 O. L., 558) section 2068, G. C., was amended and section 1815, G. C., was supplemented by adding thereto sections 1815-13, 1815-14 and 1815-15 of the General Code.

Section 2068, G. C., as amended relates to the admission of persons suffering from pulmonary tuberculosis to the Ohio state sanatorium, and provides:

"Any citizen of this state of more than seven years of age, suffering from pulmonary tuberculosis in the incipient or early stage, as determined by the superintendent, may be admitted to the sanatorium *upon payment in advance of five dollars each week*, which charge shall fully cover all expenses for medical treatment, medicine, nursing, board, lodging and laundry. Payment for the support of patients in the sanatorium shall be made in ac-

cordance with the provisions of section 1815-13, 1815-14 and 1815-15 of the General Code."

Section 1815-13, G. C., makes it the duty of the board of state charities to make collections for the support of patients at said state sanatorium, and provides that:

> "When the superintendent of the Ohio state sanatorium shall report to the board of state charities that an applicant for admission to or an inmate of that institution or any person legally responsible for his support is not financially able to pay the amount fixed by section 2068 of the General Code, it shall be the duty of the board of state charities by its authorized agents to make a thorough investigation as is provided by law for such investigations in other institutions."

Section 1815-14, G. C., provides that:

> "If, after the investigation provided in the next preceding section, it shall be found that said applicant or inmate or any person legally responsible for his support is unable to pay the amount fixed by law, said board of state charities shall determine what amount, if any, said applicant or inmates or any person legally responsible for his support shall pay,"

and further provides that:

> "The difference between the amount so determined and the amount fixed by section 2068 of the General Code shall be paid by the county in which said applicant or patient has a legal residence. The amount so determined to be paid by the county shall be paid from the poor fund on the order of the county commissioners."

Section 1815-15, G. C., however, provides that:

> "No county that is maintaining a county tuberculosis hospital or has joined in the erection or maintenance of a district tuberculosis hospital or has contracted with the proper authorities of a county, district or municipal tuberculosis hospital for the care and treatment of residents of that county suffering from tuberculosis shall be compelled to support patients in the Ohio state sanatorium, but the county commissioners of any such county may agree to support or aid in the support of a resident of that county in the Ohio state sanatorium."

Under the above provisions of section 1815-14, it is clear that, where a county has not provided for the care and treatment of residents of such county, suffering from tuberculosis, in one of the ways mentioned in section 1815-15, G. C., said county can be compelled to pay a part or all of the expenses incident to the care and treatment of said resident patients of the state sanatorium as determined by the board of state charities acting under authority and in compliance with the provisions of said section 1815-14, G. C., taken in connection with the provisions of section 1815-13, G. C.

It is equally clear that under the provision of section 1815-15, G. C., said county commissioners may, at any time, terminate this liability by making such provision for said resident patients.

From your statement of facts it appears that the commissioners of Hamilton

county entered into a contract with the director of public safety of Cincinnati for the care and treatment of the resident tubercular patients of said county at the Branch hospital in said city. While it appears that said contract was made for the term of one year commencing with the 24th day of May, 1914, that the same was not formally renewed at the end of said one year term, it further appears that said county commissioners are still paying for the care and treatment of said patients at said hospital, according to the terms of said contract, and that said contract is being treated by the parties thereto as still in full force and effect.

I am of the opinion, therefore, in answer to your first question that, inasmuch as the commissioners of Hamilton county are providing for the care and treatment of the resident tubercular patients of said county in the manner above set forth, your board cannot charge to said county commissioners the support of indigent tubercular patients, residents of said county, who are now being cared for and treated in the state sanatorium. Said county commissioners may, however, in the exercise of the discretion vested in them by provision of the latter part of said section 1815-15, G. C., enter into an agreement with your board to support or aid in the support of said patients at said state sanatorium.

Coming now to a consideration of your second question, it will be remembered that I have already held in opinion No. 970 of this department, rendered to your board under date of October 27, 1915, that so long as the patient applying for admission to the state sanatorium is financially able to pay and until the superintendent reports inability to pay, your board has no function to perform, and that the superintendent has authority, and it is his duty, to collect in advance the charge stipulated in the above provision of section 2068, G. C., as a weekly charge for the support of the patient.

In keeping with this former holding I am of the opinion that the superintendent of the state sanatorium is without authority to accept, as patients, any of the persons, referred to in your second inquiry, who are financially able to pay the charge fixed by said section 2068, G. C., except upon the payment in advance of said weekly charge.

If, however, said superintendent reports to your board that any one of said persons, either as an applicant for admission or as an inmate of said state sanatorium, or any person, legally responsible for his support under provision of section 1815-9 of the General Code, is not financially able to pay the amount fixed by said section 2068, G. C., it becomes the duty of your board to make the investigation required by the provision of the latter part of section 1815-13, G. C. If, upon said investigation, your board finds that said applicant or inmate or any person legally responsible for his support, is unable to pay the amount fixed by law, it becomes your further duty under provision of section 1815-14, G. C., to determine what amount, if any, said applicant or inmate or person legally responsible for his support, shall pay. The difference between the amount fixed by section 2068, G. C., and the amount so determined would be the amount which the commissioners of said county would be required to pay by the provision of the latter part of section 1815-14, G. C., if said county commissioners were not providing for their resident tubercular patients at the Branch hospital of Cincinnati as hereinbefore set forth.

I have already held in answer to your first question that inasmuch as said county commissioners have made said provision for said tubercular patients, they cannot be compelled to pay the aforesaid amount, as determined by your board, for the care and treatment at the state sanatorium of a tubercular patient resident of said Hamilton county, but that such county commissioners may, under the provision of the latter part of section 1815-15, G. C., enter into an agreement with your board to support or aid in the support of said patient. That is to say, they may agree to pay the aforesaid amount for the support of said patient as determined

by your board in compliance with the requirements of sections 1815-13 and 1815-14 of the General Code.

If, however, said county commissioners refuse to pay said amount and the same is not contributed from private sources, then I am of the opinion that your board is without authority in law to continue to care for said patient at the state sanatorium and that it will be your duty to return such patient, resident of Hamilton county and of the city of Cincinnati, to said county to be cared for in the local institution by said city of Cincinnati or by the county commissioners under their contract with said city.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1321.

COUNTY BOARD OF EDUCATION—CITATIONS OF STATUTES RELATING TO RECEIPTS AND EXPENDITURES BY SAID BOARD AS PREPARED BY BUREAU, APPROVED.

The citations of the statutes relating to receipts and expenditures of moneys by county boards of education as prepared by the bureau of inspection and supervision of public offices, together with the rulings made by said bureau in connection therewith, as set forth in said opinion, are in conformity with opinions heretofore rendered by the attorney-general interpreting the provisions of said statutes.

COLUMBUS, OHIO, March 6, 1916.

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

GENTLEMEN:—I have your letter under date of February 18th, which is as follows:

> "We hand you herewith citations of the laws relating to the receipts and expenditures of moneys by the county boards of education, which we believe conform to opinions already rendered by your department. These are briefed in order that they may be handy to county superintendents and boards of education for ready reference. Will you kindly review same and make the necessary corrections therein, if any, and embody same in a letter or opinion to this department at your early convenience?"

Citations of the provisions of the statutes, relating to the receipts and expenditures of moneys by county boards of education, as prepared and submitted by you, are as follows:

"COUNTY BOARD OF EDUCATION FUND.

"Sources of Revenue.

"The legal sources of revenue of the county board of education fund are:

"1. Reservations from local school funds. Section 4744-3, G. C.

"2. The state's share of county and district superintendents' salaries. Sections 4743 and 4744-1, G. C.

"3. Examination fees. Section 7820, G. C.

"4. Transfers from dog tax fund. Section 5653, G. C.

"The funds are available for expenditures as follows:

"(a) Those accruing from classes Nos. 1 and 2 are automatically appropriated, at the time of their origin, for the payment of the salaries of the county and district superintendents and for contingent expense, in the various sums as specified in the certificate under section 4744-2, G. C.

"(b) Those arising from receipts under Nos. 3 and 4 are available for conduct of teachers' institutes and the expenses of the members of the county board of education.

"These payments are to be made upon vouchers signed by the president of the board. Sections 4734, 4743 and 4744-1.

"No other sources of revenue are provided for the county board of education fund, nor has the board any powers of expenditure other than those mentioned above, viz.:

"EXPENSES OF THE COUNTY BOARD OF EDUCATION TO BE PAID UPON THE ALLOWANCE OF THE COUNTY BOARD OF EDUCATION AND WARRANT OF THE COUNTY AUDITOR.

"1. Salary of the county superintendent. Sec. 4744-1, G. C.

"An attempt by the board to fix the salary of the county superintendent high enough to cover the $300.00 expense provided by section 4744-1, G. C., is contrary to the spirit of the law, as provision is made for reimbursement of actual and necessary expense.

"2. Salary of district superintendents. Sec. 4743, G. C.

"3. Allowance to county superintendent for expenses and clerk hire. Sections 4734 and 4744-1, G. C.

"A flat allowance of $300.00 to the county superintendent for expenses is illegal.

"The expenses may include traveling and personal expenditures incurred by the superintendent while engaged on official business within the county school district.

"The county board of education may allow the superintendent an amount sufficient to cover the actual and necessary expense of maintaining and operating an automobile owned by him, when used in the discharge of his official duties.

"4. The official expense of the members of the county board of education, within the county school district. Section 4734, G. C.

"A member of the county board cannot reimburse himself for the use of his own vehicle or automobile, but may be reimbursed for the actual expense of operation; i. e., the cost of gasoline or horse-feed.

"Includes transportation and hotel expense.

"5. Stationery and supplies for the office of the county board and superintendent. Opinion of attorney-general, March 17, 1915.

"Includes postage, telephone and telegraph tolls on official business, stationery and supplies for office use of the superintendent and members of the county board of education on official business.

"6. Expense of county institutes. Section 7860, G. C.

"7. Transportation of pupils where local boards neglect or refuse to provide same. The cost thereof to be charged against the local district. Section 7731, G. C.

"8. Expenses of publication of course of study. Section 4737, G. C."

All of the statutes governing the legal sources of the county board of education fund and the availability of the funds constituting said county board of education fund for expenditure, as well as the manner in which such expenditures shall be made, have been cited by you. I suggest, however, that the proper year book in which each of said statutes as enacted or as last amended is found should be noted.

As stated by you no source of revenue other than those mentioned in said statutes are provided for said county board of education fund and the authority of the county board of education to expend money is confined to the provisions of said statutes.

I deem it advisable in this connection to call your attention to a recent decision of the court of appeals of the second appellate district in the case of State of Ohio ex rel. O. P. Mitman, et al., as the Board of Education of Greene county, Ohio, v. The Board of County Commissioners of Greene County, Ohio, interpreting the provisions of section 5653, G. C., as amended in 104 O. L., 145. Said court holds that the provisions of said section authorizing the transfer, from the dog tax fund, of any surplus as defined in said section, to the county board of education fund at the direction of the county commissioners, is directory rather than mandatory. This holding is contrary to the holding of this department in opinion No. 654 rendered to your bureau under date of July 27, 1915. The case of State ex rel. Mitman, et al., etc., v. Board of County Commissioners, supra, is now pending in the supreme court.

Your observations as to the proper limitations imposed by law on the allowance to the county superintendent for traveling expenses and clerical help and all expenditures which may be made by the county board of education, are in keeping with opinions heretofore rendered by this department.

I am of the opinion, therefore, that, with the addition above suggested, the foregoing citations of the statutes relating to receipts and expenditures of moneys by county boards of education as submitted by you together with the rulings made by you in connection therewith, are in conformity with opinions heretofore rendered by the department interpreting the provisions of said statutes.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1322.

COUNTY BOARD OF EDUCATION—TRANSFER OF TERRITORY FROM LOCAL DISTRICT TO ANOTHER WITHIN SAME COUNTY DISTRICT —SECTION 4692, G. C., GOVERNS—TRANSFER OF TERRITORY FROM ONE COUNTY TO ANOTHER COUNTY—SECTION 4696, G. C., GOVERNS.

The authority of the board of education of a county school district to transfer territory from one local district to another within such county school district is under provision of section 4692, G. C., as amended, 106 O. L., 397.

The term "county school district" as the same appears in the phrase "to another county school district" in the provision of section 4696, G. C., as amended 106 O. L., 397, refers to a county shool district as defined by section 4684, G. C., as amended 104 O. L., 133, and as distinguished from a rural or village or city school district.

COLUMBUS, OHIO, March 6, 1916.

HON. S. W. ENNIS, *Prosecuting Attorney, Paulding, Ohio.*

DEAR SIR:—In your letter of February 10, 1916, you refer to your letter under date of January 25, 1916, requesting my opinion as follows:

> "In the month of April, 1915, the county board of education of Paulding county, Ohio, transferred twelve (12) sections of land from the Harrison township rural school district of said county, to the village school district of Payne, Ohio. Since the enactment of section 4696 of the General Code of Ohio, the electors in the school district, which was transferred from Harrison township aforesaid, have petitioned the county board of education with more than 75 per cent. of the electors in said territory for the transfer of said territory back to the Harrison township rural school district, and I would like to have your opinion whether or not said section 4696, would permit a transfer of this kind of the county board of education?
>
> "Said section 4696 provides in part as follows: 'A county board of education may transfer a part or all of the school district of the county school district to an adjoining exempted village school district or city school district *or to another county school district.*' Does that part of said section, which provides, *or to another county school district* mean to another district of Paulding county or does it mean to another district of an adjoining county?"

I am informed by the superintendent of public instruction that Payne village school district is not exempt from county supervision and is, therefore, a part of Paulding county school district.

In view of this fact it is evident that you have confused the above provision of section 4696, G. C., as amended 106 O. L., 397, with the first part of section 4692, G. C., as amended by the same act of the general assembly amending said section 4696, G. C. By this same act section 4736, G. C., as amended in 104 O. L., 138, was again amended.

By virtue of these amendments the authority of the county board of education is extended under provision of section 4736, G. C., as now in force, to the creation of a new school district from one or more local districts or parts thereof; the provisions of said section 4736, G. C., as amended in 104 O. L., authorizing the county board of education to transfer territory from one rural or village school district to another within the county school district was carried into the first part of section 4692, G. C., and the authority of said county board was extended so that under provision of said part of said section 4692, G. C., as now in force, the county board of education may transfer a part or all of a school district of the county school district to an adjoining district or districts of the county school district, subject to the conditions and in compliance with the requirements prescribed by the further provisions of said section.

The provision of section 4692, G. C., as amended in 104 O. L., 135, authorizing the transfer of a part of any county school district to an adjoining county school district, or city or village school districts, by the mutual consent of the boards of education having control of said districts, was amended and as amended is now found in the first part of section 4696, G. C., as quoted by you.

By the plain terms of the above provision of said section 4696, G. C., as amended the board of education of a county school district may, by complying with the conditions and requirements contained in the further provisions of said section, transfer a part or *all* of a school district of *such county school district,* to an ad-

joining exempted village school district *or* to a city school district, *or* to *another* county school district, provided at least fifty per cent. of the electors of the territory to be transferred petition for such transfer.

I am clearly of the opinion, in answer to your second question, that the above provision of section 4696, G. C., as amended has no application to transfers of territory by the board of education of a county school district from one local school district to another within such county school district, the authority to make such transfers being vested in said county board by the above provision of section 4692, G. C., and that said provision of said section 4696, G. C., only applies to transfers made from a local district within a county school district to one of the districts mentioned in said section and located without said county school district.

The term "county school district" as the same appears in the phrase "to another county school district" in the above provision of section 4696, G. C., refers to a county school district as defined by section 4684, G. C., as amended 104 O. L., 133, and as distinguished from the rural or village or city school district, and the phrase "to another county school district" must be given the same effect as if it read "to an adjoining county school district." In other words, in order to effect a transfer of territory from a rural or village school district within one county school district to a rural or village school district within an adjoining county school district, under authority of said section 4696, G. C., as amended, said territory must first be transferred from said rural or village school district within one county school district to the adjoining county school district, by the joint action of the boards of education of said county school districts, in the manner provided in said section and according to the conditions therein prescribed. The board of education of said adjoining county school district may then annex said territory as a part of said adjoining county school district to said rural or village school district within said adjoining county school district.

The effect of the further provisions of said section 4696, G. C., as modifying the provision of the first part of said section and determining the proper meaning to be given to said section taken as a whole, was carefully considered in opinions Nos. 903 and 926 of this department, copies of which were enclosed to you under date of January 26th.

Coming now to a consideration of your first question it is evident that in view of the fact that the Payne village school district is a part of Paulding county school district, the authority of your county board of education to transfer a part of Harrison township rural school district within said county school district to said village school district, at the time the said transfer was made in April, 1915, was under provision of section 4736, G. C., as amended in 104 O. L., and as then in force.

It appears that since the amendments above referred to became effective more than seventy-five per cent of the electors residing in the territory transferred as aforesaid have petitioned your county board to transfer said territory back to your rural school district.

From what has already been said in answer to your second question it follows that the provisions of section 4696, G. C., as amended have no application to the case presented by you. The authority of your county board of education to transfer the territory in question, now a part of Payne village school district, back to Harrison township rural school district, is under the above provision of section 4692, G. C. The filing of the petition referred to in your inquiry was not, therefore, jurisdictional to the right of said county board of education to exercise the discretion vested in it by provision of said section 4692, G. C.

I am of the opinion, therefore, that, unless a majority of the qualified electors residing in the territory in question and acting under the further provision of said section, filed with said county board of education, within thirty days after the filing

of the map of said territory with the county auditor, a written remonstrance against the said proposed transfer, said county board may, in the exercise of said discretion, and by complying with the requirements of the further provisions of said section 4692, G. C., transfer said territory from said village school district to said Harrison township rural school district.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1323.

TAXES AND TAXATION—NEWSPAPERS—PUBLISHING NOTICES OF DELINQUENT TAX SALES—PUBLICATION FOR ONLY ONE WEEK, NO LIABILITY AGAINST COUNTY.

Newspapers publishing notices of delinquent tax sales must observe the statutory requirements in reference thereto, and publication of such notice for only one week creates no liability against the county for payment therefor.

COLUMBUS, OHIO, March 6, 1916.

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

GENTLEMEN:—I have your letter of February 29, 1916, containing the following statement and inquiry:

> "Section 5704, General Code, provides for the publication of the delinquent tax sale, and section 5706, General Code, provides for the fees for the publication of same.
>
> "The county auditor's office of a certain county, in making up the list for the newspapers of the delinquent land and lot sale, in delivering the advertisement to the English newspaper, through some confusion or inadvertence, only ordered it to be published one time in said English newspaper. In delivering the manuscript for advertisement to the German newspaper the proper instructions were given to publish same two times. On the day of the sale, aware of the fact that same had not been published according to the law by the English newspaper, upon the advice of the prosecuting attorney the sale was stopped and none was had. Now the question of payment of the newspaper bills for this advertisement of delinquent land sale has arisen.
>
> "Question 1. Under the circumstances here given is the German newspaper entitled to the fees for said publication out of the county treasury?
>
> "Question 2. Is the English newspaper entitled to all or any part of the fees for publishing this advertisement out of the county treasury?"

The matter of the publication of the list of delinquent lands in each county is specifically provided for by statutory law to be found in sections 5704, 5705 and 5706 of the General Code. By the provisions of said first named section each county auditor is required to have said list published weekly for two weeks between the twentieth day of December, and the second Tuesday in February, next ensuing in one newspaper in the English language, printed and of general circulation in the county, and also in one newspaper printed in the German language if such there be printed and published and of general circulation in said county.

Said section 5705 provides the form for the notice of said delinquent tax sale so to be published, and section 5706 fixes the amount that may be charged by newspapers for publishing said notice.

It will thus be seen that every essential matter connected with the publication of said delinquent tax sale is carefully and fully covered by statutory law. These provisions and requirements of the law are notice to everyone, concerned in said publication, of what is necessary to make the same legal, and all persons connected with said publication are bound by such notice. Buchanan Bridge Company v. Campbell et al., 60 O. S. 406.

The English newspaper named in your inquiry was bound to know what the requirements of the law were in regard to the publication it was called upon to make, and in law must be held to have known that such publication was required for two weeks, and that a publication for only one week was unlawful. Buchanan Bridge Company v. Campbell et al., supra. It, therefore, has no legal claim against the county for such publication and may not receive payment therefor from the county treasury.

The German newspaper named in your inquiry, upon the other hand, having complied with the law in every respect, so far as appears from your statement, is now entitled to payment for its services in that respect, and said payment may be made from the county treasury as provided by section 5706, supra.

Your first question, therefore, is answered in the affirmative and your second question in the negative.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1324.

MUNICIPAL CORPORATIONS—CHARTERS ADOPTED UNDER HOME RULE AMENDMENT TO CONSTITUTION WHICH PROVIDE FOR CIVIL SERVICE IN CITIES SUPERSEDE STATE LAW.

Charters adopted under the home rule amendments of the constitution, which provide for civil service in municipal affairs in compliance with constitutional requirements, supersede the state law in such municipalities.

COLUMBUS, OHIO, March 6, 1916.

The State Civil Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of a letter from the municipal civil service commission of Toledo, Ohio, in which the inquiry is made as to what law shall control in the administration of civil service in said city, its charter provisions or the state law? As this is a question of some importance I am directing my answer thereto to your commission.

An examination of the charter of the city in question shows that it provides a complete method or plan for the administration of civil service as applied to its municipal affairs. Its provisions appear to be in compliance with the requirements of section 10 of article XV of the constitution of Ohio that:

> "Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations."

It may also be noted in this connection that said charter was prepared and adopted under the authority of sections 3, 7, 8 and 9 of article XVIII of the constitution, and a duly certified copy thereof was filed in the office of the secretary of state. The civil service provisions of said charter may be found in sections 167-180 thereof, inclusive, and are too lengthy to be repeated here.

Whatever individual opinion may be on the questions involved in this inquiry, and however widely divergent thereon may have been the opinions of the individual members of our supreme court as ascertained by their published reports, it must be assumed, upon the principle of *stare decisis* that these questions may now be considered conclusively and finally settled by the cases of Fitzgerald v. Cleveland, 88 O. S., 338, and State ex rel. Lentz v. Edwards et al., 90 O. S., 305. The latter case is certainly decisive of the question here. The following observations of the court quoted from its opinion therein are a complete answer to the inquiry under consideration:

> "The manner of regulating the civil service of a city is peculiarly a matter of municipal concern. One of the powers of local self-government is the power of legislating with reference to the local government within the limitations of the constitutional provisions above referred to. As long as the provisions made in the charter of any municipality with reference to its civil service comply with the requirement of section 10 of article XV, and do not conflict with any other provisions of the constitution, they are valid and under the cases referred to discontinue the general law on the subject as to that municipality. That provisions adopted by a city might differ from the general laws within the limits defined was not only expected, but the very purpose of the amendment was to permit such differences and make them effective.
>
> "The averments of the petition show that the charter for the city of Dayton was framed and adopted under and in accordance with the terms of article XVIII and duly certified to the secretary of state. By the sections of the charter, which are set forth in the petition, it is further shown that the city of Dayton fully complied with the letter and the spirit of section 10 of article XV by providing for appointments and promotions in the civil service of the city according to merit and fitness to be ascertained by competitive examinations."

The charter in question here, as before observed, meets the constitutional requirements of section 10 of article XV, aforesaid, in that it provides for appointments and promotions in the civil service of said city, according to merit and fitness, to be ascertained as required by said constitutional provision, so far as practicable, by competitive examinations. It was framed and adopted as provided by the various sections in aforesaid article XVIII of the constitution. It, therefore, in the language of the court, "discontinues" the state law as to civil service in municipal affairs within said city, and the provisions of said charter, with respect to civil service in said municipality, must control over the provisions of the state law.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1325.

AUDITOR OF STATE—HAS AUTHORITY TO RELEASE BOND GIVEN UNDER SECTION 291, G. C., PROVIDED NEW BOND IS GIVEN.

The auditor of state has authority to release a bond given under section 291, G. C., provided a new bond is given, which new bond must be so worded as clearly to cover past transactions.

COLUMBUS, OHIO, March 6, 1916.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Under date of February 4, 1916, you submitted for my opinion the following inquiry:

> "July 3, 1908, G. R. Cerrito executed a bond to the state of Ohio in accordance with sections 290-295, General Code. A copy of said bond is enclosed herewith; you will note that it is signed by The Bankers' Surety Company as surety.
>
> "January 25, 1916, Attorney B. D. Nicola advised this office that his client had to give a mortgage on his premises in order to obtain this bond. Now he desires to sell his premises and in order to do so must cancel the mortgage. He proposed filing a substitute bond with personal surety and inquired of this office if we would grant the Surety Company a release from liability under their bond. We advised him that such bond would be acceptable and that we would grant the company a release from liability after the acceptance of the new bond.
>
> "Under date of January 27th, Mr. Nicola advised that this was not acceptable to the Surety Company saying that they insisted upon a release from all liability under their bond both for past actions of Cerrito and for future transactions, and he inquired if we would grant such a release if in the new bond there was incorporated a condition binding the new sureties for past as well as future acts of Cerrito.
>
> "To this we replied that we were reluctant to complicate matters by accepting such a bond and that we doubted our right or authority to accept a bond guaranteeing something which has already been done. In a letter of the second instant, Mr. Nicola insists that we inquire further into our right to do so saying that it is the only means by which his client can have this mortgage cancelled.
>
> "The question is, therefore, can we accept a bond guaranteeing past as well as future transactions? If we can accept such a bond can we grant such a release to the surety considering that these bonds are executed to the state of Ohio and not to the auditor?"

You stated in your request for opinion that the matter had been referred to you by Mr. B. D. Nicola, attorney-at-law, Cleveland, Ohio. I wrote to Mr. Nicola for his views upon the matter, and, under date of February 24, 1916, received from him a very able brief.

The statutes relative to bonds of transportation agents are contained in sections 290 to 295 of the General Code.

Section 290, G. C., requires the obtaining from the auditor of state of a certificate of compliance with sections 291 and 292 before engaging in said business.

Section 291, G. C., provides that a person about to engage in said business shall

execute a bond to the state of Ohio in the sum of five thousand dollars "conditioned for the faithful holding and transmission of any money, or the equivalent thereof, delivered to it for transmission to a foreign country, or conditioned for the selling of genuine and valid steamship or railroad tickets for transportation to or from foreign countries, or both, if to be engaged in both of such businesses."

Section 292, G. C., provides as to the sureties, and further states that "the bond shall be approved by the auditor of state, and filed in his office. Upon the relation of any party aggrieved, a suit to recover on such bond may be brought in a court of competent jurisdiction."

Section 293, G. C., provides that the auditor shall keep a bond book, giving the date of receipt, the names of principals, place of transacting business, names of surety and the name of the officer before whom the bond was executed.

There is nothing in the statutes whatsoever relative to the right of the auditor to accept a second bond in place of the first or to require additional sureties after the bond has been given, or to permit the substitution of one bond for another. In fact, the statutes are entirely silent upon the subject, and the sole question that arises is whether or not, the statutes being silent upon the subject, the auditor may deal with such bonds in the same manner as a private individual.

The law is well established that if the bond is properly worded a bond may be given to cover past transactions of the person bonded. It all depends upon the language of the bond.

> "As a general rule, the bond of a public officer has no retroactive effect, and does not cover past delinquencies unless it in terms says that it is to have such effect."
>
> Brandt on Suretyship, section 625.

The same rule is recognized in the case of Farrar v. United States, 5 Pet., 373.

> "Resort must be had to the language of the bond itself, to determine the time within which defaults must occur, in order that they may be covered by the undertaking. The bond will not be retroactive unless the contract so stipulates; it may be unlimited in duration or expire at a definite time, depending upon the language of the instrument."
>
> Stearns on Suretyship, section 147.

It is clear, therefore, that if the bond stipulates that it shall have a retroactive effect the courts will give it such effect.

Your question is:

> "Can we accept a bond guaranteeing past as well as future transactions?"

Since in ordinary practice a bond can be given to cover past transactions as well as future, and since it appears to be the only intent of the legislature that a bond shall be given which can be sued upon in case of any defalcation—and that would be accomplished now by the acceptance of a bond to cover past transactions—I am of the opinion that you may accept such a bond, and also that after accepting the same you may release the former bond heretofore filed with you.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1326.

DISAPPROVAL TRANSCRIPT OF PROCEEDING FOR BOND ISSUE BY CITY OF NEWARK, OHIO, BOND FORM.

COLUMBUS, OHIO, March 6, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

RE:—Bonds of the city of Newark, Ohio, in the sum of $30,000.00, for the purpose of re-constructing, improving and enlarging the municipal works of the city of Newark, Ohio, for the generation and transmission of electricity for the use of the city, being thirty bonds of the denomination of $1,000.00 each, falling due from March 1, 1917, to March 1, 1926, inclusive.

I have examined the transcript of the proceedings of council and other officers of the city of Newark, relative to the above bonds, and I find the same regular and in conformity with the General Code. I am, therefore, of the opinion that said bonds, when properly drawn, executed and delivered, will constitute valid and binding obligations of said city of Newark.

I am unable to approve the bond form submitted with the above transcript, and I am writing the city auditor suggesting a change in the language of one paragraph, which suggestion will doubtless be followed. I suggest, however, when the bonds are presented to the treasurer of state for delivery that I be given an opportunity to further examine the same. Respectfully,

EDWARD C. TURNER,
Attorney-General.

1327.

ROADS AND HIGHWAYS—ROAD IMPROVED UNDER AGREEMENT BETWEEN COUNTY COMMISSIONERS AND TOWNSHIP TRUSTEES—BONDS SHOULD BE ISSUED BY COUNTY COMMISSIONERS UNDER AUTHORITY OF SECTION 6929, G. C.

Where a road is improved under an agreement between county commissioners and township trustees, by the terms of which the cost is to be divided between the county and the township, and it is necessary to issue bonds, the same should be issued by the county commissioners under authority of section 6929, G. C.

COLUMBUS, OHIO, March 6, 1916.

HON. IRVING CARPENTER, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—On January 29, 1916, you addressed to me a communication, calling my attention to section 3295, G. C., as amended, 106 O. L., 536, and requested my opinion as to the proper interpretation of the section in question in the following particulars:

"1. What tax limitations apply to levies made for interest and sinking fund purposes for such bonds; especially do the two mill for Twps. and the ten mill aggregate limitations both apply?

"2. What is the length of time such bonds may run?

"3. It provides that 'bonds shall be advertised and sold in the manner provided by law.' To what provisions of law does this have reference?"

Under date of February 1, 1916, you submit the following additional inquiry regarding section 3295, G. C.:

"In issuing bonds under said section for road improvement purposes by the trustees of a township in which a municipal corporation is situated, are they an obligation on the entire township including such corporation, or only that part of the township outside the corporation?"

Under date of February 22, 1916, in response to my request for additional information as to the exact purpose or purposes for which it is proposed to issue bonds under the section in question, you advised me that the trustees of several townships in Huron county and the county commissioners of that county have agreed upon a plan for the improvement, during the coming summer, of several roads by the joint action of the trustees and commissioners, provided the trustees can raise the funds necessary to pay their part of the cost of such improvements.

You observe that for the trustees to raise the money under the Cass highway law, as interpreted by this department, would make the construction of the improvements this season impossible and say that the only method you have to suggest by which the work can be done this year is for the trustees to raise the money under section 3295, G. C., which you say seems to you to authorize an issue of bonds in an amount not greater than one per cent. of the tax duplicate of a given township without a vote of the people, both for road improvements by townships under agreement with county commissioners and also by townships alone. You further state that in several of the townships in question there are municipal corporations and that this fact led to the inquiry made by you under date of February 1st.

Section 3295, G. C., as amended, 106 O. L., 536, reads in part as follows:

"The trustees of any township may issue and sell bonds in such amounts and denominations, for such periods of time and at such rate of interest, not to exceed six per cent., for any of the purposes authorized by law for the sale of bonds by townships or by municipal corporations for specific purposes, and for the purpose of providing funds to pay the township's share of the cost of any improvement made under an agreement with the county commissioners, * * *.

"* * * All bonds heretofore issued by township trustees under assumed authority for the improvement of roads in connection with county commissioners, shall, in so far as the same might otherwise be held invalid on account of the absence of power of such trustees to issue bonds for such purpose, be held to be legal, valid and binding obligations of the township issuing such bonds."

Whatever may be the force and effect of section 3295, G. C., the situation which presents itself to you finds a full and complete solution in the provisions of chapter VI of the Cass highway law, relating to road construction and improvement by county commissioners. While it is true that the Cass highway law was passed May 17, 1915, approved June 2, 1915, and filed in the office of the secretary of state June 5, 1915, and while the act amending section 3295, G. C., being senate

bill No. 315, was passed May 27, 1915, approved June 4, 1915, and filed in the office of the secretary of state June 5, 1915, so that the Cass law was passed before senate bill No. 315 was passed, and was approved before that bill was approved, and it might therefore be argued that if there is any inconsistency between the Cass highway law and senate bill No. 315, the latter should govern, being the later expression of the legislature, yet there is another rule of statutory construction which renders it extremely doubtful whether township trustees have any authority whatever to issue bonds for road improvements under authority of section 3295, G. C. I refer to the well established principle that where there are two statutory provisions, one of which is general and designed to apply to cases generally, and the other is particular and relates to only one case or subject within the scope of the general provision, then the particular provision must prevail and, if both cannot apply, the particular provision will be treated as an exception to the general provision. It is even doubtful whether senate bill No. 315 is to be regarded as a later expression of the legislature than the Cass highway law, in view of the decision of the supreme court of Ohio in the recent case of State v. Lathrop, and the fact that senate bill No. 315 went into effect on the 4th day of September, 1915, 90 days after it was filed in the office of the secretary of state, while the Cass highway law did not go into effect until September 6, 1915.

A further question as to the right of township trustees to issue bonds for the township's share of the cost of a road improvement to be carried forward under an agreement with county commissioners is raised by a consideration of the history of senate bill No. 315, 106 O. L., 536, in which bill section 3295, G. C., was put in its present form. This bill amended sections 3295, 6912-1 and 3939, G. C., and its manifest purpose was to validate bonds theretofore issued by township trustees under assumed authority for the improvement of roads in connection with county commissioners. So far as section 6912-1, G. C., is concerned, it can have no effect, as all the other sections of the General Code, relating to the scheme of road improvement referred to in said section, were repealed by the Cass highway law. So far as section 3295, G. C., is concerned, it has already been indicated that the Cass law makes specific provision as to the issue of bonds where a road improvement is made under an agreement between county commissioners and township trustees.

It is unnecessary, in answering your inquiry, however, to determine finally whether township trustees, under authority of section 3295, G. C., may issue bonds for road improvements carried forward by them or carried forward under an agreement between the trustees and the county commissioners, inasmuch as chapter VI of the Cass highway law furnishes ample authority for the issue of bonds to meet the situation presented by you, which authority is not subject to any question, and the levies for the redemption of bonds issued under that chapter are outside of certain limitations that would undoubtedly apply if an attempt were made to issue bonds under authority of section 3295, G. C.

It appears from your communication of February 2nd, that it is desired to improve certain roads in your county, a part of the cost to be met by the county and a part by the township or townships in which the roads are situated.

Section 6921, G. C., being section 100 of the Cass highway law, provides, among other things, that the county commissioners may enter into an agreement with the trustees of the township or townships in which a road improvement is in whole or in part situated, whereby said county and township or townships may pay such proportion of the amount of costs, damages and expenses as may be agreed upon between them.

Under section 6927, G. C., being section 106 of the Cass highway law, county commissioners are authorized to levy a tax upon all the taxable property of the

township or townships interested in a road improvement and in which the same is to be constructed, for the purpose of providing by taxation a fund for the payment of the proportion of the cost and expenses of the improvement to be paid by the township or townships. This tax is, by the language in question, made subject to the limitation on the combined maximum rate for all taxes now in force. By the use of this language the legislature has indicated that the levy in question is subject to the fifteen mill limitation but is outside the ten mill limitation. Inasmuch as the levy may, under the terms of the section itself amount to as much as three mills, it is manifest that the legislature did not intend that such levy should be subject to the two mill limitation for township purposes. Under section 6929, G. C., being section 108 of the Cass highway law, the county commissioners, in anticipation of the levy provided for by section 6927, G. C., may, whenever in their judgment it is deemed necessary, sell the bonds of the county. If in your county the proportion of the costs and expenses of the projected improvement to be paid by the county is to be paid from current levies, and no bond issue is necessary to meet the county's proportion of the costs and expenses of the improvement, then it will only be necessary for the county commissioners to issue bonds in anticipation of the collection of taxes levied on the township or townships interested, and it will not be necessary to sell bonds in the aggregate amount necessary to pay the estimated costs and expenses of the improvement. If, however, it is necessary to sell bonds to pay the county's share of the costs and expenses, then both the county and township's portions of the costs and expenses may be provided by one bond issue under authority of section 6929, G. C. In either event, the bonds must state the purpose for which they are issued, the interest rate must not exceed five per cent., and the bonds must be advertised and sold in the manner provided by law.

In opinion No. 1203, rendered by this department to Hon. C. P. Kennedy, prosecuting attorney of Summit county, under date of January 25, 1916, procedure for a bond issue to care for the cost of a county road improvement to be made under an agreement between the county commissioners and the trustees of a township or townships was fully discussed, and I enclose a copy of that opinion for your information. The discussion of the matter in question will be found on pages 3 to 9, inclusive, of the opinion rendered to Mr. Kennedy.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1328.

RESTAURANT CONDUCTED ON WEEK DAYS IN CONNECTION WITH SALOON MAY BE KEPT OPEN ON SUNDAY IF REGULAR EATING HOUSE—SECTION 13050, G. C., CONSTRUED—INTOXICATING LIQUOR.

A restaurant conducted on week days in connection with a saloon may be kept open on Sunday if it is a regular eating house without violating section 13050, *G. C., providing it is securely closed off from that part of the room where liquors are regularly sold.*

COLUMBUS, OHIO, March 7, 1916.

HON. PERRY SMITH, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—Your enclosure under date of February 23, 1916, is as follows:

"A party has been conducting in this city for some time past a saloon business at the corner of Main and a side intersecting street. His room has a depth of about 100 feet and is about 20 feet in width, fronting on Main street, with a side entrance opening out on the side street near the center of the building (serving as an entrance to the restaurant, hereinafter mentioned). The room is made up of what was originally a room 50 feet in depth, fronting on Main street, and a room of equal depth, to the rear thereof, fronting on the side street, with the original wall between the two rooms removed. His license authorized the conduct of the saloon business in the entire room, and his Aiken tax is assessed accordingly. The front of the room to the depth of 45 feet (being substantially the original front room) is occupied by a bar, with all furniture, fixtures and equipment for the conduct of the retail liquor or saloon business, and the furnishing of liquor is restricted to this space, except as hereinafter mentioned.

"Substantially the whole of what was originally the rear room is occupied in the conduct of the restaurant business, being equipped with lunch counter, tables, chairs, and all necessary furniture and fixtures, meals and lunch being regularly served as a separate and independent business, blended only in their common ownership, management and serving of liquors to patrons of the restaurant, in connection with their meals, by waiters, who procure the liquor at the bar. All liquors are paid for by patrons of the restaurant at the bar. Lunch and meals are paid for by them at the restaurant. Upon the line of and in the place of the original wall separating what was originally two rooms, door casings and folding doors are erected making, when closed, substantially a solid wall, being of a character indicating a severance of the premises into two rooms, but accessible to each other. If the owner should keep his room, occupied by the restaurant, open on Sunday for the purpose of conducting his restaurant business therein, using his side street entrance for access thereto, and kept his folding doors securely closed and locked, and neither displayed nor furnished any liquors therein, would he be violating the provisions of sections 13050 and 13051 of the General Code? By separating restaurant from saloon, as herein indicated, and serving patrons of the restaurant on week days with liquors, in connection with their meals, paid for by them at the bar, would the restaurant be subject to additional Aiken tax?"

Sections 13050 and 13051 of the General Code, to which you refer, provide as follows:

"Sec. 13050. Whoever, on Sunday, sells intoxicating liquors, whether distilled, malt or vinous, or permits a place, other than a regular drug store, where such intoxicating liquor is sold or exposed for sale on other days to be open or remain open on Sunday, shall be fined not less than twenty-five dollars nor more than one hundred dollars, etc."

"Sec. 13051. In regular hotels and eating houses the word 'place,' as used in the next preceding section, shall mean the room or part thereof where such liquors are usually sold or exposed for sale, and the keeping of such room or part thereof securely closed, shall be a closing of such place within the meaning of such section."

The primary question involved in the consideration of the matter submitted

is as to the character of the restaurant which, during the week days, is operated in connection with the saloon. In other words, does it bear to the saloon the same relation as the bar room in a hotel bears to the dining room and other parts of the hotel?

From the statement of facts submitted it seems to me to be conclusive that the restaurant referred to is a regular eating house, such as is contemplated under the provisions of section 13051 of the General Code, supra, which section is a limitation on the operation of the provisions of section 13050 of the General Code, supra. From the statement of facts submitted it is made to appear that all the transactions of the saloon are separate and distinct from those of the restaurant connected therewith, payment for drinks being made at the bar, while payments for restaurant service are made in the restaurant proper.

In section 13051, of the General Code, it is specifically provided that the "place" referred to in section 13050, and which can mean nothing else but a bar room, shall be regarded as closed if the room *or part thereof* is securely closed, and the facts in this case, to my mind, constitute a case which may be clearly distinguished from the one referred to in the case of Lederer v. State, 5 O. C. C., 623, in which it was held:

> "Where the bar in a dining hall in which liquors are served at tables throughout the week is enclosed on Sundays by a wire screen only, and the hall is open to the public and other refreshments are served, it is a violation of this section."

In the case under consideration the restaurant-keeper has apparently taken every possible precaution to securely close off his restaurant from the saloon proper, and it seems to me that it would be an unwarranted and arbitrary rule which would deprive a man of the use of his property for a legitimate business to be conducted on Sunday, such as would result from an interpretation of section 13051 in this case along the lines of the decision in the case of Lederer v. State.

The question in reality turns on whether or not the restaurant herein is a "regular eating house," and that fact is specifically determined by the statements in your letter.

Therefore, assuming that the restaurant referred to is a regular eating house, and that on Sunday the restaurant is securely closed off from the part of the bar room used in connection therewith during the week, it is my opinion that section 13051 has been complied with, and the benefits of that section are extended to the keeper of the restaurant, whose action in keeping the restaurant open on Sunday under these conditions would not be a violation of the law.

This conclusion, of course, disposes of the necessity of replying to the second question, which relates to the payment of additional Aiken tax on the ground that the saloon business is being conducted in more than one place, which, of course, would be in violation of the constitutional provision governing matters of this kind.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1329.

LIQUOR LICENSE LAW—APPLICATION TO SOCIAL CLUBS AND FRATERNAL ORGANIZATIONS—WHEN SALE IS MADE BY CLUB THE TRANSACTION CONSTITUTES A SALE.

The application of the license law to clubs, lodges and associations furnishing intoxicating liquors to their members at their rooms.

Where the property in intoxicating liquor passes from a club, lodge or association to a member thereof for which there is a payment of a price or an agreement to pay the same, such transaction constitutes a sale for which a liquor license is required under the license law of this state.

COLUMBUS, OHIO, March 7, 1916.

State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—Yours under date of February 14, 1916, is as follows:

"We are in receipt of a letter from the Hamilton County Liquor Licensing Board of Cincinnati, from which we quote as follows:

"'Judge Spiegel, of our municipal court, before whom is pending a case of violation of the Sunday closing law by one of the so-called "Clubs," is desirous of a ruling from the attorney-general, and accordingly wrote to Mr. Turner upon the subject.

"'Mr. Turner replied that he would be glad to render an opinion, if requested so to do by your board. It is our opinion that any method of disposing of intoxicating beverages by a check or ticket system, constitutes a sale, and we think it would be a great assistance, not only to our board, but to the various local boards throughout the state, if a ruling to this effect could be obtained from the attorney-general.'

"The matter of social and fraternal club operations in the state has become very acute, and at our request several social and fraternal clubs in one of the cities of the state have written us setting out in full their method of operation. The originals of these letters we are enclosing herewith, numbered from one to five.

"No. 1 states its plan of handling intoxicating liquors as follows:

"'The privileges of the club are limited to members only, and sales are made to them in two ways:

"'First—Coupon books like attached, containing coupons worth five cents each are sold to members.

"'Second—Those who do not buy coupon books sign tickets which are charged to members' accounts.'

"Club No. 2 states its plan of operation as follows:

"'The dues of the club are fifty dollars a year for each member payable quarterly. In addition to this at the first of each year each member is charged with an additional forty dollars out of which fund the supplies of the club are purchased and charged the members at an agreed amount. This is done for the purpose of equalizing the accounts of the members. A great many of the members do not use up their credit, and in such case pay the balance in cash. Those who exceed the amount make up the difference at the agreed rates. In case of default in the payment of a member's account the deficit is charged off and the loss is borne equally by the members of the club. The rates at which supplies are distributed are

limited to the cost of the supplies and the cost of their service.

"'All cigars, liquors, beverages and other supplies are purchased by the members as a whole, and are distributed in the manner just mentioned. This distribution is only incidental to the main objects of the club, and in no sense is the club "a person, corporation, or co-partnership engaged in the business of trafficking in spirituous, vinous, malt or other intoxicating liquor." The word "trafficking" being defined as a purchase and sale, there is no sale as the essential element that there must be a transfer of title from one person to another is lacking. A man cannot buy from himself. The only "business" in which the club is engaged, if any, is in the maintenance of its clubhouse with its ball rooms, kitchen, library, grill rooms, reception, reading and other rooms for the promotion of the social intercourse of its members.

"'It is true that the club has a federal license to engage in the business but this is not conclusive evidence that it is "in the business of trafficking in liquor," as against the facts which prove the contrary. Frankly, the federal license was obtained in the belief that it was cheaper to pay it than engage in such a controversy as this. But in view of the holding of the state commission it will be abandoned at the end of the year.

"'It is practically impossible for this club to obtain a state license. The cost is prohibitive. But if this were not so, to whom could it be issued? The club is not a person, a corporation, and according to all the authorities, we but mention the latest, cannot possibly be considered a partnership.'

"Club No. 3 gives its plan of operation as follows:

"'First—No one but a member in good standing has access to the club rooms, and must show his receipt for dues, upon request. If he desires any beer, same can be had only through our locker system. He must fill out a card, same as copy enclosed, stating what brew he desires and sign the card; the upper half is sent to the brewery as his order, and the other half is retained by the member, after payment of $1.00 for one case of 12 pint bottles; of this amount 45 cents is for the 12 bottles and the balance of 55 cents is for icing same. Whenever he desires a bottle of beer, he presents said card and it is punched at the bottom in the space provided for same.

"'We will positively state that no other liquors of any kind are kept or handled in club.'

"Club No. 4 gives its plan of operation as follows:

"'A member wishing to have beer at the rooms must order same on order slips as per sample enclosed. At the time of ordering he pays the price of the beer, that is, the amount charged by the brewery. This makes it a transaction between him and the brewery. When the case of beer arrives at the hall it is numbered and his name placed on same. We have our different ice boxes subdivided with iron partitions so that 3 bottles from each case is kept in there separately to be iced. The number on this subdivision is the same as the member's number on the case. We give him a strip of tickets with his name and number on, also the kind of beer he has ordered. When he wishes a bottle he presents one of his tickets to the custodian at the wicket at locker room door, and said custodian goes to the ice box and takes from his compartment a bottle of beer and gives it to him. He then takes a bottle from his case which is arranged along the wall and puts it in the ice box, replacing the one that was taken out. In this way each man that orders beer gets his particular beer and no

other. This is the manner of handling our beer proposition. In addition to the above we make a charge for the locker rent of each man that has beer ordered. Any additional information you may wish we will gladly give upon request.'

"Club No. 5 states that in the use of intoxicating liquors in their club rooms they pursue the following course:

"'We use a coupon and ticket system—these coupons and tickets being redeemable in merchandise for that amount.

"'We don't conduct a bar. Refreshments of all kinds are served at tables in the club rooms, and to no one but members of the order in good standing.'

"We may state further, that we are informed by a number of other clubs situated in various parts of the state that they maintain what may be termed a locker system. That is, each member of the club has his individual locker or compartment under lock and key in which he stores his supply of wet goods purchased by himself, and to which no one else has access, which supply is only used by himself or friends upon his invitation, no money being passed except in the original purchase of the goods from brewery or liquor dealer.

"This department submitting this information to you would like to have your opinion upon the entire matter of social and fraternal clubs having no license from this department, but in which intoxicating liquors are kept by the members or for the use of members, whether all or any of the various plans discussed above are in compliance with the licensing law of the state; or if none of them are, under what plan, if any, may private, social or fraternal clubs operate so as to permit the use of intoxicating liquors by its members within the club precincts?

"You will please understand that we are requesting an opinion not only upon the various plans indicated above, but also upon the entire question of the use of intoxicating liquors in private organizations or clubs."

Your communication suggests a somewhat general consideration of the application of the liquor license law to the purchase and sale for consumption of intoxicating liquors by lodges, fraternal and social orders, clubs, associations or societies, or the members thereof, at the rooms of such lodges, orders, clubs, associations or societies.

What is known as the liquor license law (amended senate bill 203, approved May 3, 1913, 103 O. L., 216) is entitled "An act to provide for license to traffic in intoxicating liquors and to further regulate the traffic therein, etc.," and was enacted pursuant to article XV, section 9 of the constitution as adopted September, 1912, the primary provision of which is as follows:

> "License to traffic in intoxicating liquors shall be granted in this state, and license laws operative throughout the state shall be passed with such restrictions and regulations as may be provided by law, and municipal corporations shall be authorized by general laws to provide for the limitation of the number of saloons."

We have already observed that the basic or fundamental subject matter of both the constitution and statutory provisions to be considered is the "traffic in intoxicating liquors." The constitution requires that laws shall be passed for granting licenses to traffic in intoxicating liquors subject to certain restrictions and limitations therein prescribed, and the license law referred to makes specific

detailed provision for the method of, machinery for and conditions under which "license to traffic in intoxicating liquors" may be granted throughout the state. After making full provision for the granting of licenses, there was enacted in the license law, for the prevention of persons engaging in the business of trafficking in intoxicating liquors without first procuring such license, and for the purpose of enforcing said act, certain penal provisions as follows:

Section 48 of the license law, 1261-63, G. C., 103 O. L., 237,

> "Whoever sells intoxicating liquors without having been duly licensed as provided herein shall be guilty of a misdemeanor, etc."

Certain exceptions to this provision are thereafter made, which are not material to the present consideration.

Section 49 of the license law, 1261-64, G. C., 103 O. L., 238,

> "Whoever, whether licensed or not, sells intoxicating liquors in a quantity of less than two gallons, as provided therein, and who does not hold a saloon license, shall be guilty of the offense of selling liquor without a license, etc."

Prior to the adoption of article XV, section 9 of the constitution, above referred to, the phrase "trafficking in intoxicating liquors" had a statutory definition as found in section 6065, G. C., which was modified by the amendment of said section in the enactment of section 60 of the license law, 103 O. L., 241.

This definition is not, however, of substantial importance to the present consideration for the reason that the penal statutes applicable to the subject matter in hand, as above quoted, do not contain this phrase, but instead thereof there is found the phrase "sells intoxicating liquors." To this phrase the legislature has not chosen to give any special statutory definition. Whatever application the statutory definition of the phrase "trafficking in intoxicating liquors" may have to the provision of the license law in which this phrase is found, or even to the phrase "sells intoxicating liquors" as found in the penal provisions of the law, is not material to the present consideration for the reason that it is conceived that the operations or transactions of any club, lodge, society or association, to which you refer in your inquiry, which would come within the meaning of the phrase "sells intoxicating liquors" would also be within the meaning of the phrase "trafficking in intoxicating liquors" as defined by the statute, and vice versa.

While section 6099, G. C., provides that in clubs, societies or other combinations of individuals where intoxicating liquor is kept for the use of the members in dry territory, the keeping of a place where intoxicating liquors are furnished or given away in violation of the local option laws, it is not provided that such place shall be held to be a place where intoxicating liquors are sold, hence the provisions of this section offer little, if any, aid in determining the application of the license law which has reference only to sales..

The primary subject of inquiry, in so far as it is affected by the license law, is then whether or not there is a sale of intoxicating liquors by any person, firm, corporation or association not having been duly licensed according to the provisions of sections 1261-6 to 1261-73, G. C., inclusive. Since the license law is operative only upon sales, it has no application, as above observed, to the mere furnishing or giving away of intoxicating liquors.

Sale is defined by section 8381, G. C., as follows:

> "(2) A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price."

From this definition of sale it will be readily observed that the determinative feature of a sale for first consideration in the present instance is the transfer of the property in the goods which are the subject matter of the transaction under consideration.

Assuming for the purpose of your inquiry that the individual members of the lodge, club, order or association in question are the consumers of the liquors referred to, and that there is a price paid for the liquor at the time or before it reaches the consumer, the question then resolves itself into this: From whom does the property in the liquor pass to the consumer, the member of the club, order, lodge, association or society or other person who pays the price therefor? If the property in the liquor passes to the consumer, who pays the price from any person, firm, corporation or association not duly licensed and authorized to engage in the business of trafficking in intoxicating liquors under the laws of this state there is manifestly a violation of the penal provisions of the license law hereinbefore quoted, assuming that the consumer pays a price therefor. In other words, if the person from whom the property in the liquor passes to the person who pays the price therefor is not authorized and licensed to sell intoxicating liquors, such transfer will constitute a sale, and therefore a violation of the license law.

Whether or not the furnishing of intoxicating liquors by a club or association to the members thereof constitutes a sale is a question which has been much before the courts. There are two distinct and irreconcilable lines of decisions upon this question. One of these lines of decisions follows the English rule as laid down in the case of Graff v. Evans, L. R. S. Q. B. Div. 373, which is based principally upon the theory that the furnishing of intoxicating liquors by a social club to its members is only a method or device for the distribution among the several members of the common property of all. Another theory advanced in support of this holding is that the license laws are intended to operate upon only that class of transactions which constitute a business. In other words, is applicable only to that class of individuals who pursue the business of trafficking in intoxicating liquors for a livelihood, or, in short, conduct that class of places which are ordinarily termed saloons.

The other line of decisions is based upon the fundamental principle of the law of sales, viz., that where there is a transfer of the property in goods accompanied by the payment, or an agreement to pay a price therefor, such transaction constitutes a sale irrespective of the character of the parties thereto. One of the later cases upon this question is that of the County of Ada v. Boise Commercial Club, 20 Idaho, 421, 38 L. R. A. (n. s.) 101. This is a well considered case in which practically all the cases in the different lines of decisions heretofore referred to are reviewed and considered, holding that:

> "Where a social club, organized as a corporation under the general laws of the state governing social and religious corporations, keeps intoxicating liquors at the club rooms, and delivers to members such quantity of liquor as the member may request, for which the member pays in cash or gives a card to have the same charged to his account, and thereafter pays such account, and pays or agrees to pay the price fixed by the clubs, the liquor being purchased to be drank upon the premises, such liquor being kept and sold as a mere incident to the general objects and purposes of the club, such club is subject to the provision of Rev. Code, section 1506, and is required to procure a license."

The conclusion in this case, it will be observed, is based upon the primary

principle heretofore referred to, that the property in the liquor passes from the club to the member accompanied by the payment of a price or an agreement to pay the same. The question of whether or not the furnishing of intoxicating liquors to members of a social club was within the meaning of the phrase "trafficking in intoxicating liquors," was before the court in the case of University Club of Cincinnati v. Frank Ratterman, 3 C. C., 18, under the following state of facts:

> "A bona fide social club, incorporated under the laws of the state, 'for the promotion of higher education and of social and friendly relations between its members,' and not for profit, leased a building in which were reading, dining, sitting and other rooms and a library, which was open to the members of said club at all reasonable hours; and with the funds of such corporation it purchased food, wines, liquors and cigars, which during the years 1886 and 1887 were furnished at such club house, to such members as desired the same, and which were there used and paid for by the persons receiving the same, at a price fixed by the management, so as simply to pay the cost of procuring and serving them. No dividends or profits can be received by any member, nor does any officer receive a salary, and the club is not engaged in any business with a view to profit. During such period by the rules and regulations of the club, a member was authorized to introduce strangers having certain qualifications, who thereupon, for a limited period became entitled to the privileges of such club-house, and to be furnished with food, wines, liquors, etc., at the price so fixed as aforesaid, the member introducing such guests being liable for all supplies furnished him and being not paid for by such guest. During these years this privilege was occasionally exercised by the members of the club and persons so introduced were furnished by the club with wines, liquors and other supplies, which were paid for by them or the persons introducing them.
>
> "HELD: That the furnishing of such wines and liquors so purchased by said club to its members in this manner was a 'traffic in intoxicating liquors' within the meaning of section 8 of 'An act providing against the evils resulting from the traffic in intoxicating liquors' passed May 14, 1886 (82 O. L., 157), the same being a *sale by said club to its members,* and rendered it liable to assessment under the terms of said statute, as did also the furnishing of such liquors to the guests of such club in the manner stated."

In view of this holding of the circuit court of this state, and being inclined to the view taken by the supreme court of Idaho in the case above referred to rather than that of the line of cases following the English rule, it is believed as heretofore stated that the controlling factor in determining the parties to a sale is the question from whom to whom the property passes rather than the character of the parties to such transaction.

With these observations we may proceed to a consideration of the specific statements of fact submitted in your inquiry. The language of the court in the case of United States v. Alexis Club (D. C.) 98 Fed. 725, deemed particularly applicable to the present question, is as follows:

> "Did the defendant then sell liquor to its members? I shall not review the irreconcilable cases upon this subject, nor make the superfluous attempt to produce a new argument in support of my conclusion. I content myself with saying, briefly, that I agree with the general opinion of the com-

munity, and hold the transaction to be a simple, ordinary sale. If a chartered club, such as the defendant, buys liquor, the legal title to this property is in the corporation, and not in the members. * * * The legal title, then, being in the corporation, it is further to be observed that, when the title passes to a consumer, it passes by a transaction that exhibits every element of a sale, and shows no outward sign of being anything else. The intending consumer asks to be served with a definite quantity of intoxicating drink. The owner of the legal title to the liquor, acting by a paid servant, agrees to the request, requires the price to be paid in cash, or accepts the consumer's promise to pay in the future, and thereupon delivers the subject of the bargain. Nothing else takes place, and, if this is not a sale, but is really a partial distribution of the common stock, the truth is so veiled that the participants in the transaction, I venture to assert, rarely suspect that they are taking part in anything but a commonplace sale."

In addition to the statement of club No. 1, as above set forth, the accompanying correspondence shows among other things the following: "The club is incorporated not for profit."

"The fiscal year of the club ends March 31st of each year, and the books were audited some months ago up to April 30, 1915, which showed the following:

"Income from dues and initiation fees including sales of refreshments, restaurant service, cigars, billiards and pool	$16,659.19
"Expenses	17,144.71
"Deficit for year	$ 485.52
"Loss for above year from sale of refreshments and restaurant service	$ 2,709.60"

It may be here observed that whether the transaction results in profit or loss is altogether immaterial to the question as to whether or not said transaction constitutes a sale. (Sing v. Roth 14 O. N. P. (n. s.) 29). And if there is a sale it is equally as immaterial to whom the same is made, whether a member of a club or a stranger.

From the above statements it seems a fair presumption at least that the liquor in question prior to the order of the member of the club is the property of the club. The language of the court in the opinion in the case of Southshore Country Club v. The People, 228 Ill. 74, 12 L. R. A. (n. s.) 525, is pertinent as follows:

> "The liquor belongs to the corporation as a legal entity, and no member owns any share of the liquor, as a tenant in common with the other members or otherwise. An association organized merely for social, literary, scientific or political purposes, although not incorporated is not a partnership. 25 A. & E. Ency. of Law, 2nd Ed., page 1137. A member of such an association has no individual right or interest in the property, and owns no proportionate share of it, but only has a right to the joint use so long as he continues to be a member. Even if they were tenants in common the transfer of a specific part of the property to one for a stipulated price would be a sale."

In the case of State ex rel., Young v. Minnesota Club, 106 Minn., 516, it was held that the rule declared by some of the cases, that the distribution of in-

toxicating liquors to club members does not constitute a sale, for the reason that the members are the joint owners of the property, and are merely distributing to themselves property which they already own, has no application where the organization is a legally constituted corporation, and the statute prohibiting sales without a license makes no express exception in favor of such corporation.

The coupon book attached contains twenty coupons each of which states on its face "Good for Five Cents. The _____ Club." On the front cover thereof is "$1.00." No further description of the ticket is given. These coupons and tickets are manifestly only a device adopted for the payment of the price of those things, whether liquors or otherwise, for which they are exchanged. Nothing appears from the coupons indicating from whom the purchase was made other than the name of the club as above stated. I am inclined to believe, however, that the financial statement of the club above set forth warrants the presumption that "sales of refreshments" has reference to and includes the sale of intoxicating liquors. If the term "refreshments" includes intoxicating liquors of any kind, the sales thereof by the club, which is a corporation, is admitted. It would not be argued that a corporation, other than such social club, organized under the laws of the state for any lawful purpose, which engaged in the sale of intoxicating liquors without being licensed, although only as incidental to its main purpose, would be immune from the penalties of the law solely on the ground that it confined or limited its sales to persons who were members or stockholders of the corporation. If the property in the liquor is in the corporation and is transferred to a member or stockholder of such corporation for a price paid or to be paid, such transaction constitutes a sale notwithstanding some coupon or ticket device is adopted as a means of payment of the purchase price.

In Woolan & Thornton on the Law of Intoxicating Liquors, section 795, page 1337, it is said:

> "We agree with the views expressed in State v. Easton Social, Literary and Musical Club, that there is no occasion to be astute, and indulge in questionable refinements in order to relieve these corporations of the just consequences of their acts or endeavor by artificial or fictitious reasonings to permit persons in combinations to do what individuals without combinations could not do. The fact that there is no profit in a sale does not deprive the transaction of its character as a sale, and surely it makes no difference that the sale of liquor is only incidental to the main purpose of the club. The sale of liquor is but an incident to the business of a drug store or restaurant. It is certainly but a trifling incident of the business of a large hotel.

While as stated above the facts as set forth in your inquiry warrant the presumption that the property in the liquor is passed from the club to the purchaser of the coupons or tickets, thus making a sale by the club, they are perhaps not sufficient to make such presumption conclusive.

In the absence of other facts material to determine in whom the property in the liquor is when transferred to the member of the club, I can only say, in reference to what is referred to by you as "Club No. One," I am of the opinion that if the property in the liquor is transferred from the club to the member the facts stated as to the manner of payment of the price thereof would constitute such transaction a sale, and in the absence of the club having been duly licensed would be in violation of the license law of the state.

As I understand the statement designated by you as "Club No. Two," it is in brief this: The club is an unincorporated organization or association of individuals each of whom at the beginning of each year in addition to the annual dues

of fifty dollars, payable quarterly, is required to pay to the club for the purpose of creating a fund the sum of forty dollars. The purpose of this fund is to provide the several members of the club with cigars, liquor, etc., which are supplied to the several members without further payment in such quantities as he may desire at rates established by the club. If an individual member fails to exhaust his forty dollar credit at the end of the year he is paid his balance in cash. If a member has used an amount of cigars, liquors, etc., when calculated at the established rate, in excess of forty dollars during the year, he agrees to pay and is charged for the excess of his supplies at the established rate. If any member fails to pay for such excess supplies the remaining members are charged, agree to pay and do pay into the fund of the club the deficit of such defaulting member or members. A further fact not set out in your statement, which is apparently deemed to be material to the consideration, is found in the correspondence submitted, viz.:

> "The privileges of the club are never extended by card or otherwise to any residents or non-residents of the city, and no one other than a member has ever obtained any supplies at the club for cash or upon credit."

I assume this may be taken to mean that no person other than a member of the club is permitted, either directly or indirectly, to pay or contribute any money or thing of value to the club or the funds of the club which are in any way appropriated directly or indirectly to furnishing the club its supply of intoxicating liquors. In respect to this statement, however, it need only be again observed that if there is a sale of intoxicating liquor by the club it becomes altogether immaterial whether the person to whom such sale is made is or is not a member of such club.

This plan of operation is, however, clearly distinguishable from that designated in your inquiry as "Club No. One." Whether there is a sale by the club to the members under this latter plan is a question not at all free from difficulty. It might be argued with much force and apparent reason that the fund created by the payment of the forty dollars by each member is the common property of all; that likewise the stock of liquors is the common property of all, and that the establishment of fixed rates and prices is only a device adopted for the distribution of the common property according to the individual interests of the several members or shareholders, and that no price is charged or paid to the club for the liquor supplied.

It is a principle of the law of sales too elementary to necessitate reference to authorities that it is immaterial to the determination of whether a transaction constitutes a sale, whether the price of the subject of the transaction is paid before or after its delivery or the transfer of the property therein.

In all the plans submitted in your inquiry much stress is apparently laid upon the manner in which the consumer of the liquors is relieved of his money. It seems to be conceived that all depends upon the method by which payment of the price of the liquor is effected. Much cunning and ingenuity have doubtless been wasted in devising schemes, the purposes of which are too palpable for speculation. The controlling factor in determining whether or not a transaction as between given parties constitutes a sale is, as before repeatedly stated, more often dependent upon from and to whom the property in the subject of the transaction passes than the manner of the payment of the purchase price.

If, as it has been assumed from your statement since it is not altogether clear on that point, the payment of forty dollars is actually made by each member at the beginning of each year, and there is not merely a charge of that amount made against the member on the books of the club, the fund thus created by such payments to the club becomes the property of the club and ceases to be the property

of the individual member. Southshore Country Club v. People, supra. No member of the club can make any claim of individual right to any part of such fund if the fund is the property of the club as distinguished from its members. No further argument is needed in support of the position that the property in the liquors purchased from such fund is still in the club as distinguished from its members. That is to say, that payment by the members is in effect and to all intents and purchased from such fund is still in the club as distinguished from its members. which the club, as distinguished from the members, thereby agrees to furnish at such times and in such amounts as may be desired by the member at an agreed price.

Under the plan designated "Club No. Two," now under consideration, let us suppose a possible case. At the beginning of the year immediately after the payment of the forty dollars by each of the several members the fund thus created is immediately invested in a stock of supplies consisting of liquors and cigars. At the end of six months one-half of the members have consumed each his entire credit of forty dollars. None of the other half of the members have consumed any part of their several credits. There is then on hand one-half of the original stock. This is by fire or other casualty destroyed. On whom does the loss fall? Under the facts the latter half of the membership would be clearly entitled to a refunder of their money from the club. Then the property in the stock must have been in the club and would be transferred to the members only upon delivery to them individually. Again, suppose the entire fund has been invested and at the end of the year there is on hand one-fourth of the stock. One-fourth of the original amount of the fund must be refunded to those members who have not consumed the amount of their payment calculated at the fixed rate. To whom does the surplus stock belong? Manifestly to the club as an organization. If the property in the liquors is at any time in the club as distinguished from its members, it beyond question passes or is transferred from the club to the member at the time of the delivery to such member, and it matters not that the price thereof, together with the price of other liquors and supplies similarly obtained, has been paid through some device in advance.

I am for the reasons above suggested, therefore, of the opinion that intoxicating liquors may not be lawfully supplied by a club or association to its members in the manner set forth in your statement designated as "Club No. Two," without the club being duly licensed to traffic in intoxicating liquors.

The conclusion as to what is termed "Club No. Three" will turn largely if not altogether upon whether the order described therein is filled directly by the brewery or a licensed dealer, subsequent to the members signing the same, or by the club. If such orders are filled by the club from a stock had on hand by it for that purpose, such transaction would constitute a sale under the principles hereinbefore referred to. On the other hand, if no liquors come into the possession of the club, its officers or employes except from the brewery or other licensed dealer upon an order, such as described, made in good faith and in the manner stated, and no stock of liquors is kept at the club by the brewery or licensed dealer in advance for the purpose of filling such orders, I am inclined to the view that the property in the liquors passes directly from the brewer or dealer to the member of the club upon delivery of the liquors at the locker, and that no other member of the club, or the organization as such, at any time has any right, title, interest or property therein. From this it follows that the sale is between the brewery or dealer and the member as an individual, and for carrying on such transactions there is no requirement that a license be obtained by the club.

Your statement as to what is termed "Club No. Four" is in fuller detail, and, as I understand, your No. Four is substantially similar to No. Three just considered. The order is made in No. Four direct to the brewery accompanied with

the purchase price thereof, and delivery of the liquors is made by the brewery as directed in said order. The liquor becomes the individual property of the ordering member upon delivery, and neither the club nor any other member thereof could maintain any claim of right, title, interest or property therein. As I understand the statement of facts the tickets used serve no purpose other than to identify the owner of certain quantities of liquor then in store in the ice box or rooms of the club under certain designated numbers or marks to which the member has the sole and absolute right. He may claim and take such liquor at his pleasure, and the transaction described gives him no right or interest in other liquors similarly in the custody of the club. I am therefore of the opinion under the plan described in "Club No. Four" that the club is not required by law to obtain a liquor license.

Under "Club No. Five" the facts stated are not sufficient to enable me to render any opinion thereon. It may be suggested, however, that if intoxicating liquors are purchased by the club and exchanged for the coupons and tickets so that the property in the liquors is at any time in the club, I am inclined to the view that such transaction would constitute a sale by the club under the principles heretofore discussed, for which a license would be required by law.

The question of the liability of clubs or associations in what is known as "dry territory" for the Dow-Aiken tax is not here considered, nor may this opinion be so construed as to limit or restrict the operation of section 6099, G. C., in local option territory.

This opinion is limited to the facts stated herein, and is not to be held to apply to any other case where the facts may be different.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1330.

INTOXICATING LIQUORS—A LICENSE TO ENGAGE IN SAID BUSINESS IS NOT SUBJECT TO LEVY AND SALE ON EXECUTION ISSUED FOR SATISFACTION OF A JUDGMENT AGAINST THE LICENSEE.

A license to engage in the business of trafficking in intoxicating liquors issued pursuant to law in this state, is not subject to levy and sale on execution issued for the satisfaction of a judgment against the licensee. Whether license may be reached by proceedings in aid of execution, not involved herein.

COLUMBUS, OHIO, March 7, 1916.

The State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—Yours under date of January 22nd, is as follows:

> "Within the last few days a judgment was rendered against a licensee in the city of Columbus, Franklin county, by the municipal court of this city, and an execution placed in the hands of the execution bailiff of that court. The bailiff proceeded to the place of business of the licensee with his execution on the claim of a small amount something like sixty odd dollars and he levied upon a stock of bottled goods, some cigars and tobaccos but did not levy upon the entire business of the licensee, but attempted to include in this levy the license certificate issued to the licensee by the Franklin county board and removing the same from the wall of the saloon

where it was hanging in accordance with law, took it away and locked it up in a safe. The licensee closed his place of business and reported the situation to the local board, which, after some investigation, concluded that the act of the execution bailiff in taking down and carrying away the license certificate was unauthorized. The board, therefore, granted the licensee written permission to conduct his business until the license certificate was returned to him or he had obtained a duplicate of same, or until further action of their board. This act on the part of the local board was approved by the state board.

"Will you, upon the above state of facts, kindly advise this board whether or not a saloon license certificate issued to a licensee as evidence that he had been found qualified to conduct a saloon, can be levied upon as personal property apart from the entire business of the licensee? Also whether or not, if you find a saloon license certificate under such circumstances can be levied upon, the execution officer has the right to take down and remove from the place of business the certificate without bringing the entire business of the licensee under the control of the court? Also, if you find that such license certificate has sufficient of a property nature to be levied upon and to be removed from the wall of the saloon, together with only a part of the property of the licensee, whether or not such license certificate can be offered for sale and sold by the officer separate from that part of the business assets and property remaining in possession of the licensee not levied upon.

"While the individual case cited is of small concern the principle involved is of very material concern to the operating of this department and the administration of the licensing law, and we will be glad to have your opinion as requested above."

Section 10417, G. C., in reference to the requisites of an execution issued by a justice of the peace, provides in part as follows:

* * * * * * * * * *

"1. If it be a case in which the defendant cannot be arrested, it must direct the officer to collect the amount of the judgment out of the personal property of the debtor, and pay it to the party entitled thereto;

"2. If it be a case in which any of the judgment debtors are certified on the docket as surety, it shall command the money to be made of the personal property of the principal debtor, and for want thereof, of the personal property of the surety. In such cases the personal property of the principal, subject to execution within the jurisdiction, shall be exhausted before any of the property of the bail can be taken in execution;"

Section 10490, G. C., provides as follows:

"The provisions of title four, part third, of the statutes, in their nature applicable to proceedings, before justices, and in respect of which no special provision is made in this title shall apply thereto."

and section 11655, G. C., which is found in title 4, part 3, of the General Code, provides as follows:

"Lands and tenements, including vested interests therein, permanent leasehold estates renewable forever, and goods and chattels, not exempt

by law, shall be subject to the payment of debts, and liable to be taken on execution and sold as hereinafter provided."

Further sections of the same chapter relative to execution are limited in their terms to "goods and chattels," viz.: 11657, 11664, 11666, 11667, 11669 and 11670.

Since a license to engage in the business of trafficking in intoxicating liquors is clearly not within the other enumerated classes of property subject to sale on execution for the payment of debts, it remains only to be determined if such license is within the meaning of the terms "personal property" or "goods and chattels" as herein used.

Section 37 of the license law, section 1261-52, G. C., 103 O. L., 231, provides as follows:

"Upon the death of a licensee or of any person who has an interest in a license, such a partner or member of an association of persons or otherwise, the interest of the decedent shall be disposed of by the administrator or the executor under the direction of the probate court without delay. The surviving member or partner, members or partners (or if there be no survivors in interest then the relict of the deceased, or if there be no relict then the child or children), paying to the said administrator or executor such an amount and upon such terms as the court may direct, shall have the right to assume the interest of said decedent providing that notice is given of such intention to the probate court within thirty days after the death of the decedent. If a license or an interest therein shall pass by descent or otherwise to one who cannot qualify under the law as licensee, or if the survivor or relict or child or children, as the case may be, shall not in the time prescribed elect to assume said decedent's interest in the license, or if said survivor or relict or child or children, as the case may be, does not comply with the terms fixed by the court, the probate court shall order the license as a whole sold, without delay but after proper notice given by publication, and shall order the proceeds distributed to the survivors in the ownership of the license, if there be such, and the executor or administrator of the decedent, according as their interest may appear, providing, however, that the purchaser of the license shall be duly qualified under the law, and provided further that the said purchaser shall have filed the application required by law of an original applicant for a license.

"If all the conditions have been complied with, and if the applicant is qualified by law, the county licensing board shall, upon proper certificate from the probate court and without fee, transfer the license to the purchaser thereof for the remainder of the license year. The said purchaser shall have all the rights and obligations of the original licensee under said license.

"Pending the settlement in the probate court, the executor or administrator may continue the business upon notice to the county licensing board that such is his intention, but within three days said executor or administrator must file an application in all respects as is required of an original applicant, except that no fees shall be required. And if said executor or administrator does not possess the qualifications required by law, the probate court may appoint some person who has such qualifications to serve as trustee of the license pending said settlement. If there are survivors in interest in the license, said survivors shall have the privilege of continuing said business until the settlement in the probate court has been effected.

"In case the survivor continues in temporary charge of the business, or in case the executor or administrator continues the business, accountings

shall be made to the probate court of the business done in the interim, and distribution shall be made to the decendant's estate and to the survivors in interest, as the law and justice shall require.

"If a guardian or a receiver or other officer of a court shall be appointed for a licensee or for one holding an interest in a license, or if in any way a licensee's business shall come under the control of any court in the state, the said license or interest therein shall be treated by the court as personal property and the purchaser at any sale shall have all the privileges and duties of a purchaser in the case of the death of a licensee, as provided for herein.

"In all cases the court shall, before ordering a sale or an assumption of a license, appoint three appraisers to appraise said license and the interest of the licensee therein, which said appraisers shall be sworn to appraise said interest according to its true value. Any creditors of the deceased or of the owner of the license shall have all rights with reference to the appraisement or sale and the distribution of the assets as any creditor has with reference to any personal property left by any decedent. No license shall be sold or assumed for a sum less than two-thirds of the appraisement. When the articles of partnership in force at the death of a partner, or when the will of a deceased licensee or co-licensee provides for a different mode of settlement of the deceased person's interest from that provided for herein or dispenses with appraisement and sale, or either, then the interest of the deceased shall be settled in accordance with said articles or said will, and appraisement or sale may be dispensed with providing the disposition is otherwise in accordance with law.

"So far as applicable, and so far as is not inconsistent herewith, the laws of Ohio concerning the disposition of the personal estate of a deceased person shall be applied."

While it is here declared that under certain conditions and circumstances a license or an interest therein shall be "treated by the court as personal property" and that so far as not inconsistent with the license law, the law governing the disposition of personal estate shall be applied to licenses of deceased licensees, it is no where in the license law specifically stated that licenses shall be or are personal property.

Indeed, a careful reading of section 1261-52, G. C., supra, will disclose the exercise of some degree of care on the part of the legislature to avoid just such statement. If it had been the purpose to put licenses in the class of personal property, it seems that all that is aimed at in that section could have been effectively accomplished with the simple declaration that licenses shall be regarded as personal property and in the event of the death of the owner thereof, or any interest therein, the same might be taken over at the appraised value thereof by the heirs of the deceased or the survivors in interest, or the same immediately sold as other personal property, provided in every case that the purchaser taking over or purchasing the same should have the qualifications of a licensee.

It necessitates no argument to support the proposition that if a saloon license is within the meaning of the term "goods and chattels," and subject to levy and sale on execution, it is, therefore, "personal property." If a saloon license is personal property, it must be subject to that provision of section 2 of article XII of the constitution, which requires that "laws shall be passed taxing by uniform rule * * * all real and personal property according to its true value in money."

It could hardly be maintained that such a license is subject to assessment and taxation, as a stock of merchandise. A saloon license is a mere privilege, a fran-

chise. I can conceive no substantial distinction between the license to traffic in intoxicating liquors and a corporate franchise, or the privilege of being a corporation, for the purposes of the present consideration.

A license is defined in the case of State v. Hipp, 38 O. S., 199, as follows:

> "A license is a permission granted by some competent authority to do an act which, without permission, would be illegal."

If a saloon license bears an analogy to a corporate franchise such as I have above suggested, it will, of course, be subject to the same rules with reference to the determination of the question, as to whether or not it is property, as such corporate franchise has by the courts of the state been subject.

The supreme court in considering the question whether a corporate franchise was properly subject to taxation, in the case of Bank v. Hines, 3 O. S., 1, 8-9, made the following observations:

> "Does a corporate franchise, in sober truth and reality, possess the essential qualities of property? It is said that the corporate franchise of a bank, conferring a peculiar legal capacity, and the high function of making and circulating paper money, is valuable—indeed, a thing of real value. The right of suffrage is esteemed valuable; a public office, with its emoluments, is valuable; *a license to keep a tavern,* as formerly granted in this state, or *a license* to carry on any special business, which is prohibited without a special grant of authority from the government, may be valuable; and a right to either of these things may be asserted and maintained in a court of justice, *yet neither of them possess the essential qualities which constitute property.* Our right to the free use and enjoyment of things which are in common, such as air, light, water, etc., is valuable; and our right to the free use of the public highways, and to many of the privileges and advantages derived from the government, may be valuable, and may be maintained by legal process. Yet none of these things come within the denomination of property. *Those things which constitute the subject-matter of private property are such as the owner may exercise exclusive dominion over in the use, enjoyment and disposal of them without any control or diminution, save only by the laws of the land.* 1 Wend. Bla., 138. It is a fundamental principle, that "property, considered as an exclusive right to things, contains not only a right to use those things, but a right to dispose of them either by exchanging them for other things, *or by giving them away to any other person, without any valuable consideration in return, or even of throwing them away, which is usually called relinquishing them.* Rutherford's Institutes, 20 Puffendorf, chap. 9, b. 7.
>
> "It is said that capability of alienation or disposal, either by sale, devise, or abandonment, is an essential incident to property. 2 Kent. Com. 17.
>
> "A corporate franchise, therefore, being a mere privilege, or grant of authority by the government, is not *property of any description,* and consequently not subject to taxation under the above provision of the constitution."

This case was cited with approval in the case of Baker v. Cincinnati, 11 O. S., 450, in holding that a license fee for theatrical exhibitions imposed by the municipality was not in violation of any provisions of the constitution restricting the power of taxation vested in the general assembly. The effect of the holding in this case was that a license of theatrical exhibitions was not property and that therefore, the license fee exacted therefor was not a tax. No distinction

is suggested as between a saloon license as granted at present under the statute of the state of Ohio and the class of licenses under consideration in this case granted by the city of Cincinnati to persons conducting theatrical exhibitions.

In the case of Telegraph Co. v. Mayer, 28 O. S., 521, it is held in the third branch of the syllabus, that:

> "The privilege that a foreign corporation enjoys by legislative consent of exercising its corporate powers, and of carrying on its business within the state, is not property within the meaning of article 12, section 2 of the state constitution."

In 17 Cyc. 947, the rule is laid down as follows:

> "A franchise, being an incorporeal hereditament, cannot, upon the settled principles of the common law, in the absence of statute, be seized and sold under a *fieri facias*."

If a saloon license is not "goods and chattels" within the meaning of those terms, as found in section 11655, G. C., supra, then there is no specific statute in Ohio making such license subject to execution and under the rule stated in 17 Cyc., 947, supra, such license would not be at common law so subject to sale.

The decisions of the state courts and those of the federal courts are apparently not in harmony as to whether a liquor license is property subject to sale on execution.

In Porter v. Johnson, 96 Ga., 145, it is held:

> "3. Where a licensed retailer of spirituous liquors dies pending the term for which the license was granted, such license is not assets of the estate of the deceased in the hands of his administrator nor can the latter legally continue the business under the license for the unexpired term covered by it."

In the case of Blumenthall's Petition, 125 Pa. St., 412, it is held:

> "The right to sell liquors under a license granted by the state is personal to the licensee, is not assignable, does not pass to the personal representatives, and, therefore, cannot be transferred unless expressly authorized by an act of the assembly."

In Grimm's Estate, 181 Pa. St., 233, it is said:

> "A liquor license is a personal privilege which ends with the life of the licensee; it is not assignable by him, does not go to his personal representatives, and is not an asset of his estate."

A similar holding was made in the case of Breen's License, 2 Pa. Dist. Rep., 651, quoting from Randenbusch's case, 120 Pa., 328.

In the case of Ulrich's License, 6 Pa. Dist. Rep., 408, U. agreed to transfer license to B. Public notice of transfer for ten days was required. During the interval a creditor of U. had execution levied upon U.'s interest in the license. The court overruled an objection made to the allowance of transfer after levy, saying:

> "A liquor license could not be levied upon and sold in the ordinary way, because the sheriff had no power to make title to the purchaser. The

original licensee could not transfer unless the court approved and unless a petition and bond were presented by the proposed transferee in accordance with law. To hold that the sheriff might disregard these statutory requirements, and by virtue of a levy might convey to a purchaser an enforceable right, would be equivalent to a decision that the sheriff could sell what the debtor never had and by this means could override the court's discretion and force upon the quarter sessions a person who might be altogether unfit."

In the case of Koehler v. Olsen, 22 N. Y. Sup., 677, the court held:

"A liquor license, being assignable only with the consent of the board of excise (laws 1892, c. 401, sec. 26) is not property which can be reached by a creditor's action."

The statute under consideration in this case provided that:

"The board of excise may * * * grant written permission * * * to sell, assign, or transfer such license during the term for which it was granted."

The court in the opinion said the license was a personal privilege which was not subject to transfer or assignment without the consent of the board and the interest of the licensee therein was not property which could be reached by a creditor's action as the court has no power to enforce a transfer.

This action was brought in the form of a creditor's bill, as stated in the opinion, for the reason and upon the ground that the license and other property sought to be reached was not then subject to levy and sale on execution.

In the case of McNeely v. Wetz, 166 N. Y., 124, in which levy was made upon a liquor tax certificate under the New York statutes, the court said:

"The judgment creditors and their representative, the sheriff, took nothing by virtue of the execution and the attempted levy thereunder, because a liquor tax certificate is not subject to levy and sale under execution, at least unless a warrant of attachment has been issued and a levy made by virtue thereof (Code of Civ. Proc., Sec. 648). It is a mere chose in action incapable of seizure and delivery by the sheriff. * * * It does not come within the description of 'personal property bound by execution' as laid down in section 1405 of the Code of Civil Procedure, which provides that "the goods and chattels of the judgment debtor * * * and his other personal property * * * are bound by execution? * * * While the certificate was personal property, it was not a chattel, but an intangible right."

In the case of Semple v. Flynn, 10 Atl., 177, it is held:

"A saloon keeper's license is personal to the holder, and cannot be delegated, assigned, nor committed to the care of any receiver by the court."

Thus the decisions of the state courts of New York and Pennsylvania have apparently been uniform to the effect that a liquor license or a license to engage in the business of the sale of intoxicating liquors is not in any sense property subject to levy and sale on execution and are in harmony with the decision of the supreme court of this state in the case of Bank v. Hines, 33 O. S., 1, supra, holding that the corporate franchise of a banking company was not property. On the contrary, in the case of in re Broddine, 93 Fed., 643, the court held:

"Under the laws and regulations in force in the city of Boston, the right to apply for the renewal of a license to sell liquor, held by a bank-

rupt, passes to his trustee as assets in bankruptcy and may be disposed of by the latter for the benefit of the estate."

It is also held in the case of Becker, 98 Fed., 407:

"Where the laws of the state permit the transfer of a license for the sale of intoxicating liquors, subject to the approval of the buyer by the licensing authority, and such licenses have an actual money value for the purpose of sale and transfer, the right to sell a license of this kind will vest in the trustee in bankruptcy of the licensee, for the benefit of the estate, and the bankrupt will be required to execute the instruments necessary to effectuate the sale."

The second syllabus in the case of Fisher v. Cushman, 103 Fed., 860, 51 L. R. A., 292, is as follows:

"A liquor license which is by law transferable to any person who is satisfactory to a board of police commissioners, though it may be destroyed without compensation by subsequent legislation, is 'property' within the meaning of the bankrupt act, Sec. 70 (30 Stat. at L. 565, 566), which provides that a bankrupt must transfer 'property which, prior to the petition, he could by any means have transferred.'"

The legal conditions under which liquor licenses could be transferred in the city of Boston, under consideration in this case, were analogous to the provision of statute with reference to the transfer of liquor licenses in this state at the present time and the question at issue was whether or not the license or its proceeds were under the control of the district court for the purpose of the action which it took in reference thereto. That is to say, whether it was "property which, prior to the petition he (the bankrupt) could by any means have transferred or which might have been levied upon and sold under judicial process against him." The court in this case did not choose to put its decision upon the ground that a liquor license was property subject to levy and sale on execution, but rather that it was "property which, prior to the filing of the petition of the bankrupt, could by any means have been transferred." The court in the course of its consideration observed:

"* * * that there may be property which cannot be sold under judicial process, and that there may be property of that character which passes for the benefit of creditors."

The court on this basis held that the licensee might be compelled by the trustee to execute such endorsement upon the license as was necessary under the statute to transfer the same and ordered the same sold for the benefit of the creditors of the bankrupt.

The question here involved was considered in the case of Distilling Co. v. Hornstein, unreported, decided by the common pleas court of Cuyahoga county, in which it was held that a saloon license was subject to levy and sale on execution. So far as I am aware, no other court in this state has passed upon the question.

The court summarized its conclusion in the following statement:

"I am of the opinion that under our law it is the policy of the state liquor license commission and the policy of our state to recognize that as property and to be transferred as property. That being so, if the sheriff could get this license in his possession, he could make a levy upon that as he could upon anything else."

It seems that the court here perhaps overlooked a distinction which might well be urged. The paper which may be seized by the officer is only the tangible evidence of an intangible right. The paper writing evidencing the right of a licensee to engage in the sale of intoxicating liquors is certainly not so clearly the evidence or representative of a property right as a certificate of corporate stock, yet the latter is subject to attachment only by virtue of special statutory provision in reference thereto (Sec. 8673-13, G. C., et seq.) and is subject to taxation solely by reason of special reference thereto rather than as coming within the general term "property" as found in section 2 of article XII of the constitution of this state. The seizure of the paper does not confer upon any one the right to exercise the privilege of which it is the evidence, nor does it deprive in the least the licensee of the power to exercise the privilege conferred upon him of which it is the evidence. Nor is there any power or authority in the levying officer to restrict the privilege of the licensee. It would not be argued that if the paper license of any licensee were destroyed by fire or other casualty, the licensing authority would not be fully authorized to deliver to him proper evidence of the license granted to him in the absence of any disqualification, and so long as the licensee has or could procure any stock from which to make sales, no power could restrain such sale. If, on the other hand, he could not procure any liquor to sell, that would not of necessity curtail his privilege so long as the license remained unrevoked or unsurrendered. If the privilege followed the paper evidence thereof in to the hands of whomsoever it might fall, and it was of any value whatsoever, it might be contended with much force that it was property subject to execution, but this is clearly not so, as above pointed out.

So long as the licensee lives, is not under disability or legal disqualification, and his business does not come under the control of a court, under the provisions of section 37 of the license code above quoted, no power exists to deprive him of the privilege unless he chooses to make application for transfer. This, it is held by the federal courts, the licensee may be compelled to do in bankruptcy proceedings, but I am not inclined to the view that a levying officer or court of this state could compel the licensee to make such application for the transfer to the purchaser.

Though it is provided that the license shall, in certain cases, be treated as personal property, it will be noted it is only in those cases in which the licensee becomes incapacitated to exercise the privilege conferred by the license and that the transfer of the license is essential to the protection of the value of the business that such provision is made. The express provision being limited in its terms to the particular class of cases above referred to, gives rise to the inference, at least, that its application to such cases is exclusive. I am further inclined to the view that property subject to sale on execution must in every case be property within the meaning of the constitutional provision of section 2, article XII, requiring all property to be taxed by a uniform rule at its true value in money. It has not yet been suggested that a liquor license is subject to taxation as property and it is not believed that such a position is at all tenable. On the contrary, I am of opinion that a liquor license may be sold and transferred in this state only in the manner and under the conditions for which there is specific statutory provision and that it may not, therefore, be levied upon and sold upon execution issued upon judgment against the licensee.

Whether a saloon license may be reached by and subjected to sale under proceedings in aid of execution, is not here submitted, has not been considered and no opinion thereon is herein expressed.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1331.

COUNTY COMMISSIONERS—DUTY OF ALLEN COUNTY COMMISSIONERS TO MAINTAIN MAIN STREET BRIDGE ACROSS OTTAWA RIVER IN CITY OF LIMA AND REPLACE IT WHEN NECESSARY.

Under the facts as submitted, it is the duty of the county commissioners of Allen county to maintain the Main street bridge across the Ottawa river in the city of Lima and to replace the present structure with a new bridge should the necessity for such action arise.

COLUMBUS, OHIO, March 8, 1916.

HON. ORTHA O. BARR, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—I have your communication of November 30, and December 30, 1915, and February 26, 1916, relating to the duty of the county commissioners to maintain the Main street bridge across the Ottawa river in the city of Lima and to replace the present structure with a new bridge, should the necessity for such action arise. The facts as submitted to me in your several communications are quite involved and while not all material, in my opinion, I deem it proper to set them forth in detail.

Originally the St. Johns road came into the city of Lima from the southeast and ran in a northwesterly direction until it intersected what is now Main street about one hundred and thirty-three feet south of what is now Circular street. The Wapakoneta road originally came into the city of Lima from the southwest and ran in a northeasterly direction, crossing Kibby street at a point where Greenlawn avenue and Kibby street now intersect and continuing in practically a straight line to what is now Main street at a point almost opposite the point where the St. Johns road entered what is now Main street. A township line road between Shawnee and Perry townships, established about 1841, intersected the Wapakoneta road at a point about where Kibby street intersects Greenlawn avenue. Greenlawn avenue is either an extension of this township line road, or, what is more probable, the township line road was named Greenlawn avenue. The original St. Johns road has been vacated between Central avenue and Main street and traffic on this road coming into the city is now diverted to Central avenue. The greater part of the old Wapakoneta road between Metcalf street and Main street has been vacated. When this road was vacated traffic coming into the city on the township line road—now Greenlawn avenue—was compelled to use Kibby street to Main street and Main street from Kibby street into the central portion of the city. Later Greenlawn avenue, which was the township line road, was closed through the Lake Erie & Western Railroad Company's yards and through the grounds now occupied by the Lima Locomotive Works Company's plant. The township line road between Perry and Shawnee townships is a county road, under the jurisdiction of the county commissioners, and traffic coming into the city over this road was first diverted from the original road over Kibby street to Main street and later over Fourth street to Main street, and at the present time the only route over which those coming into the city on this township line road can travel is over Fourth street to Main street and north on Main street into the central portion of the city. The intersection of Kibby street and Greenlawn avenue marks the corner of Shawnee, Perry, Bath and German townships, as they originally existed. The bridge about which you inquire is on Main street and spans the Ottawa river at a point several blocks north of the point where the original St. Johns and Wapakoneta roads formerly intersected what is now Main street. That part of the St. Johns road between Central avenue and Main street was vacated in 1882. What is now Central avenue, extending northward from

the southeast end of that part of the St. Johns road vacated in 1882 was opened in 1855 as a county road as far north as the Ottawa river. That part of the original Wapakoneta road between Kibby street and Main street was vacated in 1877 and the part of this road between Metcalf street and Kibby street was vacated in 1883. Metcalf street was opened as a county road from the Wapakoneta road northward crossing the Ottawa river in 1880. Greenlawn avenue was vacated from Fourth street northward to a point crossing the Lake Erie & Western Railroad Company's tracks in 1912. All of the vacations referred to by you and mentioned above were made by the councils of the village or city of Lima and you state that they were made when the various plats of territory were accepted and such territory annexed to the city.

You further state that you believe that the Wapakoneta and St. Johns roads were originally established as state roads, and that they existed as such at the time the territory traversed by them was annexed to the village or city of Lima, as the case may be; and that Main street at the point of intersection of the Wapakoneta and St. Johns roads was a state road and that this state road extended northward along the present route of Main street from the point of intersection of the Wapakoneta and St. Johns roads across the Ottawa river to a point known as Elm street. The present bridge across the Ottawa river was constructed by the city of Lima in the year 1888 and the city has since maintained the same.

It should first be observed that the rule is well established in Ohio that a municipal council has no power to vacate that part of a county road which lies within the municipality.

Railroad Co. v. Cummins, 53 O. S., 683.
Railroad Co. v. Akron, 6 N. P. N. S., 81.

In the case last cited above the decision of the court contains an exhaustive review of the authorities, and from an examination of the same it is apparent that the same rule must be applied to state roads, and that a municipal corporation has no power to vacate that part of a state road which lies within the municipality.

Sections 7557 and 2421 of the General Code are the sections relating to the duties of county commissioners as to bridges in villages and cities.

Section 7557, G. C., reads as follows:

"The county commissioners shall cause to be constructed and kept in repair, as provided by law, all necessary bridges in villages and cities not having the right to demand and receive a portion of the bridge fund levied upon property within such corporations, on all state and county roads, free turnpikes, improved roads, transferred and abandoned turnpikes and plank roads, which are of general and public utility, running into or through such village or city."

Section 2421, G. C., reads as follows:

"The commissioners shall construct and keep in repair necessary bridges over streams and public canals on state and county roads, free turnpikes, improved roads, abandoned turnpikes and plank roads in common public use, except only such bridges as are wholly in cities and villages having by law the right to demand, and do demand and receive part of the bridge fund levied upon property therein. If they do not demand and receive a portion of the bridge tax, the commissioners shall construct and keep in

repair all bridges in such cities and villages. The granting of the demand, made by any city or village for its portion of the bridge tax, shall be optional with the board of commissioners."

In an opinion rendered by my predecessor, Hon. U. G. Denman, to Hon. E. E. Sayles, prosecuting attorney of Sandusky county, on October 28, 1910, and found at page 781 of the Attorney General's Report for 1910-1911, it was held, in effect, that no city or village now has a right to demand and receive any part of the bridge fund levied upon property therein. The following is quoted from the opinion in question:

"I beg to advise that section 2824 of the Revised Statutes provided for certain cities receiving part of the bridge fund from the county. This section has been divided and written into the General Code as sections 5635 and 5636. Neither of these sections now provide for paying any portion of the bridge fund to any city, I note from the table of revision in the General Code that that portion of old section 2824, R. S., which provided for certain cities receiving a portion of the bridge fund, was considered special legislation by the codifying commission and was omitted in the General Code.

"Section 2421 of the General Code makes a reference to cities which receive a part of the bridge fund, but I am unable to find anywhere in the General Code any provision for any city to receive any portion of such fund, and I am, therefore, of the opinion that the city of Fremont is not entitled to demand and receive any portion of the bridge fund."

I concur in the view expressed by my predecessor and it follows that sections 7557 and 2421, G. C., are of general application and require the county commissioners to construct and keep in repair all necessary bridges over streams and public canals on all state and county roads, free turnpikes, improved roads, transferred and abandoned turnpikes and plank roads in common public use, or which are of general and public utility, without regard to whether the bridges are located within or without municipal corporations.

In view of the sections of the General Code above quoted and of the construction which must necessarily be placed thereon, it is my opinion that it is the duty of the county commissioners of Allen county to maintain the bridge referred to by you, and to replace the present structure with a new bridge should the necessity for such action arise. This conclusion rests on the fact that Main street at the point where it crosses the Ottawa river was established as a state road, and the duty of the county commissioners under sections 7557 and 2421, G. C., arises from that fact. Should further investigations on your part alter your conclusion as to the original establishment as a state road of what is now Main street, then the opinion herein expressed would not apply.

It should be added that the road referred to in sections 7557 and 2421, G. C., as a state road is a road which existed as such prior to the going into effect of the Cass highway law, which law provides a new classification for roads.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1332.

STATE HIGHWAY COMMISSIONER—IF HE IMPROVES INTERCOUNTY HIGHWAY OR MAIN MARKET ROAD WITHOUT CO-OPERATION OF COUNTY COMMISSIONERS OR TOWNSHIP TRUSTEES, COST OF LAND NECESSARY FOR NEW RIGHT OF WAY, PAID BY STATE.

Where the state highway commissioner is improving an intercounty highway or main market road without the co-operation of county commissioners or township trustees, and it is necessary to acquire or appropriate lands for a new or for additional right of way, it is the duty of the state highway commissioner to make payment for the same, which payment is to be regarded as a part of the cost and expense of the improvement, and under such circumstances the county commissioners or township trustees are without authority in the premises and cannot be charged with any duty in reference to the furnishing of the additional land that may be needed.

COLUMBUS, OHIO, March 8, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of February 23, 1916, in which you request my opinion as to whether the state highway department must, of necessity, pay for the purchase of right-of-way when the same is needed and where the state is improving an intercounty highway or main market road without co-operation with either a county or a township.

The first sentence of section 194 of the Cass highway law, section 1201, G. C., reads as follows:

> "If the line of the proposed improvement deviates from the existing highway, or if it is proposed to change the channel of any stream in the vicinity of such improvement, the county commissioners or township trustees making application for such improvement must provide the requisite right of way."

The portion of section 1201, G. C., not quoted above, relates to the procedure for condemnation in those cases where the commissioners or trustees are unable to agree with the owner or owners of the land needed.

Section 195 of the Cass highway law, section 1202, G. C., reads as follows:

> "If the state highway commissioner proposes to improve an intercounty or main market road without the co-operation of the county commissioners or township trustees, and it is necessary as a part of the proposed improvement of the said highway, bridge or culvert to acquire or appropriate lands or property, and the state highway commissioner is unable to agree with the owner or owners of such land or property as to the value thereof, the said highway commissioner may proceed to condemn such land or property in the manner hereinbefore fixed for county commissioners and township trustees. The state highway commissioner may condemn materials for road purposes in like manner."

A comparison of the provisions of sections 1201 and 1202, G. C., can leave no doubt that in those cases where the state highway commissioner is proceeding without the co-operation of the commissioners or trustees, it is his duty to provide any new or additional right-of-way that may be needed. Indeed, it would be foreign

to the idea of non-co-operation if the state highway commissioner might require local authorities to furnish right-of-way, and if the commissioners or trustees should furnish right-of-way at the expense of the county or township it could not be said that they were not co-operating in the making of the improvement.

I, therefore, advise you, in answer to your specific inquiry, that where the state highway commissioner is improving an intercounty highway or main market road without the co-operation of county commissioners or township trustees, and it is necessary to acquire or appropriate lands for a new or for additional right-of-way, it is the duty of the state highway commissioner to make payment for the same, which payment is to be regarded as a part of the cost and expense of the improvement, and under such circumstances the county commissioners or township trustees are without authority in the premises and cannot be charged with any duty in reference to the furnishing of the additional land that may be needed.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1333.

APPROVAL OF ORDER, STATE BOARD OF HEALTH TO GERMAN-AMERICAN SUGAR COMPANY AT PAULDING, IN RE: POLLUTION OF FLAT ROCK CREEK.

COLUMBUS, OHIO, March 8, 1916.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Enclosed herewith you will find an order of the state board of health to the German-American Sugar Company at Paulding, in re: Pollution of Flat Rock creek.

I have examined said order, which is issued under section 1251 of the General Code, and find same to be regular.

It is my opinion that it should be approved and I have, therefore, approved same and am transmitting order to you for your approval.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1334.

APPROVAL OF AMENDMENT OF ORDER, STATE BOARD OF HEALTH TO CITY OF XENIA, OHIO, TO INSTALL SEWERS AND SEWAGE TREATMENT PLANT.

COLUMBUS, OHIO, March 8, 1916.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Enclosed herewith you will find an amendment of an order of the state board of health to the city of Xenia, Ohio, to install necessary sewers and a new sewage treatment plant to correct certain conditions complained of as set forth in a resolution adopted by the board of county commissioners of Greene county, Ohio.

I have examined said amendment and find same to be regular, and it is my opinion that it should be approved. I have, therefore, approved the same under the provisions of section 1251 of the General Code and am transmitting the same to you for your approval.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1335.

APPROVAL OF TRANSCRIPT, BOND ISSUE FOR ROAD IMPROVEMENT IN GEAUGA COUNTY, OHIO.

COLUMBUS, OHIO, March 8, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE: Burton-Bloomfield road improvement bonds of Geauga county in the sum of $11,000, being twenty-two bonds $500.00 each, dated August 2, 1915, and payable August 2, 1916, to August 2, 1920."

I have examined the transcript of the proceedings of the county commissioners and other officers of Geauga county relative to the issuance of the above described bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the General Code of Ohio.

I am, therefore, of the opinion that said bonds, drawn in accordance with the form presented, when properly executed and delivered, will constitute valid and binding obligations of said Geauga county.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1336.

APPROVAL, TRANSCRIPT OF BOND ISSUE FOR CITY OF LIMA, OHIO.

COLUMBUS, OHIO, March 8, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE:—Bonds of the city of Lima, Ohio, in the sum of $15,000.00, for the purpose of providing funds to pay the cost and expense of equipping and furnishing the fire department in said city, being thirty bonds of $500.00 each, dated April 1, 1915, due and payable April 1, 1916, to October 1, 1930, inclusive."

I have examined the transacript of the proceedings of the council and other officers of the city of Lima, Ohio, relative to the issuance of the above bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the General Code of Ohio.

I am, therefore, of the opinion that said bonds, drawn in accordance with the form presented, when properly executed and delivered, will constitute valid and binding obligations of said city of Lima.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1337.

APPROVAL OF TRANSCRIPT OF BOND ISSUE FOR ROAD IMPROVEMENT IN TRUMBULL COUNTY, OHIO.

COLUMBUS, OHIO, March 10, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE: Trumbull county road improvement bonds in the amount of $24,500.00 for the purpose of providing a fund for the improvement of a certain road in Liberty township of said county, being forty-nine bonds of the denomination of $500.00 each, bearing interest at five per cent. per annum, payable semi-annually and falling due from April 1, 1917, to October 1, 1921, inclusive."

I have examined the transcript of proceedings of the commissioners and other officers of Trumbull county relative to the issuance of the above bonds; also the bond and coupon form attached thereto, and I find the same regular and in conformity with the General Code of Ohio.

I am, therefore, of the opinion that said bonds drawn in accordance with the form submitted, when properly executed and delivered, will constitute valid and binding obligations of said Trumbull county.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1338.

ARTICLES OF INCORPORATION—THE TERMINAL HOTELS COMPANY—APPROVED.

Purpose clause of the proposed articles of incorporation of the Terminal Hotels Company, approved.

COLUMBUS, OHIO, March 10, 1916.

HON. C. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*
DEAR SIR:—I have your letter of March 7, 1916, with enclosures, requesting my opinion as follows:

"We are submitting proposed articles of incorporation of 'THE TERMINAL HOTELS COMPANY,' check for $10.00, and a ten cent internal revenue stamp, and would like an opinion as to whether or not the purpose clause in the articles of incorporation is dual in character."

The purpose clause of the proposed articles of incorporation of The Terminal Hotels Company, referred to in your enquiry, is as follows:

> "Said corporation is formed for the purpose of constructing and maintaining a building or buildings to be used for hotels, store rooms, offices, warehouses and factories, with the right to acquire by purchase or otherwise and the right to hold, own, mortgage, pledge, assign, transfer, sell and dispose of all the real and personal property, tangible and intangible, necessary or convenient for use in connection with and in carrying on the business herein mentioned, or any part thereof, and doing all things necessarily or conveniently incident to said business."

The purpose clause above quoted was evidently taken from the language of section 10210 of the General Code, which is as follows:

> "A corporation organized for the purpose of constructing and maintaining buildings to be used for hotels, store rooms, offices, warehouses, and factories, may acquire by purchase or lease, and hold, use, mortgage and lease all such real estate or personal property as is necessary, for such purpose. But no such corporation shall acquire or mortgage any real or leasehold estate, or lease it for a period exceeding, with all privileges of renewal, the term of five years, without the consent of the holders of two-thirds of the stock, obtained at a meeting called for that purpose, written notice of which was given to each stockholder, either personally, or deposited in the postoffice, properly addressed and duly stamped, not less than ten days before the day fixed for such meeting. Nothing herein shall authorize corporations to buy and sell, or to deal in real estate for profit."

Although the above section does not in terms contain authority to organize a corporation, yet it apparently recognizes the right to organize a corporation with such purpose clause, otherwise the restrictions and regulations prescribed for such a corporation would be useless. A careful examination of the language of the purpose clause under consideration discloses that the real purpose for which the corporation is organized is that of constructing and maintaining buildings. The words, "to be used as hotels, store rooms, offices, warehouses and factories," are simply descriptive of the different kinds of buildings which the corporation may construct and maintain and limits rather than to enlarge the prior language of the purpose clause.

I am, therefore, of the opinion that the proposed articles of incorporation of The Terminal Hotels Company set forth a proper purpose clause and should be received and recorded by you.

I return the enclosures herewith.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1339.

APPROVAL TRANSCRIPT OF BOND ISSUE, VILLAGE OF EAST VIEW, OHIO.

COLUMBUS, OHIO, March 11, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

RE:—Village of East View bonds for the construction of water main in Birch avenue, amounting to $2,000.00, being four bonds of $500.00 each.

I have examined the transcript of the proceedings of the village council and other officers of the village of East View relative to the issuance of the above bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the provisions of the General Code of Ohio.

I am therefore of the opinion that said bonds drawn in accordance with the form submitted, when properly executed and delivered, will constitute valid and binding obligations of said village of East View.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1340.

APPROVAL, TRANSCRIPT OF BOND ISSUE OF VILLAGE OF EAST VIEW, OHIO.

COLUMBUS, OHIO, March 11, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE:—Village of East View bonds for grading, draining, paving and constructing sidewalks in Milverton road amounting to $18,000, being eighteen bonds of $1,000 each."

I have examined the transcript of the proceedings of the council and other officers of the village of East View relative to the issuance of the above bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the provisions of the General Code of Ohio.

I am therefore of the opinion that said bonds drawn in accordance with the form submitted, when properly executed and delivered, will constitute valid and binding obligations of said village of East View.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1341.

APPROVAL, TRANSCRIPT OF BOND ISSUE, VILLAGE OF EAST VIEW, OHIO.

COLUMBUS, OHIO, March 11, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Village of East View bonds for the construction of sewers in Milverton road amounting to $7,000.00, being fourteen bonds of $500.00 each."

I have examined the transcript of the proceedings of the council and other officers of the village of East View relative to the issuance of the above bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the provisions of the General Code of Ohio.

I am therefore of the opinion that said bonds drawn in accordance with the form submitted, when properly executed and delivered, will constitute valid and binding obligations of the village of East View.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1342.

APPROVAL, TRANSCRIPT OF BOND ISSUE, VILLAGE OF EAST VIEW, OHIO.

COLUMBUS, OHIO, March 11, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Village of East View bonds for the construction of water main in Malverton road amounting to $3,168.00, being one bond of $168.00 and six bonds of $500.00 each."

I have examined the transcript of the proceedings of the council and other officers of the village of East View relative to the issuance of the above bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the provisions of the General Code of Ohio.

I am therefore of the opinion that said bonds drawn in accordance with the form submitted, when properly executed and delivered, will constitute valid and binding obligations of said village of East View.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1343.

APPROVAL, TRANSCRIPT OF BOND ISSUE, VILLAGE OF EAST VIEW, OHIO.

COLUMBUS, OHIO, March 11, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Village of East View bonds for grading, draining, paving and constructing sidewalks in Amesbury road, amounting to $23,000.00, being twenty-three bonds of one thousand dollars each."

I have examined the transcript of the proceedings of the council and other officers of the village of East View relative to the issuance of the above bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the provisions of the General Code of Ohio.

I am therefore of the opinion that said bonds drawn in accordance with the form submitted, when properly executed and delivered, will constitute valid and binding obligations of said village of East View.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1344.

APPROVAL, TRANSCRIPT OF BOND ISSUE, VILLAGE OF EAST VIEW, OHIO.

COLUMBUS, OHIO, March 11, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Village of East View bonds for the construction of sewers in Amesbury road in the amount of $11,600.00, being one bond of $100.00 and 23 bonds of $500.00 each."

I have examined the transcript of the proceedings of the council and other officers of the village of East View relative to the issuance of the above bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the provisions of the General Code of Ohio.

I am therefore of the opinion that said bonds drawn in accordance with the form submitted, when properly executed and delivered, will constitute valid and binding obligations of said village of East View.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1345.

APPROVAL, TRANSCRIPT OF BOND ISSUE, VILLAGE OF EAST VIEW, OHIO.

COLUMBUS, OHIO, March 11, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Village of East View bonds for the construction of water mains in Amesbury road, in the amount of $3,535.00, being one bond of $35.00 and seven bonds of $500.00 each."

I have examined the transcript of the proceedings of the council and other officers of the village of East View relative to the issuance of the above bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the provisions of the General Code of Ohio.

I am therefore of the opinion that said bonds drawn in accordance with the form submitted, when properly executed and delivered, will constitute valid and binding obligations of said village of East View.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1346.

APPROVAL, TRANSCRIPT OF BOND ISSUE, VILLAGE OF SHAKER HEIGHTS, OHIO.

COLUMBUS, OHIO, March 11, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Village of Shaker Heights bonds for grading, draining, paving and constructing sidewalks in Marchmont road, amounting to $22,500.00, being forty-five bonds of $500.00 each."

I have examined the transcript of the proceedings of the council and other officers of the village of Shaker Heights relative to the issuance of the above bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the provisions of the General Code of Ohio.

I am therefore of the opinion that the said bonds drawn in accordance with the form submitted, when properly executed and delivered, will constitute valid and binding obligations of said village of Shaker Heights.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1347.

APPROVAL, TRANSCRIPT OF BOND ISSUE, VILLAGE OF SHAKER HEIGHTS, OHIO.

COLUMBUS, OHIO, March 11, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Village of Shaker Heights bonds for the construction of sewers in Marchmont road, in the amount of $12,245.00, being one bond of $245.00 and twelve bonds of $1,000.00 each."

I have examined the transcript of the proceedings of the council and other officers of the village of Shaker Heights relative to the issuance of the above bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the provisions of the General Code of Ohio.

I am therefore of the opinion that said bonds drawn in accordance with the form submitted, when properly executed and delivered, will constitute valid and binding obligations of said village of Shaker Heights.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1348.

APPROVAL, TRANSCRIPT OF BOND ISSUE, VILLAGE OF SHAKER HEIGHTS, OHIO.

COLUMBUS, OHIO, March 11, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Village of Shaker Heights bonds for the construction of water main in Marchmont road in the amount of $2,890.00, being one bond of $390.00 and five bonds of $500.00 each."

I have examined the transcript of the proceedings of the council and other officers of the village of Shaker Heights relative to the issuance of the above bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the provisions of the General Code of Ohio.

I am therefore of the opinion that said bonds drawn in accordance with the form submitted, when properly executed and delivered, will constitute valid and binding obligations of said village of Shaker Heights.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1349.

APPROVAL, TRANSCRIPT OF BOND ISSUE, VILLAGE OF SHAKER HEIGHTS, OHIO.

COLUMBUS, OHIO, March 11, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE:—Village of Shaker Heights bonds for grading, draining, paving and constructing sidewalks in Malvern road, amounting to $8,700.00, being one bond of $200.00 and seventeen bonds of $500.00 each."

I have examined the transcript of the proceedings of the council and other officers of the village of Shaker Heights relative to the issuance of the above bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the provisions of the General Code of Ohio.

I am, therefore, of the opinion that said bonds drawn in accordance with the form submitted, when properly executed and delivered, will constitute valid and binding obligations of said village of Shaker Heights.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1350.

APPROVAL, TRANSCRIPT OF BOND ISSUE, VILLAGE OF SHAKER HEIGHTS, OHIO.

COLUMBUS, OHIO, March 11, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE:—Village of Shaker Heights bonds for the construction of sewers in Malvern road in the amount of $2,774.00, being one bond of $274, and five bonds of $500 each."

I have examined the transcript of the proceedings of the council and other officers of the village of Shaker Heights relative to the issuance of the above bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the provisions of the General Code of Ohio.

I am, therefore, of the opinion that said bonds drawn in accordance with the form submitted, when properly executed and delivered, will constitute valid and binding obligations of the said village of Shaker Heights.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1351.

APPROVAL, TRANSCRIPT OF BOND ISSUE, VILLAGE OF SHAKER HEIGHTS, OHIO.

COLUMBUS, OHIO, March 11, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE:—Village of Shaker Heights bonds for the construction of a water main in Malvern road in the amount of $1,827.00, being one bond of $327.00 and three bonds of $500.00 each."

I have examined the transcript of the proceedings of the council and other officers of the village of Shaker Heights relative to the issuance of the above bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the provisions of the General Code of Ohio.

I am, therefore, of the opinion that said bonds drawn in accordance with the form submitted, when properly executed and delivered, will constitute valid and binding obligations of said village of Shaker Heights.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1352.

APPROVAL, TRANSCRIPT OF BOND ISSUE, VILLAGE OF SHAKER HEIGHTS, OHIO.

COLUMBUS, OHIO, March 11, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE:—Village of Shaker Heights bonds for grading, draining, paving and constructing sidewalks in Morley road in the amount of $21,750.00, being one bond of $250.00 and forty-three bonds of $500.00 each."

I have examined the transcript of the proceedings of the council and other officers of the village of Shaker Heights relative to the issuance of the above bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the provisions of the General Code of Ohio.

I am, therefore, of the opinion that said bonds drawn in accordance with the form submitted, when properly executed and delivered, will constitute valid and binding obligations of said village of Shaker Heights.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1353.

APPROVAL, TRANSCRIPT OF BOND ISSUE, VILLAGE OF SHAKER HEIGHTS, OHIO.

COLUMBUS, OHIO, March 11, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE:—Village of Shaker Heights bonds for the construction of sewers in Morley road in the amount of $9,337, being one bond of $337.00 and nine bonds of one thousand dollars each."

I have examined the transcript of the proceedings of the council and other officers of the village of Shaker Heights relative to the issuance of the above bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the provisions of the General Code of Ohio.

I am, therefore, of the opinion that said bonds drawn in accordance with the form submitted, when properly executed and delivered, will constitute valid and binding obligations of said village of Shaker Heights.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1354.

APPROVAL, TRANSCRIPT OF BOND ISSUE, VILLAGE OF SHAKER HEIGHTS, OHIO.

COLUMBUS, OHIO, March 11, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE:—Village of Shaker Heights bonds for the construction of water mains in Morley road, consisting of one bond of $248.00 and seven bonds of $500 each."

I have examined the transcript of the proceedings of council and other officers of the village of Shaker Heights relative to the issuance of the above bonds; also the bond and coupon form attached thereto; and I find the same regular and in conformity with the provisions of the General Code of Ohio.

I am, therefore, of the opinion that said bonds drawn in accordance with the form submitted, when properly executed and delivered, will constitute valid and binding obligations of said village of Shaker Heights.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1355.

COUNTY COMMISSIONERS—PROCEEDINGS OF JOINT BOARDS OF HANCOCK AND HARDIN COUNTIES FOR ROAD IMPROVEMENT, INVALID—EFFECT OF CASS HIGHWAY LAW ON PRIOR PROCEEDINGS.

Proceedings had by the joint board of county commissioners of Hancock and Hardin counties, prior to September 6, 1915, for the improvement of a county line road, known as the Garling road, are invalid, and the proceedings are, therefore, not saved by section 303 of the Cass highway law.

COLUMBUS, OHIO, March 11, 1916.

HON. JOHN E. BETTS, *Prosecuting Attorney, Findlay, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication of February 14, 1916, in which you request my opinion as to the legality of certain proceedings had by the joint board of county commissioners of Hardin and Hancock counties, and looking toward the improvement of a county line road known as the Garling road.

The petition for the improvement was filed with the county commissioners of Hancock county in December, 1913, and action was taken by the joint board of commissioners of the two counties in June, 1914. The improvement was projected under the provisions of house bill No. 544, 103 O. L., 198, amending sections 6926 to 6956, inclusive, of the General Code of Ohio. You transmitted to me a complete copy of the record of the action of the joint board of commissioners of Hancock and Hardin counties, relative to the road improvement in question, and you state that no other or further action was ever taken by the commissioners save as set forth in the copy of the record of proceedings forwarded to me. A number of defects in the proceedings are pointed out by you in your communication and certain other defects are apparent after an examination of the record.

Section 6930, G. C., provided that when the road proposed to be improved was along the county line between two or more counties, a copy of the petition certified to by the commissioners of the county in which the original was on file should be filed with the commissioners of each of the several counties along the line of the proposed road. In the case now under consideration the petition was filed with the commissioners of Hancock county and a copy of the same was filed with the commissioners of Hardin county, but such copy was not certified to by the commissioners of Hancock county.

Under sections 6926 and 6930 of the General Code, the several boards of county commissioners were required to go upon the line of the road described in the petition. It does not appear from the record submitted to me that this duty was ever performed by the boards of county commissioners of the two counties.

Section 6926, G. C., contained the following provision:

> "If, in their opinion, the public utility requires such road to be graded and improved, they shall determine whether the improvement shall be partly or wholly constructed of stone, gravel or brick, any or all, and what part or parts of such road improvement shall be of stone, gravel or brick, and enter their decision on their journal."

The record submitted to me does not show that the joint board ever made a finding that the public utility required the road described in the petition to be graded and improved. The record does not show any determination by the joint

board as to the kind of material to be used in the construction of the improvement. In fact, the record submitted to me makes no reference to the petition for the improvement. The record does not show the purpose for which the meeting of the joint board was held and the only reference to the improvement in question, indicating any action by the board, is contained in the following quotations from the record:

> "Moved by Glock, seconded by Breidenbach that Garling road be granted to start at the southwest corner of section 32, Madison township, Hancock county, Ohio, and run east on the county line to the first road east of the Mt. Olive church running south and there terminate, and Hardin county be permitted to make their assessments according to benefits. Vote: Deringer, yes; Breidenbach, yes; Glock, yes; Beck, no; Finsel, no; Orwick, yes. Motion carried.
>
> "Moved by Glock, seconded by Orwick that * * * L. R. Anspach be appointed to survey and superintend the Garling pike. All voted 'yea.' Motion carried."

You state that as a matter of fact the description of the road which was "granted" by the county commissioners is not the same as that contained in the petition, the road as granted being about a mile shorter than that described in the petition.

Section 6927, G. C., required that the commissioners should order that the improvement be made. The record submitted to me does not show that the commissioners ever made any such order.

Under sections 6928 and 6929 of the General Code, the county commissioners were required to determine the proportion of the cost to be paid by general taxation and the proportion to be assessed upon and collected from the owners of real estate benefited by the improvement in proportion to the benefit to be derived therefrom, and this order was also required to state the lands which should be subject to be assessed and whether the estimated assessment should be made before the improvement was commenced or after it was completed. All of the above stated requirements were entirely ignored by the joint board of county commissioners.

It has already been observed that the commissioners in their action made no reference to the petition and it should be added that they made no determination as to whether the petition had been signed by the requisite number of owners of real estate. It is extremely doubtful whether the action of the commissioners, in appointing L. R. Anspach to "survey and superintend" the road, was a sufficient compliance with the provision of section 6927, G. C., to the effect that the county commissioners should appoint an engineer to go over the line of such road and make such markings, gradient lines, plat, profiles and estimates as they prescribed in the entry on their journal. You state that it was the intention of the county commissioners to adopt separate methods of assessment in the two counties, which fact is indicated, in a way, by the record quoted above, and such a proceeding seems to have been unauthorized by the sections of the General Code under consideration.

It is unnecessary to proceed further, however, with a discussion of the defects in the proceedings submitted to me, as it is apparent from the facts already set out that the action of the joint board of county commissioners must be regarded as a nullity for the reasons, among others, that the jonit board never made any finding that the public utility required the road in question to be graded and improved, that the board never determined the material with which the improvement should be constructed, and that the board failed to make any order as to the portion of the cost to be paid by general taxation and the portion to be specially assessed, and

never made any order setting forth the lands which should be subject to be assessed.

There never having been a valid resolution adopted by the joint board of county commissioners, it follows that there is nothing upon which the saving provisions of the Cass highway law, found in section 303 thereof, can act, and I, therefore, advise you that the joint board is without authority to take any further action in the premises.

I may add that upon receipt of your communication, I wrote Hon. Donald F. Melhorn, prosecuting attorney of Hardin county, requesting his views in the matter, for the reason that Hardin county is affected equally with Hancock county and that the opinion herein expressed is in accordance with the views of Mr. Melhorn, as set forth in a letter to me under date of February 21, 1916.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1356.

COUNTY COMMISSIONERS—NO AUTHORITY FOR PAYMENT OF EXPENSES OF COMMISSIONERS IN PROCEEDINGS FOR JOINT COUNTY DITCHES.

There is no authority in law for the payment of the expenses of county commissioners in proceedings under sections 6536, 6537 *and* 6556, *G. C., as amended,* 103 *O. L.,* 836, *or section* 6559, *G. C.*

COLUMBUS, OHIO, March 11, 1916.

HON. D. F. MILLS, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR:—Yours under date of March 4, 1916, is as follows:

> "I would like to have your opinion as to whether or not county commissioners are to be allowed their actual expenses while engaged in the **location, construction** or improvement of joint county ditches.
>
> "Section 6563-44, G. C., provides as follows:
>
> " 'Said surveyors named in section 8 shall meet with the joint board of county commissioners whenever required by said board, and said surveyors and auditors shall be paid their necessary expenses while employed under this act, and shall be allowed the same fees as are allowed in ditch work generally, and said commissioners shall receive the sum of $3.00 a day and *their actual expenses while employed under this bill.*'
>
> "This particular section of the statute specifically refers to the bill passed by the General Assembly in Vol. 102, p. 575 O. L., now designated in the General Code as sections 6563-1 to 6563-48 inclusive. While it is clear that the commissioners are allowed their expenses, if the proceedings are instituted and the improvement constructed under the provisions of said bill, I would like to know as to whether or not they are allowed their actual expenses if the proceedings are instituted and the improvement constructed under sections 6536 and 6537, G. C., as amended in O. L., 836; 6556, G. C., as amended in 103 O. L., 836, or 6559, G. C."

Section 6563-44, G. C., quoted by you, was enacted as section 44 of house bill No. 489, approved May 12, 1911, 102 O. L., 575, as stated by you.

In this act there was provided a distinct and complete scheme for the construction of joint county ditches. The procedure therein provided was not made

exclusive, however, since none of the statutory provisions then in force and operation, relative to the subject matter of joint county ditches, were specifically repealed by said act.

An examination of the statutes governing the activities or proceedings of county commissioners, in respect to joint county ditches, in force and operation at the time of the enactment of said house bill No. 489, being sections 6536 to 6563, G. C., inclusive, fails to disclose any provision for the payment of the expenses of county commissioners, incurred in the discharge of their duties in relation to joint county ditches under said section, nor is there found any provision for payment of the expenses of commissioners in joint county ditch matters in the amendment of a number of said last mentioned sections of the General Code, enacted in 103 O. L., 836.

It will be readily observed that the provision for the payment of the expenses of county commissioners, found in section 6563-44, G. C., quoted by you, is expressly limited by its terms to *"actual expenses while employed under this bill."* The application of this provision is specifically limited by its terms to the expenses of commissioners employed under the act of the legislature in which said section of the General Code was originally enacted. The language of this provision is too plain to require interpretation and cannot be given such construction as to render it applicable to cases clearly not within its terms. It may be difficult to assign a satisfactory reason for a provision for the payment of expenses of public officials in a given case, and a failure to make such provision in another similar case. It is, however, a sufficient reason for such distinction, in the present instance, that the legislature has seen fit to make provision for the payment of expenses in the one case and omitted to do so in the other.

It is a principle well established that public officials are entitled to receive only such compensation, fees and salaries as are authorized by law. Since, then, the legislature has chosen to make specific provision for the payment of expenses of county commissioners when employed under the provisions of sections 6563-1 to 6563-48, inclusive, of the General Code, but has not chosen to make provision for the payment of expenses when engaged in similar service under other statutory provisions, it follows from the familiar principle just referred to that in the latter case there is no authority for the payment of the expenses of county commissioners.

I am therefore of opinion, in answer to your inquiry, that the expenses of county commissioners in proceedings under the provisions of sections 6536, 6537, 6540 and 6556, as amended, 103 O. L., 836, or section 6559, G. C., are not authorized by law to be paid.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1357.

TAXES AND TAXATION—SECTIONS 2746 TO 2749, G. C., PROVIDE METHOD FOR COLLECTION OF TAXES IN CITY OR VILLAGE OTHER THAN COUNTY SEAT—TAX PAYERS MAY SELECT AGENT TO PAY THEIR TAXES—CITY OF LORAIN.

The provisions of sections 2746 to 2749, G. C., provide the exclusive method of plan whereby tax receiving offices may be established in a city or village other than the county seat. While agents may be selected by the tax payers of such cities or villages through whom such tax payers may pay their taxes, yet such agents may not represent the county treasurer in receiving taxes nor may said treasurer in any manner be officially connected with such arrangement.

COLUMBUS, OHIO, March 11, 1916.

HON. CHARLES F. ADAMS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I have your letter of February 16th bearing the following statement and inquiry:

> "The city of Lorain, with about 35,000 population, is located nine miles north of Elyria, the county seat of Lorain county. Many of the tax payers of Lorain are working men who are obliged to lose from one-half day to a day, and incur the additional expense of transportation in order to pay their taxes at Elyria.
>
> "The county treasurer, while anxious to accommodate the tax payers of Lorain, does not feel that he desires under sections 2746-49, General Code of Ohio, to open an office in the city of Lorain for the receipt of taxes.
>
> "One of the leading merchants of Lorain, and one with large financial backing, has proposed that he receive the taxes from Lorain tax payers as the agent of the tax payers, the same to be paid into the county treasurer's office before the 20th of June and the 20th of December each year, and upon the payment of taxes by him into the county treasurer's office, receipts for same are to be issued by the county treasurer to the different tax payers so paying.
>
> "It is further suggested that the receipt given by the merchant to the tax payers bear upon it an endorsement in substance, that the tax payer constitutes the merchant his agent to pay the taxes, and that no liability attaches to the county treasurer by reason of the same until paid into his office, at which time receipt will be given. This will mean a great saving in time and money to the tax payers of Lorain, and be decidedly convenient, and I desire to know whether in your opinion this proposal is in violation of any of the statutes or improper.
>
> "I personally can see no objection to it as in fact the county treasurer, aside from furnishing to the merchant the list of tax payers and amount of taxes, has nothing to do with money until it is paid into his hands."

The sections of the General Code to which you refer in your foregoing letter, being sections 2746 to 2749, inclusive, provide a complete method whereby taxes may be collected by a county treasurer in offices established outside of the county seat and under the provisions of said sections your county treasurer may establish a tax receiving office in the city in question. It would seem from the circumstances stated in your letter that very potent reasons exist for the establishment of such an office in said city, but that the treasurer, while anxious to accommodate

the tax payers thereof, does not desire so to do. Be that as it may, the provisions of said sections must be considered as exclusive, and therefore your treasurer may not under any other plan or method permit the collection of taxes in said city.

Unquestionably the citizens of Lorain may legally constitute the merchant named in your letter as their agent to pay their taxes. They may, as between said agent so constituted and themselves, adopt any plan to accomplish their purpose in this respect, but your county treasurer cannot in any manner whatever officially recognize or acquiesce in any arrangements so made between the citizens of said city and their said agent. The law does not permit the treasurer to prepare a list of tax payers in said city, and the amount of taxes due from each at the expense of the county. His activities must be confined and limited to receiving from the agent the taxes due from each person the agent represents, and returning to the agent or to said person his receipt therefor. Everything necessary to effectuate the arrangement between the agent and the taxpayers of said city must be done by them without any assistance from the treasurer which might in any way be construed as an official adoption of or acquiescence in the same. He must not be connected with their transactions in any way. With these limitations, then it becomes simply a matter of the tax payers of said city paying their taxes through an agent, to which plan or arrangement no objection may be made.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1358.

SALOON LICENSE—PUBLICATION OF NOTICE OF SALE, MANDATORY —MAY BE SOLD AT PRIVATE SALE AFTER SUCH PUBLICATION.

The publication of notice of the sale of a saloon license ordered by the probate court under the provisions of section 1261-52, *G. C.*, 103 *O. L.*, 231, *may not be dispensed with.*

Under the conditions prescribed in section 10700, *G. C., for the sale of personal property of a decedent at private sale, a saloon license when ordered sold pursuant to said section* 1261-52, *G. C., may be sold at private sale after publication of proper notice thereof.*

COLUMBUS, OHIO, March 11, 1916.

HON. WILLIAM H. LUEDERS, *Probate Judge, Cincinnati, Ohio.*

DEAR SIR:—Yours under date of March 1, 1916, is as follows:

> "The following matter was presented to me this morning, and as I am in doubt concerning same, I write you today for your opinion in the matter:
>
> "O. L. 103 of the year 1913, section 1261-52, sub-section 37, on page 231, at bottom of page 2d, last line, directs as follows:
>
> "'The probate court shall order the license as a whole sold, without delay, but after proper notice given by publication' the words 'by publication' on page 232.
>
> "Under an opinion written by you to the Hon. John V. Campbell, of date of February 2, 1916, you direct and give as an opinion:
>
> "'That where a saloon license is ordered to be sold as a whole by the probate court, notice of such sale should be made by publication according to the provisions of section 10700, G. C.'

"*QUERY*—Are the directions as set forth, that the probate court shall order the license as a whole sold without delay, but after proper notice by publication, mandatory? In other words, must the license be sold by public sale after said publication?

"*QUERY*—Can executor or administrator follow section 10700, G. C., 'when on sufficient proof the court is satisfied that it would be for the advantage of the estate to sell any part of the personalty, etc., at the appraisers' valuation by private sale, the court may authorize the executor or administrator so to sell any part thereof either for cash or on other terms at its discretion * * * at not less than its appraised value, etc.?' In other words, is the sale mandatory, or can executor or administrator sell at private sale under section 10700, G. C., without publication?

"In case at issue, the administrator has an offer for more than the appraisers' valuation, and grave doubts exist as to whether on a public sale as large a sale would be realized?

"It is my opinion that sale at public auction after publication must be had, and that the private sale under section 10700, G. C., does not apply."

That part of section 37 of the license law, section 1261-52, G. C., 103 O. L., 231, particularly applicable to the questions submitted, is as follows:

"If a license or an interest therein shall pass by descent or otherwise to one who cannot qualify under the law as licensee, or if the survivor or relict or child or children, as the case may be, shall not in the time prescribed elect to assume said decedent's interest in the license, or if said survivor or relict or child or children, as the case may be, does not comply with the terms fixed by the court, the probate court shall order the license as a whole sold, without delay but after proper notice given by publication, and shall order the proceeds distributed to the survivors in the ownership of the license, if there be such, and the executor or administrator of the decedent, according as their interests may appear."

As stated in the inquiry, under date of February 2, 1916, I rendered an opinion to Hon. John V. Campbell, prosecuting attorney of Hamilton county, in which it was held that the notice required by the above provision to be given by publication should be published in accordance with the provisions of section 10700, G. C.

It is further provided by said section 1261-52, G. C., supra, that:

"So far as applicable, and so far as not inconsistent herewith, the laws of Ohio concerning the disposition of the personal estate of a deceased person shall apply."

and it is assumed that it is this provision which gives rise to the questions now under consideration. This provision would, beyond question, give full authority to the probate court "when, on sufficient proof, it is satisfied that it would be for the advantage of the estate to sell any part of the personalty not taken by the widow at the appraiser's valuation at private sale," to "authorize the executor or administrator to sell any part thereof, either for cash or on such other terms as in its discretion it directs, but not at less than its appraised value," etc., at private sale as per the terms of section 10700, G. C., unless such latter provision be found to be inconsistent with the provisions of the license law relative to the disposition of the interest of deceased licensees in liquor licenses.

It will be observed, upon examination of said section 10700, G. C., that the

provision thereof authorizing private sale of property of deceased persons, under the conditions therein stipulated, constitutes an exception to the general provisions of the same section requiring the sale of all personal property of decedents to be made at public auction, after notice, etc. This, in itself, would subject the provision as to private sale to a strict construction, favorable to a sale at public auction and tend to exclude from the application of the provision for private sale, the sale of all property not clearly within its specific terms.

On the other hand, the provisions of the license law, above referred to, are special in character and control to the exclusion of general statutes governing the sale and disposition of personal property of decedents, in so far as the special provisions are applicable. Indeed, it is believed that the only purpose of the last sentence of said section 1261-52, G. C., supra, is to make provision for such matters as are not covered by the license law as to sale of licenses of deceased persons.

The subject of the sale or transfer of liquor license is a matter wholly subject to statutory control. That is to say, the authority to sell a liquor license in any event is found solely upon the statutory provision, and it is not believed that in the absence of such statutory authorization a liquor license would be the subject of barter and sale at all. This being then a purely statutory proceeding, it must, under the general rule as to such matters, be strictly pursued, and for these reasons, I am inclined to the view that the publication of the notice of sale may not be dispensed with.

It could not be maintained, however, that the publication of notice, according to the provision of said section 10700, G. C., is materially inconsistent with a private sale of a license, under the provisions of said section.

The primary purpose of the notice is that the greatest amount possible may be realized from the sale of the license, and while it is true that perhaps in a great majority of cases this purpose would be more effectively attained by a public sale, I am not prepared to say that there may not be circumstances and conditions which would render it to the advantage of the estate that the license be sold at private sale, even after publication of notice in the manner prescribed by said section 10700, G. C., thus bringing the same within the provisions of said section authorizing a private sale.

The manifest purpose of the authorization of the sale of personal property of a decedent at private sale is that the same be made in the manner of the greatest advantage to the estate, so, in the case of a liquor license, if it appeared to the satisfaction of the court, upon proof, that it would, for any reason, be to the financial advantage of the estate that the license be disposed of at private sale, no purpose would be served in making a sacrifice of the interest of the estate in adhering to the requirement for a public sale. Indeed a case may be readily imagined in which it would be to the substantial advantage of the estate that the entire business of the decedent, together with the license, be sold at private sale, and under such condition, as above observed, it would contravene the whole policy of the law of administration of estates to make the sale at public auction, to the disadvantage of the estate.

I am therefore of the opinion that under the conditions prescribed therefor in said section 10700, G. C., a liquor license of a decedent, when ordered sold by the probate court, may be ordered by said court to be sold at private sale, after publication of notice thereof, as hereinbefore suggested.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1359.

ONLY *PORTION* OF ROAD IMPROVED BY COUNTY ASSUMES CHARACTER OF COUNTY ROAD—OTHERWISE RETAINS ITS FORMER CHARACTER.

When a county has improved only a portion of a given road, such improvement operates only so far as to give to the portion improved the character of a county road and has no effect as to the portion of the road not improved, and the portion of road not improved, if formerly a township road, retains its character as such and is to be maintained by the township trustees.

COLUMBUS, OHIO, March 11, 1916.

HON. ADDISON P. MINSHALL, *Prosecuting Attorney, Chillicothe, Ohio.*

DEAR SIR:—I have your communication of February 21, 1916, which reads as follows:

> "The Ross county highway superintendent has requested me to obtain from you a construction of section 241 of the road laws (section 7464 of the General Code), classifying highways. He desires to know whether, when the county has improved a mile or so of road by placing gravel thereon, the entire road shall be maintained by the county commissioners or just that part of the road which has been improved as before stated."

That portion of section 241 of the Cass highway law, section 7464, G. C., pertinent to your inquiry, is paragraph (b) thereof, which paragraph reads as follows:

> "County roads shall include all roads which have been or may be improved by the county by placing brick, stone, gravel or other road building material thereon, or heretofore built by the state and not a part of the intercounty or main market system of roads, together with such roads as have been or may be constructed by the township trustees to conform to the standards for county roads as fixed by the county commissioners, and all such roads shall be maintained by the county commissioners."

I am of the opinion that the context requires that the word "roads," as used in the above quoted provision, must be taken to mean only such portions of entire roads as have been or may be improved by the county, or were heretofore built by the state and not a part of the intercounty or main market system of roads, or as have been or may be constructed by the township trustees to conform to the standards for county roads. Any other construction would result in consequences manifestly not intended by the legislature. As an illustration of what might result if a different construction were to be adopted, it would be within the power of the trustees of a township, in which a township road, several miles in length, might be situated, to relieve the township of the duty of maintaining the entire road and to cast that duty upon the county merely by improving a small portion of the road in question, so as to conform to the standard for county roads for the particular county.

I, therefore, advise you, in answer to your specific question, that when a county has improved only a portion of a given road, such improvement operates only so far as to give to the portion improved the character of a county road and has no

effect as to the portion of the road not improved, and the portion of road not improved, if formerly a township road, retains its character as such and is to be maintained by the township trustees.

Respectfully.
EDWARD C. TURNER,
Attorney-General.

1360.

ROADS AND HIGHWAYS—COUNTY HIGHWAY SUPERINTENDENT—HIS EXPENSES AND COMPENSATION TO BE PAID FROM GENERAL COUNTY FUND.

The expenses of the county highway superintendent, incurred in the performance of any duty with respect to roads, and also his compensation, are to be paid from the general county fund.

COLUMBUS, OHIO, March 11, 1916.

HON. JOHN H. SCHRIDER, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR:—I have your communication of March 3, 1916, in which you submit the following inquiry:

> "Are the expenses and fees of the county highway superintendent, acting under the authority of the state highway commissioner, in making the surveys, plans, specifications, maps and profiles, for the construction and improvement of intercounty highways included in the terms 'costs and expenses of such improvement' referred to in sections 91, 98, 101 and other sections of the Cass law?"

You observe, in connection with the inquiry submitted by you, that if the term "costs and expenses," referred to by you, does not include the expenses and fees of the county highway superintendent and if such expenses and fees of the county highway superintendent are not to be paid from special funds created for specific improvements, or if the county fund is not to be reimbursed from the special fund, after the same is created, the result will be the exhaustion of the county fund.

It should first be observed that sections 91, 98 and 101 of the Cass highway law, referred to by you, do not relate to the activities of the state highway department in the construction of intercounty highways, but relate to the activities of the county commissioners relative to county roads. This fact will not interfere, however, with an answer to your inquiry, as the rule is the same whether the county highway superintendent be engaged under the general supervision of the state highway department in the preparation of plans for intercounty highways, or whether he be engaged at the instance of the county commissioners in the preparation of plans for county road improvements.

It ought also to be observed that the compensation of the county highway superintendent, when engaged in road work, cannot be properly referred to as "fees," for the reason that such compensation takes the form of a stated salary.

Your inquiry, in so far as it relates to the expenses of the county highway superintendent, was answered in opinion No. 1184 of this department, rendered to the bureau of inspection and supervision of public offices, on January 19, 1916, in which opinion it was held that the expenses of the county highway superintendent incurred in the performance of his duties with respect to roads and bridges, under the Cass highway law, are to be paid from the general county fund and that no

effort should be made to pay the same out of special funds, where the same exist, or to reimburse the general county fund where payment is originally made from the general county fund and a special fund is thereafter created for the improvement in question. Under section 138 of the Cass highway law, section 7181, G. C., both the salary and the expenses of the county highway superintendent are made payable from the county treasury and the section is silent as to the particular fund from which payment is to be made. The reasoning of opinion No. 1184, referred to above, therefore, applies as well to the compensation of the county highway superintendent as to his expenses and I am, therefore, of the opinion, in answer to your specific inquiry, that not only the expenses of the county highway superintendent incurred in the performance of any duty with respect to roads, under the provisions of the Cass Highway Law, but also his compensation for the time so employed, are to be paid from the general county fund and that the same should not be paid out of any special fund, where the same exists, and the general county fund should not be reimbursed where payment is made from it and a special fund is thereafter created for the improvement in question.

A copy of opinion No. 1184, referred to above, is enclosed for your information.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1361.

CASS HIGHWAY LAW—COUNTY COMMISSIONERS AUTHORIZE EMPLOYMENT OF NECESSARY MEN FOR COUNTY ROAD REPAIR WORK BY COUNTY HIGHWAY SUPERINTENDENT AND FIX THEIR COMPENSATION—SELECTION OF INDIVIDUALS IS WITH COUNTY HIGHWAY SUPERINTENDENT.

Where men are to be employed in the operation of a road roller in the repair of county roads, the county commissioners will have exhausted their authority when they have authorized or approved the employment of the necessary men by the county highway superintendent and have fixed the compensation of such employes, and the selection of individuals to fill the authorized employments lies wholly with the county highway superintendent.

COLUMBUS, OHIO, March 11, 1916.

HON. J. H. MUSSER, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—I have your communication of March 7, 1916, in which you call my attention to section 155 of the Cass highway law, section 7198, G. C., which section reads as follows:

> "The county highway superintendent may, with the approval of the county commissioners or township trustees, employ such laborers, teams, implements and tools, and purchase such material as may be necessary in the performance of his duties."

You state that Auglaize county has a steam road roller and other equipment, which has been used in repairing and maintaining the roads, and the roller has heretofore been in charge of the county commissioners and has been operated by a force of two men, the men being designated as foreman and engineer, and receiving salaries of $75.00 and $60.00 per month, respectively. These men have been employed continuously from April 1st to about December 1st of each year, and have

received a straight time salary during that period. The present county commissioners desire to continue this arrangement and the question has arisen as to who has the appointing authority in naming the men for these two places. You request my opinion as to whether the county commissioners are authorized to name these two men or whether the employment of any particular persons is subject to the approval of the county commissioners, or whether, on the other hand, the selection of the individuals to fill these specified employments lies wholly with the county highway superintendent, the only authority of the commissioners being to authorize or approve the employment of a foreman and engineer, at a stated salary, for the purpose of operating the road roller.

Your question was touched upon and in effect answered in opinion No. 1093 of this department, rendered to Rodger D. Hay, prosecuting attorney of Defiance county, on December 13, 1915, in which it was held that in view of the language of section 7198, G. C., laborers engaged on county road work, where the county commissioners are proceeding by force account, are to be employed by the county highway superintendent, such employment having been authorized by the county commissioners. I am unable to see how any other conclusion could be reached, in view of the language of the section in question, and I, therefore, advise you that under the circumstances presented by your communication, the county commissioners will have exhausted their authority when they have authorized or approved the employment by the county highway superintendent of a foreman and engineer to operate a road roller, and have fixed the compensation of such employes, and that the selection of individuals to fill these specified employments lies wholly with the county highway superintendent. The county highway superintendent will, of course, be without authority to act in the premises until the commissioners have taken the action suggested above.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1362.

TOWNSHIP TRUSTEES, CLERK OR TREASURER'S EXPENSES CANNOT BE PAID FROM TOWNSHIP TREASURY IN ABSENCE OF STATUTES AUTHORIZING SUCH EXPENDITURES.

In the absence of a law expressly authorizing payment of expenses, expenses of township trustees, clerk or treasurer cannot be paid from township treasury.

COLUMBUS, OHIO, March 13, 1916.

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

GENTLEMEN:—I am in receipt of your letter of February 21, 1916, as follows:

"We would respectfully request your written opinion upon the following question:

"May the railroad fare and hotel and meals of township trustees, clerk, treasurer, or township highway superintendent be paid from the township funds if such expenses have been necessarily incurred in the transaction of public business within or without the township, in the absence of a law expressly providing for the payment of such expenses from the township funds?"

In this state the rule is that an officer is not entitled to be reimbursed for expenses incurred by him while in the discharge of a public duty unless the statute specifically authorizes such expenditure, if such officer receives compensation for the performance of such duties.

That an officer is not entitled to be reimbursed for expenses incurred by him unless the statute specifically provides therefor is recognized in the case of Richardson v. State ex rel., 66 O. S., 108.

This doctrine is likewise recognized in Pennsylvania, in the case of Albright v. County of Bedford, 106 Pa., 582.

Furthermore, in regard to township trustees, a trustee under section 1245, G. C., when chosen as a delegate to the annual conference of the board of health, is by statute authorized to receive from the township his necessary expenses upon the presentation of a certificate from the secretary of the state board; and when attending under the provisions of section 7189, G. C. (106 O. L., 615) the annual meeting called by the county highway superintendent is authorized to receive his actual and necessary expenses.

The statutes providing in certain instances that the trustees of a township may receive their actual and necessary expenses, it is clear that the legislature intended that, in the absence of such special authorization by statute, no expenses shall be paid.

The same is true with respect to the township clerk and treasurer.

I hold, therefore, that railroad fare and hotel bill and meals of township trustees, clerk and treasurer cannot be paid from township funds in the absence of a law expressly providing for the payment of expenses.

In regard to the township highway superintendent, I would call your attention to section 3373, G. C. (106 O. L., 594), wherein it is provided that the township trustees shall fix the compensation of the township highway superintendent, and further provides:

> "The compensation and all proper and necessary expenses, when approved by the township trustees, shall be paid by the township treasurer upon warrant of the township clerk."

While it is true that in the case of Richardson v. State ex rel., supra, the court held in regard to the commissioner, in the second branch of the syllabus:

> "Expenses incurred for railroad fare, livery hire, charges for the use of his own conveyance, for the feed and shoeing of horses used by him, and for his board and others of a like nature, are of a personal character, for which no valid claim can be made against the county, although they are incurred while about the business of the county."

nevertheless, in that case the facts were that besides the three dollars per day allowed the commissioner, the statute likewise allowed him mileage, which the court construed to mean an amount allowed to compensate him for expenses of travel on official business. Such is not the case in regard to the township highway superintendent.

I therefore believe and hold that the actual expenses of the township highway superintendent incurred while in the discharge of his official duties may be paid from township funds, and that said expenses may include necessary railroad fare and hotel charges and meals, provided, of course, that the same are allowed by the township trustees.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1363.

APPROVAL, TRANSCRIPT OF BOND ISSUE, VILLAGE OF SHAKER HEIGHTS, OHIO.

COLUMBUS, OHIO, March 13, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Village of Shaker Heights bonds for the improvement of Falmouth road between Shaker boulevard and Marchmont road, by constructing storm and sanitary sewers therein, amounting to $8,378.00, being one bond of $378.00 and sixteen bonds of $500.00."

I have examined the transcript of the proceedings of the council and other officers, of the village of Shaker Heights relative to the issuance of the above bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the provisions of the General Code.

I am therefore of the opinion that said bonds drawn in accordance with the form submitted, when properly executed and delivered, will constitute valid and binding obligations of said village of Shaker Heights.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1364.

APPROVAL, TRANSCRIPT OF BOND ISSUE, VILLAGE OF SHAKER HEIGHTS, OHIO.

COLUMBUS, OHIO, March 13, 1916.

Industrial Commision of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Village of Shaker Heights bonds for the improvement of Falmouth road between Shaker boulevard and Marchmont road, by grading, draining, paving and constructing sidewalks therein, amounting to $31,800.00, being one bond of $300.00 and sixty-three bonds of five hundred dollars each."

I have examined the transcript of the proceedings of the council and other officers of the village of Shaker Heights relative to the issuance of the above bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the provisions of the General Code.

I am, therefore, of the opinion that said bonds drawn in accordance with the form submitted, when properly executed and delivered, will constitute valid and binding obligations of said village of Shaker Heights.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1365.

APPROVAL, TRANSCRIPT OF BOND ISSUE, VILLAGE OF SHAKER HEIGHTS, OHIO.

COLUMBUS, OHIO, March 13, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE:—Village of Shaker Heights bonds for the improvement of Falmouth road between Shaker boulevard and Marchmont road, by constructing a six-inch water main therein, amounting to $4,833.00, being one bond of $333.00 and nine bonds of $500.00 each."

I have examined the transcript of the proceedings of the council and other officers of the village of Shaker Heights relative to the issuance of the above bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the provisions of the General Code.

I am therefore of the opinion that said bonds drawn in accordance with the form submitted, when properly executed and delivered, will constitute valid and binding obligations of said village of Shaker Heights.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1366.

APPROVAL, TRANSCRIPT OF BOND ISSUE, VILLAGE OF SHAKER HEIGHTS, OHIO.

COLUMBUS, OHIO, March 13, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE:—Village of Shaker Heights bonds for the improvement of Montgomery road from Shaker boulevard to Marchmont road, by grading, draining, curbing, paving and constructing sidewalks therein, amounting to $31,200.00, being one bond of $200.00 and thirty-one bonds of one thousand dollars each."

I have examined the transcript of the proceedings of the council and other officers of the village of Shaker Heights relative to the issuance of the above bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the provisions of the General Code.

I am therefore of the opinion that said bonds drawn in accordance with the form submitted, when properly executed and delivered, will constitute valid and binding obligations of said village of Shaker Heights.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1367.

APPROVAL, TRANSCRIPT OF BOND ISSUE, VILLAGE OF SHAKER HEIGHTS, OHIO.

COLUMBUS, OHIO, March 13, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE:—Village of Shaker Heights bonds for the improvement of Montgomery road from Shaker boulevard to Marchmont road by constructing storm and sanitary sewers therein, amounting to $8,838.00, being one bond of $338.00 and seventeen bonds of $500.00 each."

I have examined the transcript of the proceedings of the council and other officers of the village of Shaker Heights relative to the issuance of the above bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the provisions of the General Code.

I am, therefore, of the opinion that said bonds drawn in accordance with the form submitted, when properly executed and delivered, will constitute valid and binding obligations of said village of Shaker Heights.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1368.

APPROVAL, TRANSCRIPT OF BOND ISSUE, VILLAGE OF SHAKER HEIGHTS, OHIO.

COLUMBUS, OHIO, March 13, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE:—Village of Shaker Heights bonds for the improvement of Montgomery road from Shaker boulevard to Marchmont road, by constructing a six-inch water main therein, amounting to $4,474.00, being one bond of $474.00, and eight bonds of $500.00 each."

I have examined the transcript of the proceedings of the council and other officers of the village of Shaker Heights relative to the issuance of the above bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the provisions of the General Code.

I am therefore of the opinion that said bonds drawn in accordance with the form submitted, when properly executed and delivered, will constitute valid and binding obligations of said village of Shaker Heights.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1369.

APPROVAL, TRANSCRIPT OF BOND ISSUE, VILLAGE OF SHAKER HEIGHTS, OHIO.

COLUMBUS, OHIO, March 13, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE:—Village of Shaker Heights bonds for the improvement of Kingsley road from Montgomery to Marchmont roads by grading, draining, paving and constructing sidewalks therein, amounting to $21,800.00, being one bond of $300.00 and forty-three bonds of $500.00 each."

I have examined the transcript of the proceedings of the council and other officers of the village of Shaker Heights relative to the issuance of the above bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the provisions of the General Code.

I am therefore of the opinion that said bonds drawn in accordance with the form submitted, when properly executed and delivered, will constitute valid and binding obligations of said village of Shaker Heights.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1370.

APPROVAL, TRANSCRIPT OF BOND ISSUE, VILLAGE OF SHAKER HEIGHTS, OHIO.

COLUMBUS, OHIO, March 13, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE:—Village of Shaker Heights bonds for the improvement of Kingsley road from Montgomery road to Marchmont road by the construction of storm and sanitary sewers therein amounting to $8,591.00, being one bond of $91.00 and seventeen bonds of $500.00 each."

I have examined the transcript of the proceedings of the council and other officers of the village of Shaker Heights relative to the issuance of the above bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the provisions of the General Code of Ohio.

I am therefore of the opinion that said bonds drawn in accordance with the form submitted, when properly executed and delivered, will constitute valid and binding obligations of said village of Shaker Heights.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1371.

APPROVAL, TRANSCRIPT OF BOND ISSUE, VILLAGE OF SHAKER HEIGHTS, OHIO.

COLUMBUS, OHIO, March 13, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Village of Shaker Heights bonds for the improvement of Kingsley road from Montgomery road to Marchmont road, by constructing a six-inch water main therein, amounting to $3,407.00, being one bond of $407.00 and six bonds of $500.00."

I have examined the transcript of the proceedings of the village council and other officers of the village of Shaker Heights relative to the issuance of the above bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the provisions of the General Code of Ohio.

I am therefore of the opinion that said bonds drawn in accordance with the form submntted, when properly executed and delivered, will constitute valid and binding obligations of said village of Shaker Heights.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1372.

APPROVAL OF RESOLUTION FOR IMPROVEMENT OF OHIO RIVER ROAD IN JEFFERSON COUNTY, OHIO.

COLUMBUS, OHIO, March 13, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of March 10, 1916, transmitting to me for examination final resolution relating to the improvement of the Ohio River road, I. C. H. No. 7, petition No. 1231, in Jefferson county.

I find this resolution to be in regular form, and am therefore returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1373.

COLLATERAL INHERITANCE TAX—CONSTRUCTION OF WORDS "TO OR FOR USE OF AN INSTITUTION IN THIS STATE FOR PURPOSE ONLY OF PUBLIC CHARITY OR OTHER EXCLUSIVELY PUBLIC PURPOSES" AS USED IN SECTION 5332, G. C.—MARIETTA, OHIO.

A devise of real property or a bequest of personal property to certain persons named as trustees in a will to be held by said persons in trust and to be administered by them for a benevolent or charitable purpose according to the terms of said will, is not one "to or for use of an institution in this state for purpose only of public charity or other exclusively public purposes" within the meaning of the provision of section 5332, G. C., and such devise or bequest is not therefore exempt from the collateral inheritance tax.

COLUMBUS, OHIO, March 14, 1916.

HON. ALLEN T. WILLIAMSON, *Prosecuting Attorney, Marietta, Ohio.*

DEAR SIR:—I have your letter under date of February 11, 1916, which is as follows:

> "In behalf of the probate judge of this county I herewith submit to you for your opinion whether or not the collateral inheritance tax under section 5331 and 5332, General Code of Ohio, should be charged and collected against the bequests bequeathed by items 15 and 17 of the will of Sarah R. Warren, deceased, duly admitted to probate in this county. Are the two items embraced within the exceptions of section 5332. We are not clear whether these bequests are exempt from the payment of the tax when not made to an 'institution' in this state although made in accordance with the last part of the first sentence of said section 5332 for 'exclusively public purposes.' As bearing upon the question I cite you the case In Re Estate of Isabella Brown, 13th Ohio Decisions, page 168. I enclose copy of items in the will."

Items 15 and 17 of the will of the said Sarah R. Warren, deceased provide in part as follows:

> "Fifteenth—I give, devise and bequeath to Herbert Minshall, Katharine Parr Nye and Robert M. Noll, Esq., the sum of three thousand dollars ($3,000.00), to hold as trustees, and be expended by them, without charge for their services, except necessary expenses incurred by them, in the erection and maintenance and repair of a public drinking fountain for man and animals, but especially for horses and dogs, to be erected by them at such place in the city of Marietta, Ohio, as they may deem best for such purpose.
>
> "Seventeenth—I devise and bequeath to the following named persons, as trustees, to wit: Edward M. Booth, John A. Gallagher and Winfield S. Hancock, all the rest and residue of my estate, both real and personal property, not hereinbefore devised and bequeathed, and wheresoever the same may be situated, to have and to hold in trust, for the purposes hereinafter mentioned.
>
> "Until such a time as a free public hospital is established by the city of Marietta, Ohio, or a free public hospital is given said city, and endowed, which in either case said hospital shall be of a value of not less than twenty thousand ($20,000.00) dollars, including grounds, building

and equipment: the income arising from said property shall be used by said trustees or their successors, in providing funds for hospital services rendered by any private hospital in said city to persons, when required by said trustees, and those who shall have preference thereto shall be as follows: First—To worthy poor widows with children or other members of their family dependent on them for support: second, to worthy poor single women dependent on their own exertions for support; third, to worthy poor men, with families or children dependent on them for support; all of such persons to be residents of Marietta township, Washington county, Ohio, and shall be cared for irrespective of their religious beliefs. Each case, however, shall be passed upon by said trustees and their decision shall be final.

* * * * * * * * * *

"Said trustees shall keep an account of all moneys received and expended and shall every two years file with the probate court of said county, an itemized statement of the same.

"Whenever a free public hospital shall be established by the city of Marietta, Ohio, as permitted by the laws of the state or a free public hospital is given to said city in the sum hereinbefore mentioned for either of said hospitals, then the trustees shall assign and convey to the city of Marietta, for the hospital fund of said city for the use of said free public hospital, the property hereinbefore mentioned, and such property and the funds arising from the sale thereof, may then be used in any manner or way the city of Marietta may deem proper for the benefit of said free public hospital."

Section 5332, G. C., provides:

"The provisions of the next preceding section (providing for a collateral inheritance tax) shall not apply to property, or interests in property, transmitted to the state of Ohio under the intestate laws of the state, or embraced in a bequest, devise, transfer or conveyance to, or for the use of the state of Ohio, or to or for the use of a municipal corporation or other political subdivision thereof for exclusively public purposes, or public institutions of learning, *or to or for the use of an institution in this state* for purpose only of public charity or other exclusively public purposes. * * *"

If the respective bequest or devise to the respective persons named in items 15 and 17 of the will of the said Sarah R. Warren, deceased, as above set forth, to be held in trust and to be used and expended by said persons for the purposes therein mentioned, is exempt from the collateral inheritance tax under provision of section 5332, G. C., as above quoted, it must be on the ground that said bequest or devise is one "to or for the use of an institution in this state for purpose only of public charity or other exclusively public purposes." Unless it can be said that said bequest or devise is to or for the use of an institution in this state for the purposes mentioned in the statute, the same is not exempt from the collateral inheritance tax provided for in section 5331, G. C., as amended in 103 O. L., 463.

In the case of Humphreys v. Little Sisters, 29 O. S., 201, the court in its opinion said:

"By the term institution is to be understood as an organization which is permanent in its nature, as contradistinguished from an undertaking which is transient and temporary."

In the case of Gerke v. Purcell, 25 O. S., 229, in the opinion of the court at page 244 appears the following definition:

> "The term 'institution' is sometimes used as descriptive of the establishment or place where the business or operation of a society or association is carried on; at other times it is used to designate the organized society."

The Century dictionary defines the term "institution" as "an establishment for the promotion of some object; an organized society or body of persons, usually with a fixed place of assemblage and operation, devoted to a special pursuit or purpose."

In the case of in re Brown, 15 O. D., 168, the court held that the purpose of the exception in the collateral inheritance tax law contained in the words "or to or for the use of any institution in said state for the purposes of purely public charity or for other exclusively public purposes," is to exempt from taxation charitable bequests and devises when made to permanent organizations in the state, corporate or otherwise, capable of holding property, and also to exempt charitable bequests or devises when the property so devised or bequeathed is actually located in this state and used here permanently for the charitable purposes for which it is given.

Section 9624 of the statutes of Illinois provides that:

> "When the beneficial interest of any property or income therefrom shall pass to or for the use of any * * * benevolent or charitable purpose the same shall not be subject to the inheritance tax."

In the case of in re Graves, 242 Ill., 23, the court held that under the above provision of the statute a certain gift to public authorities for the erection of a drinking fountain or drinking basin for horses, and in connection therewith a bronze statue of a certain horse together with a record of his performances, was exempt from the inheritance tax as a charitable gift. It must be observed, however, that under the provision of said statute it is only necessary that the beneficial interests in any property or the income therefrom shall pass to or for the use of any benevolent or charitable purpose, and the right to exemption is not necessarily limited to the transfer of such beneficial interests to or for the use of an institution as above defined organized and established for benevolent or charitable purposes.

The statute of Massachusetts relating to the collateral inheritance tax exempts from the tax bequests or devises to "charitable institutions the property of which is exempt from taxation." In the case of Hooper v. Shaw, 176 Mass., 190, the court held that a legacy left to the New England Trust Company of Boston, "the interest of which they will pay to needy aged men and women who had been in better circumstances in early life but had become in want when in old age" is not "to or for a charitable institution" within the meaning of the collateral inheritance tax law. The court in its opinion said:

> "Giving the broadest latitude to the word 'institution,' and assuming that there is an exemption if a charitable institution of the kind described is either trustee or *cestui que trust,* we cannot read the words as meaning to embrace all charitable gifts. Very likely the institution need not be incorporated, but it is contemplated as an owner of property, not as property."

In the case of Knight v. Stevens, 66 N. Y., App. Div., 267, the court held that a bequest to trustees in trust to found, erect and maintain "a home for those

who by misfortune have become incapable of providing for themselves and those who have slender means of support," is subject to the transfer tax as the statute providing that the property of a "corporation or association" organized exclusively for charitable or benevolent purposes shall be exempt from taxation, and the statute imposing a transfer tax upon property passing "to persons or corporations not exempt by law from taxation" do not include a gift for charitable purposes made to trustees.

In view of the foregoing definitions of the term "institution" and the authorities cited, I am compelled to conclude that the bequest provided for in item 15 of the will of the said Sarah R. Warren, deceased, as well as the devise and bequest provided for in section 17 of said will, is not one to or for the use of an institution in this state within the meaning of the above provision of section 5332, G. C., and I am of the opinion therefore that said devise and bequests are not exempt from the collateral inheritance tax.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1374.

BOARD OF EDUCATION—HOW NOTES MAY BE EXECUTED TO CONSTITUTE A LEGAL OBLIGATION AGAINST SCHOOL FUNDS OF DISTRICT.

Where the board of education of a school district, properly organized and in the exercise of the authority conferred upon it by the provisions of sections 4749 *and* 5656, *G. C., borrows money under the conditions prescribed in said section* 5656,*G. C., and for the purpose mentioned in said section, and in consideration therefor issues its note for the sum of money so borrowed, the members of said board of education may sign the corporate name of the board of education to said note or they may authorize one or more of the officers of said board to sign said name to said note.*

COLUMBUS, OHIO, March 14, 1916.

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

GENTLEMEN:—In your letter under date of February 25th you request my opinion upon the following questions:

> "In auditing a village school district it was found that a note had been given by the board of education of said district for loan under section 5656, General Code, said note being signed as follows: 'The board of education of the village school district of the village of Eastview, Ohio, by Flora M. Kinner, president; F. W. Blasdell, vice-president; S. H. Sisley, secretary; L. J. Clozie, and Bessie Collins Newton,' said individuals comprising the board of education of said village school district.
>
> "*Questions*:—
>
> "In your opinion would said note, executed in that form, be a legal obligation against the school funds of said district?
>
> "If held to be illegal, what, in your opinion, would be the proper method of attaching the signature of the board of education to such instrument?"

Under provision of section 4749, G. C., the board of education of a school district, when properly organized, is a body politic and corporate, and as such is capable of suing and being sued and of contracting and being contracted with.

Under provision of section 5656, G. C., said board of education may, under the conditions therein prescribed and for the purpose therein mentioned, borrow money.

Assuming therefore that the board of education of the village school district referred to in your inquiry was properly organized and that, in the exercise of the authority vested in it by the provisions of said sections 4749 and 5656 of the General Code, said board of education issued the note, mentioned in your inquiry, under the conditions prescribed in said section 5656, G. C., and for the purpose mentioned in said section, I am of the opinion in answer to your questions that said note, executed in the manner set forth in your inquiry, is a valid and binding obligation against the school funds of said district.

The members of said board of education, at a legal meeting of the board and by a resolution duly passed, might have authorized one or more of its officers to sign the name of the board of education to said note and said instrument so signed by said officer or officers duly authorized thereunto would have evidenced a binding obligation on the school funds of said school district. Said members having chosen to sign the corporate name of the board of education to said note rather than to authorize one or more of its officers to sign said instrument, there can be no question as to its validity.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1375.

TOWNSHIP TRUSTEES—BONDS ISSUED PRIOR TO SEPTEMBER 6, 1915, UNDER SECTION 7004, G. C., NOW REPEALED—TRUSTEES *NOW* WITHOUT AUTHORITY TO ISSUE ADDITIONAL BONDS UNDER SAID SECTION NO FURTHER ACTION HAVING BEEN TAKEN IN THE PREMISES BY THE TRUSEES.

Where prior to September 6, 1915, township trustees had issued bonds under section 7004, G. C., repealed by the Cass highway law, but had taken no action looking toward a further and additional issue of bonds thereunder, the trustees are now without authority to issue additional bonds under said section.

COLUMBUS, OHIO, March 15, 1916.

HON. RUSSELL M. KNEPPER, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—Under date of February 8, 1916, you requested my opinion with reference to the sale of bonds under the General Code, sections 6976 to 7019, where the proceedings were begun prior to September 6, 1915. You stated that it was to be assumed that all proceedings were regular and that the plats and maps were regularly filed and the system properly begun and the funds raised from the present sale would go toward finishing said improvement plan. The vote was taken April 20, 1915, and only $10,000 worth of bonds were sold.

Under date of February 22, 1916, in response to my request for additional information, you wrote me that the plats and maps provided for under the scheme of improvement in question, and which designated the principal roads of the

township, were properly filed. From the roads so designated and certified to the trustees, the trustees selected some five miles to be improved the first year and issued $10,000 worth of bonds for the improvement of the roads so selected. The remainder of the roads certified in the maps and plats remain unimproved and you request my opinion as to the right of the trustees to continue to sell bonds under the repealed sections. You express the view that such right does not exist, and in view of the nature of the scheme of road improvement provided for by sections 6976 to 7019 inclusive, of the General Code, now repealed, I concur in the opinion expressed by you.

Section 6976, G. C., provided that the trustees of a township, on petition of one hundred or more tax payers, should submit the question of road improvement to the qualified electors of the township. Under section 6977, G. C., the electors voted on the proposition of road improvement by general taxation, and did not vote upon a bond issue. Under sections 6981 and 6982, G. C., the trustees, in the event of a favorable vote, were required to assess taxes for road improvement purposes and appoint three freeholders as commissioners, and under section 6985, G. C., it was the duty of the commissioners so appointed to designate and determine the established roads and streets in the township which, in their opinion, should be improved. The commissioners were required to call to their assistance a competent engineer, and it was the duty of this engineer to make a correct map of the township, showing the established roads and streets therein, which had been designated by the commissioners for improvement, and also profiles of such roads and streets. Under section 6987, G. C., the township trustees, after the report of the commissioners and the map and profiles have been filed with the township clerk, were required to determine which roads should be first improved, of those designated by the commissioners. Section 7004, G. C., provided that for the purpose of providing the money necessary to meet the expenses of improving such roads and streets, the trustees of a township, if advisable in their opinion, might issue the bonds of the township.

If, prior to September 6, 1915, all of the preliminary steps had been taken and the township trustees had adopted a resolution providing for a further additional bond issue, then in conformity with opinions Nos. 978 and 1128 of this department, relating to the effect of the saving provisions of the Cass highway law on proceedings under old sections 7033 to 7052 inclusive, and for the reasons expressed in such opinions, it would be my view that such bonds provided for by the resolution of the township trustees might be issued after September 6, 1915, and the proceeds used in accordance with the provisions of the old sections 6976 to 7019 inclusive, of the General Code.

Under the facts submitted by you, the trustees did not, however, prior to September 6, 1915, take any action looking toward a further and additional bond issue and a bond issue was never authorized by a vote of the people, the submission of the question of a bond issue to the voters not being authorized by the scheme of road improvement in question. I am unable to see, therefore, how the saving provision of section 303 of the Cass highway law, to the effect that the provisions of that act shall not affect or impair any act done or right acquired under or in pursuance of any resolution adopted by the trustees of any township, prior to the time of the taking effect of the Cass highway law, can have any operation under the state of facts disclosed by your inquiry, and it is my opinion, in answer to your specific question, that the trustees of the township to which you refer are without authority to continue to sell bonds under sections 6976 to 7019, inclusive, of the General Code, now repealed.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1376.

TRANSCRIPT OF BOND ISSUE, VILLAGE OF EAST VIEW, OHIO, APPROVED.

COLUMBUS, OHIO, March 15, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE:—Village of East View bonds to pay the village's portion of the cost and expense of improving Kinsman road by constructing storm and sanitary sewers therein to the amount of $7,520.00, being one bond of $20.00 and 14 of $500.00 each."

I have examined the transcript of the proceedings of the village council and other officers of the village of East View relative to the issuance of the above bonds, also the bond form attached thereto, and I find the same regular and in conformity with the provisions of the General Code of Ohio.

I am therefore of the opinion that said bonds drawn in accordance with the form submitted, when properly executed and delivered, will constitute valid and binding obligations of said village of East View.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1377.

APPROVAL, TRANSCRIPT OF BOND ISSUE, VILLAGE OF EAST VIEW, OHIO.

COLUMBUS, OHIO, March 15, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"Re:—Village of East View bonds in anticipation of the collection of special assessments for the improvement of Olive avenue from the north line of Kinsman road to a point seven hundred feet northerly therefrom, by constructing a six-inch water main therein, amounting to $1,273.00, being one bond of $273.00 and two bonds of $500.00 each."

I have examined the transcript of the proceedings of the village council and other officers of the village of East View relative to the issuance of the above bonds, also the bond form attached thereto, and I find the same regular and in conformity with the provisions of the General Code of Ohio.

I am, therefore, of the opinion the said bonds drawn in accordance with the form submitted, when properly executed and delivered, will constitute valid and binding obligations of said village of East View.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1378.

APPROVAL, TRANSCRIPT OF BOND ISSUE, VILLAGE OF EAST VIEW, OHIO.

COLUMBUS, OHIO, March 15, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE:—Village of East View bonds in anticipation of the collection of special assessments for the improvement of Almyra avenue, from the north line of Kinsman road to a point 760 feet northerly therefrom, by grading, draining and constructing sidewalks therein, amounting to $2,061, being one bond of $60.00, and four bonds of $500.00 each."

I have examined the transcript of the proceedings of the village council and other officers of the village of East View relative to the issuance of the above bonds, also the bond form attached thereto, and I find the same regular and in conformity with the provisions of the General Code of Ohio.

I am, therefore, of the opinion that said bonds drawn in accordance with the form submitted, when properly executed and delivered, will constitute valid and binding obligations of said village of East View.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1379.

APPROVAL, TRANSCRIPT OF BOND ISSUE, VILLAGE OF EAST VIEW, OHIO.

COLUMBUS, OHIO, March 15, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE:—Village of East View bonds issued in anticipation of the collection of special assessments for the improvement of Kinsman road from the west line of said village to the center line of East View avenue, by constructing storm and sanitary sewers therein to the amount of $20,760.00, being one bond of $260.00 and forty-one bonds of $500.00 each."

I have examined the transcript of the proceedings of the village council and other officers of the village of East View relative to the issuance of the above bonds, also the bond form attached thereto, and I find the same regular and in conformity with the provisions of the General Code of Ohio.

I am, therefore, of the opinion that said bonds drawn in accordance with the form submitted, when properly executed and delivered, will constitute valid and binding obligations of said village of East View.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1380.

STATE HIGHWAY COMMISSIONER—MAY USE BOTH INTERCOUNTY AND MAIN MARKET ROAD FUNDS IN CO-OPERATION WITH COUNTY COMMISSIONERS WHEN HIGHWAY HAS BEEN DESIGNATED AS AN INTERCOUNTY HIGHWAY AND MAIN MARKET ROAD.

Where a highway which it is proposed to improve is both an intercounty highway and a main market road, the state highway commissioner may use both intercounty highway funds and main market road funds in improving a section of such highway in co-operation with county commissioners.

COLUMBUS, OHIO, March 15, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of March 2, 1916, transmitting to me for examination final resolutions relating to the improvement of the Barnesville-Hendrysburg road, I. C. H. No. 101, petition No. 1196, in Belmont county.

As appears by your certificate upon said resolution, the intercounty highway in question has been designated as a main market road. It further appears from the certificates of the chief clerk of your department that of the $30,100.00 required for the state's half of the cost of this improvement, it is proposed to pay $10,900.00 from the main market road fund and $19,200.00 from the intercounty highway fund. Section 226 of the Cass highway law, section 1231, G. C., contains the following provision:

> "County commissioners, township trustees and village councils shall have the same power and authority to co-operate in the construction, improvement, maintenance and repair of main market roads as is granted to them by this act in the construction, improvement, maintenance and repair of intercounty highways; and in case the commissioners of any county, the trustees of any township and the council of any village, or any of such authorities, determines to co-operate in the construction, improvement, maintenance or repair of any main market road, the procedure shall be the same as in the case of co-operation by such authorities in the construction, improvement, maintenance and repair of intercounty highways, as provided in this act."

In view of the above quoted provision and of the fact above noted that the road which it is proposed to improve is both an intercounty highway and a main market road, I see no objection to the use of intercounty highway and main market road funds in constructing a single improvement in the manner contemplated by you. An identical result could be obtained by dividing the portion of road which it is proposed to improve into two sections and proceeding separately and letting a separate contract as to each section. I am unable to see how any advantage could be gained by such division or how any evil can result from the contemplated arrangement, and incline to the view that the same is authorized in the present state of the law.

I am, therefore, returning the final resolution in question with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1381.

ROADS AND HIGHWAYS—TOWNSHIP HIGHWAY SUPERINTENDENT —DUTY OF DRAGGING ALL GRAVELED AND UNIMPROVED ROADS RESTS PRIMARILY WITH SUCH TOWNSHIP OFFICIAL. .

The duties of township officials with reference to the dragging of roads under chapter I' of the Cass highway law, extend to all graveled and unimproved roads, whether the same be township roads, county roads or state roads.

COLUMBUS, OHIO, March 15, 1916.

HON. J. W. WATTS, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR:—I have your communication of February 17, 1916, in which you submit the following inquiry:

> "Are the township trustees required under section 3375, G. C., to drag county and state roads as defined by section 7464, G. C., provided they are graveled roads, and are the county commissioners and the state highway department required to drag any roads?
>
> "Section 85 of the Cass road law (G. C., 6906), empowers the county commissioners to reconstruct or repair any existing road or part thereof by grading, paving, draining, dragging, etc., but I find no provision in said law by which the county commissioners are required to carry out any particular system of road dragging."

You observe that the question of whether township trustees are required, under section 3375, G. C., to drag county and state roads, as defined by section 7464, G. C., provided they are graveled roads, seems to have been answered in the affirmative by opinion No. 847 of this department, rendered to the Bureau of Inspection and Supervision of Public Offices, on September 21, 1915, in which opinion the following language was used:

> "By section 3375, G. C., et seq., the township highway superintendent is given certain duties in reference to dragging the graveled and unimproved public roads of his district and these duties extend to all the graveled and unimproved public roads of the district without reference to their class."

You state that certain township trustees of your county are interested in this question, and that you have advised them that township trustees are required to drag all graveled public roads even though the same might be county or state roads, your advice being given in accordance with your understanding of opinion No. 847, referred to above, but that the trustees desire you to submit the matter to this department for a more specific answer.

You are entirely correct in your understanding of the opinion referred to by you, it being intended to hold therein that the duties of the township highway superintendent and other township officials, with reference to the dragging of the graveled and unimproved public roads, extended to all roads of the township or district, as the case might be, without regard to whether such roads were township, state or county roads. As a matter of fact, the duty of township authorities in reference to dragging state roads is very limited at the present time, inasmuch as there cannot be an unimproved state road under the present classification, and in view of the further fact that of over a thousand miles of state roads, only about twenty miles have been improved by the use of gravel. I advise you, in answer

to your specific question, that it is the duty of the township highway superintendent, under section 3375, G. C., to divide all the graveled and unimproved public roads of the township into road dragging districts, which must include all mail routes and main traveled roads within the township which are graveled or unimproved, and that in exercising this duty the township highway superintendent should take into consideration all graveled and unimproved public roads, whether they be county roads, township roads or state roads, and must include in the road dragging districts all mail routes and main traveled roads which are graveled or unimproved, without reference to whether such roads be state roads, county roads, or township roads. County commissioners are undoubtedly *authorized* to drag certain roads, and the same may also be said of the state highway commissioner, but the *duty* of dragging all graveled and unimproved roads rests primarily on the township authorities, and this duty is not limited to roads of any particular class but extends to all graveled and unimproved roads.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1382.

ROADS AND HIGHWAYS—TOWNSHIP TRUSTEES ARE AUTHORIZED TO PURCHASE IRON PIPE, ETC., FOR CULVERT WORK IN REPAIR OF TOWNSHIP ROADS.

Township trustees are authorized to purchase iron pipe or other materials suitable for culvert work, and to use the same in their repair work on township roads, carried forward through the township highway superintendent.

COLUMBUS, OHIO, March 15, 1916.

HON. T. M. POTTER, *Prosecuting Attorney, New Lexington, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication of February 18, 1916, in which you state that the trustees of the various townships of your county are in doubt as to their right to construct culverts in the repair of roads, the usual character of culverts that they have been using being iron pipe running in diameter from 8 to 36 inches. You state that all of the townships have so-called bridge funds, produced by a levy under section 7562, G. C., repealed by the Cass highway law. You call attention to section 3370, G. C., which provides, among other things, that the township highway superintendent, under the direction of the township trustees, shall have control of the roads of his district and keep them in good repair. You also call attention to section 6956-1, G. C., which provides, among other things, that the board of county commissioners shall provide, annually, a fund for the repair and maintenance of bridges and county highways. The question upon which you desire my opinion is as to whether township trustees, in the general repair of the roads, are authorized and empowered, as part of that repair, to place in such roads underground drains consisting of a pipe of the character referred to by you, and pay for the same out of the road fund of the township.

This department has, in effect, covered the matter submitted by you in a number of opinions previously rendered. In opinion No. 847, rendered to the Bureau of Inspection and Supervision of Public Offices, on September 21, 1915, it was pointed out that the duty of the township highway superintendent to keep the roads of his district in good repair is limited to township roads as defined in section 241 of the Cass highway law, section 7464, G. C. It was held in opinion No. 1063, rendered to Hon. Hugh F. Neuhart, prosecuting attorney of Noble coun-

ty, on December 3, 1915, that balances in the township bridge fund not needed for bridges on account of a transfer of authority from the trustees to the commissioners, might properly be transferred in the manner provided by section 2296, et seq., of the General Code. It was pointed out in this opinion that the Cass highway law had changed the jurisdiction of the township trustees in relation to bridges and culverts, and that no separate levy by the trustees for bridge purposes is now provided by law. It was further observed that at least a part of the duties of the township trustees, as to bridges and culverts, formerly conferred upon them, are taken away from the trustees and lodged with the county commissioners.

In opinion No. 1279, rendered to Hon. E. E. Lindsay, prosecuting attorney of Tuscarawas county, on February 16, 1916, the exact nature of the duties of township trustees with respect to bridges and culverts, under the Cass Highway Law, was defined and it was held, among other things, that while both the county commissioners and the township trustees are *authorized* to repair or maintain all bridges and culverts on a township road, yet the *duty* of such repair or maintenance rests primarily on the trustees.

In view of the foregoing and with the preliminary observations that the duty of the township in respect to the repair and maintenance of roads, bridges and culverts extends only to township roads and to the bridges and culverts situated thereon, I advise you that township trustees are authorized to purchase iron, pipe or other materials suitable for culvert work, and to use the same in their repair work on township roads, carried forward through the township highway superintendent. If there remains any balance in the so-called bridge fund created by levy under section 7562, G. C., now repealed, payment for such culvert pipe should be made from such fund. If, however, there is no balance in such fund, payment may properly be made from the road fund of the township.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1383.

APPOVAL, TRANSCRIPT OF BOND ISSUE FOR RURAL NO. 1 SCHOOL DISTRICT OF NEWPORT TOWNSHIP, WASHINGTON COUNTY OHIO.

COLUMBUS, OHIO, March 16, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN :—

> "RE:—Bonds of rural No. 1 school district in Newport township, Washington county, Ohio, in the sum of $15,000.00, being thirty bonds of $500.00 each, bearing interest at five per cent. per annum, payable semi-annually."

I have examined the transcript of the proceedings of the board of education and other officers of rural No. 1 school district of Newport township, Washington county, Ohio, relative to the issuance of the above bonds, also the bond form attached thereto, and I find the same regular and in conformity with the provisions of the General Code.

I am, therefore, of the opinion that said bonds prepared in accordance with the form submitted, when properly executed and delivered, will constitute valid and binding obligations of said rural school district.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1384.

DISAPPROVAL, TRANSCRIPT OF BOND ISSUE, VILLAGE OF JEFFERSON, MADISON COUNTY, OHIO—ASSESSMENT BONDS ISSUED BY VILLAGE TO PAY COST OF PAVING BETWEEN RAILS OF AN INTERURBAN RAILROAD.

Industrial commission advised not to accept the bonds of the village of Jefferson, Madison county, Ohio, in the amount of $14,600.00, *because said bonds were issued in anticipation of the collection of special assessments to be collected from The Columbus, London and Springfield Railway Company to pay the cost of improving that portion of Main street in said village which the railway company, under its franchise, is required to pave at its own expense.*

COLUMBUS, OHIO, March 16, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

> "RE:—Bonds of the village of Jefferson, Madison county, Ohio, in the amount of $14,600.00, issued in anticipation of the collection of special assessments for the improvement of Main street in said village."

I have examined the transcript of the proceedings of the council and other officers of the village of Jefferson relative to the above bond issue, and I find that said bonds are issued in anticipation of the collection of special assessments to pay the cost and expense of so much of the improvement of said street as is properly chargeable to The Columbus, London and Springfield Railway Company. The tracks of this company are laid in the street so improved, and under its franchise the company is required to construct a pavement between its rails and for two feet on each side thereof.

It is established in Ohio that if a railway company fails to comply with the provisions of its franchise in respect to paving its right-of-way, the municipality may itself construct the improvements and collect the cost from the company by suit. I am, however, unable to find any provision of the General Code authorizing the municipality, by agreement or otherwise, to pay this cost and then reimburse the municipal treasury by an assessment against the railway payable in ten annual installments, or to issue municipal bonds in anticipation of the collection of such special assessments. The practical result of this proceeding is that the municipality loans its credit to the railway company.

In reply to a letter which I wrote to F. G. Brown, clerk of the village of Jefferson, on March 1, 1916, calling his attention to this lack of authority on the part of the village council, I have received a letter from E. W. Johnson, solicitor of the village of Jefferson, which is as follows:

> "In re village of Jefferson $14,600.00 bond issue, issued for the purpose of paying the Ohio Electric Railway Company's portion of the Main street paving.

"Upon receipt of your letter to Forest G. Brown, clerk of the village of Jefferson, concerning this bond issue, I advised him to mail the same to the attorneys for the Andrews Asphalt Paving Company, of Hamilton, Ohio, as these people had already agreed with the village of Jefferson to accept these bonds in payment for the work which they have already completed, provided the same were not taken when offered to the industrial commission, or taken by bidders when advertised and sold.

"The proceedings of West Jefferson as you noted by the transcript of proceedings contemplated a cash settlement by the railway company, and the bond issue arranged for was made at their request and with the consent of the contractor.

"Although I feel that this bond issue comes within the provisions for special assessments, and that the assessments will be paid the same as by other property benefited and assessed as abutting property, nevertheless at the time aforementioned arrangement was made, I raised the same point as solicitor for the village, that has been raised by you, and it was because of that status of affairs that caused Mr. Andrews to agree to take the bonds.

"For these reasons I do not care to make a different ruling on the proposition, and I will ask that you have the industrial commission accept or reject the bonds at once, so that the village can take final action to dispose of them."

In view of the statements contained in this letter, and in view of the lack of authority upon the part of the municipal officers to issue the bonds under consideration, I am unable to approve the same, and advise you that they should be rejected by your commission.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1385.

KENT STATE NORMAL SCHOOL—EIGHT-HOUR LAW IS APPLICABLE TO JANITORS AT SAID INSTITUTION.

The provisions of sections 17-1 *and* 17-2, *G. C.,* 103 *O. L.,* 854, *apply to janitors of state normal schools.*

COLUMBUS, OHIO, March 16, 1916.

HON. JOHN E. MCGILVREY, *President Kent State Normal College, Kent, Ohio.*

DEAR SIR:—I have your letter of March 10, 1916, setting forth a copy of an order received by you from the Industrial Commission of Ohio which directs you to not require or permit a janitor or other employe of your institution to work more than eight (8) hours in any calendar day or more than forty-eight (48) hours in any week. You desire to know whether such employments in your institution are covered by sections 17-1 and 17-2 of the General Code, 103 O. L., 854.

Replying to your inquiry I beg to say that this order made by the industrial commission is in harmony with an opinion to said commission from this department under date of September 15, 1915, in which certain employes of the Ohio

University including janitors were in question, and which opinion held that said employes, including janitors of said institution, were within the operation of said sections 17-1 and 17-2 of the General Code, aforesaid.

In answer therefore to your inquiry I must advise that the provisions of said sections aforesaid cover the employment of janitors and other employes at your institution.

The scope and effect of these sections were fully discussed in opinion No. 814 under date of September 10, 1915, a copy of which is herewith enclosed. A further discussion therefore of their provisions is unnecessary.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1386.

COUNTY COMMISSIONERS—WHERE IT IS DESIRED TO BORROW MONEY IN ANTICIPATION OF TAX LEVIES MADE UNDER SECTIONS 1222 AND 6926, G. C., ONLY METHOD PROVIDED BY LAW IS BOND ISSUE UNDER SECTIONS 1223 AND 6929, G. C.

Where it is desired to borrow money in anticipation of tax levies made under sections 1222 and 6926, G. C., the only method provided by law is a bond issue under sections 1223 and 6929, G. C.

COLUMBUS, OHIO, March 16, 1916.

HON. ROBERT C. PATTERSON, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—I have your communication of March 6, 1916, which reads as follows:

> "At the November election, 1915, the electors of Montgomery county voted in favor of a one mill levy for two years for road improvements under chapters VI and VIII of the Cass law.
>
> "The commissioners are about to proceed with these improvements, and desire to know if they can borrow money as well as issue bonds in anticipation of the collection of this tax. They are of opinion that they can save considerable interest money if permitted to borrow amounts needed as the work progresses. I am unable to find any other provisions, except under General Code, 1223 and 6929, which authorizes only bond issues; but, as the commissioners desire to borrow only such amounts as are needed from time to time, I write asking if you know of any proceeding by which this can be done. I ask the favor of an early answer.
>
> "If you decide that a bond issue is necessary, I enclose for your inspection a form of resolution for that purpose, calling attention particularly to the provision as to a levy to meet any deficiency in the collection of the tax, and ask if the form meets with your approval."

As I understand your inquiry, you desire to know whether there is any method other than the issuance of bonds under sections 1223 and 6929, G. C., by which county commissioners can borrow money in anticipation of levies made under sections 1222 and 6926, G. C. Sections 1223 and 6929, G. C., provide only for the issuance of bonds, and it is my opinion that the method of anticipating tax levies

provided for by the sections in question is exclusive and that county commissioners are without authority to borrow money in anticipation of levies made under sections 1222 and 6926, G. C., in any manner other than by the issuance and sale of bonds. I am unable to see where any advantage could accrue from any other method of borrowing money. Under section 5660, G. C., the county commissioners cannot enter into a contract involving the expenditure of money unless the auditor first certifies that the money required for the payment of the obligation is in the treasury to the credit of the fund from which it is to be drawn or has been levied and placed on the duplicate and is in process of collection and not appropriated for any other purpose. Even if it were permissible for the commissioners to issue short time notes, such notes would have to be issued before road contracts could be entered into, and in view of the fact that the obligation, whatever its nature, is to be met from the taxes levied for the year 1916, the maturity of notes could not be earlier than that of the bonds which your county commissioners propose to issue.

The form of bond resolution submitted by you is as follows:

"RESOLUTION.

"Whereas, at a general election held in Montgomery county, Ohio, on the 2nd day of November, 1915, the question of levying taxes for two years at a rate of one mill on each dollar of the taxable property of said county in excess of the maximum rate authorized by sections 5649-2 and 5649-3 of the General Code of Ohio, for the purpose of improving, reconstructing or repairing certain roads under the provisions of chapters VI and VIII of the act of May 17, 1915 (106 O. L., 574), was submitted to a vote of the electors of said county; and a majority of said electors voting at such election voted in favor thereof;

"And Whereas, said tax has been certified and levied for collection upon the duplicate of said county for each of the years 1916 and 1917; Now, therefore

"Be it Resolved by the board of county commissioners of Montgomery county, Ohio, for the purpose of improving, reconstructing or repairing the following roads, or parts thereof, to wit:

(Naming roads)

"and in anticipation of the collection of the tax above mentioned, deem it necessary to sell the bonds of said county, as hereinafter set forth.

"Resolved further, That the bonds of said county be issued for the aforesaid purpose in the sum of $_____, each of said bonds to be in the denomination of $_____, numbered consecutively from one to _____all made payable on the 1st day of September, 1917, and bearing interest at the rate of five per cent. per annum, payable semi-annually, the first installment of interest to be payable March 1, 1917, evidenced by coupons attached thereto; said bonds to be dated _____ (day of sale) _____ and payable at the county treasury of said county. Said bonds shall express upon their face the purpose for which they are issued, and that they are issued in pursuance of this resolution and sections 1223 and 6929, of the General Code of Ohio.

"Resolved further, That there shall be levied and collected by taxation on all taxable property on the tax duplicate of Montgomery county, Ohio, for the year 1916, an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for the payment of said bonds at maturity, provided that the amount of such levy shall be such as to provide for and make up any deficiency in the revenues of said county available for

the payment of such interest and the creation of such sinking fund from the collection of the one mill levy above mentioned; and the proper taxing authorities shall complete the amount of such general tax levy and certify the same for collection as other taxes are certified and collected.

"Resolved further, That said bonds shall be first offered to the Industrial Commission of Ohio, as provided in section 1465-58 of the General Code of Ohio, and such of said bonds that are not taken by said commission shall be advertised and sold in the manner provided by law."

I assume from the form of the bond resolution submitted by you that it is proposed to issue bonds only for the purpose of paying the county's proportion of the cost and expense of the projected improvements. In so far as roads may be improved by the commissioners, the entire cost and expense may be paid by the county, but under the law relating to inter-county highway and main market road improvements, carried forward by the state highway department, and in which a county may co-operate, ten per cent. of the cost and expense of such improvements must be assessed against the owners of the abutting real estate. That portion of the bond resolution submitted by you which relates to tax levies, indicates, however, that you propose to provide by the bond issue in question only the county's portion of the cost and expense of the projected improvement, inasmuch as all tax levies referred to in the bond resolution are to be made on all the taxable property of the county. What is said herein in reference to the form of resolution submitted by you will, therefore, be based upon the assumption that the proposed bond issue is designed to provide only the county's share of any costs and expenses to be incurred, and in view of that fact I suggest that the third paragraph of the bond resolution, as submitted, should be so worded as to recite that it is necessary to sell the bonds of the county for the purpose of paying the county's portion of the cost of improving, reconstructing or repairing the described roads.

It is apparent from an examination of the form of resolution submitted by you that it is at present proposed to anticipate only the levy made for the year 1916, and I suggest that this fact should also be indicated in paragraph 3 of the resolution. With the two changes above mentioned, the paragraph in question might read as follows:

Be it Resolved by the board of county commissioners of Montgomery county, Ohio, that for the purpose of paying the county's portion of the cost and expense of improving, reconstructing or repairing the following roads or parts thereof, to wit:

(Naming roads)

and in anticipation of the collection of the taxes above mentioned and levied for the year 1916, said county commissioners deem it necessary to sell the bonds of said county, as hereinafter set forth.

It is my opinion that in all other respects the form of bond resolution submitted by you is in substantial compliance with the requirements of the statutes.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1387.

ROADS AND HIGHWAYS—APPLICATION FOR STATE AID WITHIN AND WITHOUT A VILLAGE—SUBSEQUENT PROCEDURE FOR IMPROVEMENT OUTSIDE OF A VILLAGE.

Where an application to the state highway department for state aid relates to any portion of a highway within a village, all steps subsequent to the application are to be taken in the same manner as though the projected improvement were situated outside a village.

COLUMBUS, OHIO, March 16, 1916.

HON. GEORGE THORNBURG, *Prosecuting Attorney, St. Clairsville, Ohio.*

DEAR SIR:—On March 8, 1916, you addressed to me the following communication:

> "The National road through Belmont county except the part lying within the municipality of Morristown, was improved under the state highway law in force prior to the passage of the Cass law.
>
> "Under section 128 of the Cass law the county commissioners may extend a road improvement into and through a municipality.
>
> "I desire your advice as to the method of paying the proportion of the costs and expense of the improvement in the municipality, which the commissioners under an agreement with the council oblige themselves to pay.
>
> "We understand that you have already rendered an opinion on a similar matter in another county, and if so, please send me your opinion."

Under date of March 13, 1916, in response to my request for additional information, you advised me as follows:

> "Morristown is a small village containing about one and one-eighth miles of the National road, has a tax valuation of $88,000, a debt of approximately $1,000, a tax rate of 15 mills. The town as a corporation does not desire to pay any part of the cost of the improvement, but the abutting property owners are willing to pay ten per cent.
>
> "The county commissioners desire to know whether it will be lawful for them to assess 15 per cent. of the cost of this improvement upon all the taxable property of Union township which contains the village of Morristown. The county and state are taking care of the other seventy-five per cent. of the cost of improvement."

Your reference in your letter of March 8th, to section 128 of the Cass highway law, section 6949, G. C., led me to conclude that it was proposed that the county commissioners should improve that part of the National road lying within the village of Morristown without co-operation with the state highway department, inasmuch as section 6949, G. C., applies where the county commissioners are making an improvement and does not apply where the improvement is being made under the control and supervision of the state highway department. It appears, however, from your communication of March 13th, that the state is to pay a portion of the cost and expense of the proposed improvement, and that the same is to be carried forward under the supervision of the state highway department.

Where the improvement is being made by the state highway department upon

the application and with the co-operation of the county commissioners, the authority for such a procedure is found in section 186 of the Cass highway law, section 1193, G. C., which section provides in part as follows:

> "Each application for state aid in the construction, improvement, maintenance or repair of intercounty or main market roads, shall be accompanied by a properly certified resolution of the county commissioners * * * stating that the public interest demands the improvement of the intercounty or main market roads therein described, which may include any portion of a highway in the limits of any village, when the same is a continuation of the proposed improvement, and the consent of the village has been first obtained."

The above quoted provision was fully discussed and the proper procedure thereunder was outlined in opinion No. 1317 of this department, rendered to Hon. Clinton Cowen, state highway commissioner, on March 4, 1916, and I enclose a copy of that opinion for your consideration.

In the opinion in question it was pointed out that the statute is silent as to the procedure subsequent to the application, where the application relates to any portion of a highway within the limits of any village, and that therefore it must be concluded that all steps subsequent to the application are to be taken in the same manner as though the projected improvement were situated outside a village. The normal and ordinary division of the cost and expense of improvements carried forward under the supervision of the state highway department is provided for by sections 206 and 207 of the Cass highway law, being sections 1213 and 1214, G. C. These sections provide for the apportioning to the township or townships in which the improvement is located of fifteen per cent. of the cost and expense of such improvement, except the cost and expense of bridges and culverts.

I therefore advise you, in answer to your specific inquiry, that fifteen per cent. of the cost of the projected improvement through the village of Morristown may lawfully be apportioned to Union township, in which the village of Morristown is situated. The tax levy resorted to for the purpose of producing the township's share of the cost and expense of the improvement, or the tax levy made for the redemption of bonds issued to meet the township's portion of the cost and expense, is, of course, to be made on all the taxable property of Union township, both within and without the village of Morristown.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1388.

APPROVAL OF LEASE TO THE SMITH-EATON COMPANY, CERTAIN CANAL LANDS IN CITY OF AKRON.

Lease to The Smith-Eaton Company of certain canal land in the city of Akron is in proper form. The superintendent of public works has a right to enter into the lease in question and the claims of The Smith-Eaton Company under a former alleged lease have enough of merit to make it unwise for the state to attempt to enter into a lease with any other party covering the premises in question, especially in view of a tentative agreement made for the settlement of a controversy between the company and the state.

COLUMBUS, OHIO, March 17, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of February 23, 1916, which reads as follows:

"Under date of April 25, 1914, the state of Ohio, through its superintendent of public works, entered into a lease with The Smith-Eaton Company of Akron, Ohio, covering four certain tracts of canal lands, all within the city of Akron. This lease was properly signed by John I. Miller, superintendent of public works, and by the president and secretary of The Smith-Eaton Company. It was later approved by the attorney-general, and bore also what was supposed to be the signature of James M. Cox, governor. Acting in good faith, upon the theory that the signature of the governor was genuine, The Smith-Eaton Company at once proffered the first six months' rental ($936.00), which was accepted by this department and a receipt given therefor. This rental money was deposited in the usual way, and is still in the custody of the secretary of this department. On the first of each May and November, since the signing of this lease, a representative of The Smith-Eaton Company has appeared at this office and has tendered in cash the rental, according to the terms of the lease.

"Shortly after April 25, 1914, the date of the lease, The Quaker Oats Company, a property owner adjoining the canal lands, supposed to be under lease to The Smith-Eaton Company, appeared before Governor Cox and protested against the Smith-Eaton lease on the grounds that, as adjoining property owners, their interests had been disregarded in the granting of this lease. After some investigation Governor Cox announced that the signature upon the lease was not his own but was the act of one of his secretaries, performed without his knowledge or consent. The governor immediately repudiated his signature and instructed the superintendent of public works to cancel the lease, which was done May 16, 1914.

"After the cancellation of the Smith-Eaton lease, a conference was held in the office of Governor Cox, between Governor Cox, the superintendent of public works and representatives of the Smith-Eaton and the Quaker Oats Companies. The result of this conference was the granting of certain rights, contained in the Smith-Eaton lease to the Quaker Oats Company, with the understanding that The Smith-Eaton Company would be granted a new lease at a reduced rental. The rights obtained by the Quaker Oats Company were incorporated in two leases and signed by Governor Cox on January 7, 1915, four days before he left office.

"The Smith-Eaton Company and John I. Miller, my predecessor in office, for some reason, were unable to agree on the terms of a new lease up to the time Mr. Miller left office, July 31, 1915.

"The lease attached hereto covers the same property, contains the same conditions and provides for the same rental as agreed upon at the conference previously referred to in the office of Governor Cox.

"Since the drafting of this new lease several protests have been filed with the department, but all of them have been withdrawn except that of Mr. Otto Hower's, who owns property adjoining the canal tract on Market street. Mr. Hower offers a substantial increase in rental for this property, and in view of his offer he questions our right to enter into a lease with The Smith-Eaton Company.

"The Smith-Eaton Company, on the other hand, claim that their rights under the original lease are of such a nature as to at least throw doubt upon the validity of any lease covering the property in question, which might be entered into between the state and any party, other than The Smith-Eaton Company.

"I am anxious to secure for the state all the income possible from what is now a non-productive property, but at the same time I do not want to enter into a lease that might involve the state in endless litigation.

"The accompanying lease is submitted to you for your approval with the request that you give your opinion as to the state's right to enter into this proposed lease, and also as to whether or not the rights of The Smith-Eaton Company, under its original lease, are of such a nature as to render it unwise for the state to enter into a lease, for the property in question, with any party other than The Smith-Eaton Company."

Your statement of the facts relating to the proposed lease to The Smith-Eaton Company corresponds in all substantial particulars with my information relating to said facts. So far as the alleged approval of the original lease to The Smith-Eaton Company by the then governor, Hon. James M. Cox, is concerned, it should be stated that it appears from a statement of facts made by Mr. Dow Harter to me on March 9, 1915, that it was the practice in the governor's office at that time for a subordinate to approve canal leases, and that the original lease to The Smith-Eaton Company was approved by this subordinate in the usual manner. If the act of approval could not be regarded as the act of the governor, then many, if not all, of the canal leases executed during the administration of former Governor Cox have the same status, and must be regarded as never having been approved by him. In other words, if the original lease of The Smith-Eaton Company is invalid for the reason that the same was never approved by the governor, then many, if not all, of the canal leases executed during the administration of former Governor Cox are invalid for the same reason.

To your statement of facts there should be added also the following facts, which I regard as important:

The situation several weeks ago was that the original lease to The Smith-Eaton Company had been cancelled, or at least the superintendent of public works had assumed to cancel the same. The first installment of rental paid by that company remained in the hands of your department and tenders of subsequent installments had been made and refused. The Smith-Eaton Company was claiming that its original lease was in every respect valid, and the situation was complicated by the subsequent lease to the Quaker Oats Company. Litigation resulting in the establishment of the validity of the original Smith-Eaton lease would have invalidated the subsequent lease to the Quaker Oats Company. There were at that time no persons manifesting any substantial interest in the property in question

or offering therefor any rental in excess of that offered by The Smith-Eaton Company. Under this state of facts there was affected, as a proper and business-like solution of the entire difficulty, what might be styled a gentleman's agreement, which agreement, as far as I can learn, had the assent not only of The Smith-Eaton Company, but of all the state officials charged with any duty in the premises. This agreement was, in effect, that the Smith-Eaton Company should execute a release of any rights which it might have under its original lease, and that it should be given a lease covering the remainder of the premises in question at the agreed rental of $1,672.00 per year. In pursuance of this arrangement, the lease referred to by you as the new lease, and which you now submit to me for approval, was drawn, and in order to avoid any errors that might creep into the procedure, this department was requested to prepare, and did prepare, forms for the resolutions by the directors of The Smith-Eaton Company, authorizing the cancellation of the old lease and authorizing the application for and execution of the new lease, and also a form for the release in question.

The lease, as now submitted for approval, has attached to it properly certified copies of the resolutions and a properly executed release, all of which are drawn in accordance with the suggestions made by this department. It must have been a matter of common knowledge in Akron, for many months, that the question of whether or not the state had actually leased these premises was in dispute, and that should that question be determined in the negative, the state would desire to lease the premises to the person offering the highest rental. It was not, however, until a tentative agreement covering the entire matter had been reached between the representatives of the Smith-Eaton Company and the representatives of the state that protests were filed against the making of the lease and an offer of an increased rental made by Mr. Hower.

The persistency with which the officers of the Smith-Eaton Company have pursued this matter and asserted their alleged rights warrants the belief that if the officers of the state should now refuse to carry out the tentative agreement above referred to and make a lease to a third party, the matter would be involved in litigation at once, and in view of the established practice of your department not to attempt to enforce the collection of rentals where you are unable to put the lessee in peaceable possession of the leased premises, the state would be deprived of all revenue from this land until such time as the validity of the original lease to The Smith-Eaton Company might be passed upon and determined by the courts.

I find no provision of law which gives Mr. Hower any legal rights in the matter or which requires you, after you have appraised a piece of canal land and entered into a tentative agreement for its rental, to repudiate such agreement and enter into a lease with a new bidder offering a higher rental. While you are entirely correct in your attitude, to the effect that you should secure for the state all the income possible from leased premises, and while under ordinary circumstances negotiations with a prospective lessee should be so conducted as to leave the matter open and give you a free hand to negotiate a lease with any new bidder offering a higher rental, I am not prepared to say that such principle is the one which should govern you in the present transaction.

It is unnecessary to determine the question of whether the original lease to The Smith-Eaton Company is valid or invalid. It is sufficient for the purpose of this inquiry to observe that the facts surrounding the transaction are involved in such doubt as to make the issue a doubtful one, and for that reason it is impossible to assert with confidence that the lease is void, and that The Smith-Eaton Company has no rights under the same.

Answering your specific inquiries, it is my opinion that you have a right to enter into the lease with The Smith-Eaton Company, as submitted by you

for approval, and that the claims of The Smith-Eaton Company, under its original lease have enough of merit to make it unwise for the state to attempt to enter into a lease with any other party covering the premises in question, especially in view of the tentative arrangement made for the settlement of the controversy.

I find that the lease submitted by you is properly drawn and for the reasons above stated I am returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1389.

COUNTY COMMISSIONERS—BONDS MAY BE ISSUED FOR CONSTRUCTION OF BRIDGES UNDER SECTION 2434, G. C., 102 O. L., 55.

Bonds may be issued by county commissioners for the construction of bridges under the provisions of section 2434, *G. C., as amended* 102 *O. L.,* 55.

COLUMBUS, OHIO, March 17, 1916.

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

GENTLEMEN:—I have your letter of March 9, 1916, as follows:

> "Section 2434, General Code, as originally adopted by the general assembly upon the incoming of the work of the codifying commission, read as follows:
>
> "'For the execution of the objects * * * or for a court house, county offices, jail, county infirmary, or other necessary building or bridge, or for the purpose of * * *'
>
> "This section clearly authorizes bond issues for bridge construction.
>
> "This section was amended March 28, 1911, (102 O. L., 55) to read as follows:
>
> "'For the execution of the objects * * * or for a court house, county offices, jail, county infirmary, detention home, or additional land for an infirmary or county children's home or other necessary buildings or bridges, or for the purpose * * *'
>
> "The absence of a comma after the word 'home,' where it last appears above, the grammatical context of the section, as amended, apparently limits the power to issue bonds as to bridges to the acquisition of additional land.
>
> "The section as above amended is now in law.
>
> "QUERY: Can bond issues be made under this particular section for the construction of bridges?"

Section 2434, G. C., as it appeared prior to its amendment in 102, O. L., 55, read as follows:

> "For the execution of the objects stated in the preceding section or for the purpose of erecting or acquiring a building in memory of Ohio soldiers or for a court house, county offices, jail, county infirmary, or other necessary building or bridge, or for the purpose of enlarging, repairing, improving or rebuilding thereof, or for the relief or support of the poor,

the commissioners may borrow such sum or sums of money as they deem necessary at a rate of interest not to exceed six per cent. per annum and issue the bonds of the county to secure the payment of the principal and interest thereof."

As amended 102 O. L., 55, aforesaid, it now provides as follows:

"For the execution of the objects stated in the preceding section, or for the purpose of erecting or acquiring a building in memory of Ohio soldiers, or for a court house, county offices, jail, county infirmary, detention home, or additional land for an infirmary or county children's home or other necessary buildings or bridges, or for the purpose of enlarging, repairing, improving, or rebuilding thereof, or for the relief or support of the poor, the commissioners may borrow such sum or sums of money as they deem necessary, at a rate of interest not to exceed six per cent. per annum, and issue the bonds of the county to secure the payment of the principal and interest thereof.

"Provided, that if the judge designated to transact the business arising under the jurisdiction provided for in section 1639 of the General Code of the state of Ohio, shall advise and recommend in writing to the county commissioners of any county the purchase of land for and the erection of a place to be known as a detention home, or additional land for an infirmary or county children's home, the commissioners without first submitting the question to the vote of the county may levy a tax for either or both of such purposes in an amount not to exceed in any one year two-tenths of one mill for every dollar of taxable property on the tax duplicate of said county."

It will be observed from the foregoing sections that the amendment made in 102 O. L., added in the first paragraph of said section the following "detention home," and "or additional land for an infirmary or county children's home." It also added the concluding paragraph of said section which is devoted entirely to provisions referring to a detention home or to the purchase of additional land for an infirmary or county children's home, being the new matter inserted as before observed in the first paragraph of said section by the amendment. As suggested in your letter, had a comma followed the term "children's home" in the amendment no question could be raised as to the meaning of the amended statute.

It is a general rule of law in the construction of a statute that the matter of punctuation is of little consequence in determining the effect of its provisions. It is held in the case of Albright v. Payne, 43 O. S., 8,

"In construing a statute, punctuation may aid, but does not control unless other means fail; and in rendering the meaning of a statute, punctuation may be changed or disregarded."

Referring to the same subject, Black on Interpretation of Laws, page 185, observes:

"The British statutes, on the original rolls of parliament, are not punctuated at all, and although more or less marks of punctuation appear in the printed transcripts of the acts of parliament, they are not inserted by authority and are not regarded as an essential part of the law. In the legislative bodies of this country, the punctuation marks are usually inserted, with a greater or less approach to correctness, by the member who

drafts and introduces the bill, are sometimes changed by the engrossing clerks, and are frequently reformed by the printer. They very seldom receive the attentive consideration of the legislature, and no great importance is ever attached to them during the progress of the bill through the house. For this reason it has come to be recognized as a settled legal doctrine that the punctuation marks are no part of the statute."

On page 186 the same author again remarks:

"If, therefore, the words of the act, taken in themselves alone, or compared with the context and read in the light of the spirit and reason of the whole act, convey a precise and single meaning, they are not to be affected by the want of proper punctuation or by the insertion of incorrect or misplaced marks. In that event, the court will disregard the existing punctuation, supply such stops as may be missing, transpose those which are erroneously placed, eliminate those which are superfluous, reform such as are incorrectly used, and read the act as if correctly punctuated."

When we consider the purpose of the amendment to this section, as stated above, it is manifest that it was made for the purpose of adding to the provisions of the former section the additional purposes of providing for a detention home, and for purchasing additional land for an infirmary or county children's home, and that said amendment was made for no other purpose. This conclusion is unavoidable when we consider the concluding paragraph of the amended statute which deals with the amendments in the first paragraph thereof exclusively. I am convinced, therefore, that the legislature did not intend that the provision for the purchase of additional land for an infirmary or county children's home should apply to that which immediately follows it, viz., "or other necessary buildings or bridges," but that said terms "buildings" and "bridges" are used in the amended statute in the same sense as they were used in the original enactment.

I am, therefore, of the opinion that your inquiry must be answered in the affirmative, and that bond issues may be made under the provisions of said amended statute 2434, supra, for the construction of bridges.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1390.

APPROVAL TRANSCRIPT OF BOND ISSUE, WARREN TOWNSHIP RURAL SCHOOL DISTRICT, TRUMBULL COUNTY, OHIO.

COLUMBUS, OHIO, March 17, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Warren township rural school district, Trumbull county, Ohio, in the sum of $30,000.00, to secure funds for the purchase of a site and the erection and equipment of a school building for the accommodation of the centralized schools of said school district, being sixty bonds of $500.00 each, bearing interest at five per cent. per annum, payable semi-annually."

I have examined the transcript of the proceedings of the board of education and the other officers of Warren township rural school district of Trumbull county, Ohio, relative to the issuance of the above described bonds, and I find the same regular and in conformity with the General Code of Ohio.

I am of the opinion that said bonds drawn in accordance with the form presented, when properly executed and delivered, will constitute valid and binding obligations of said school district.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1391.

TAX COMMISSION—DISTRICT BOARD OF COMPLAINTS—WHAT APPEALS MAY OR MAY NOT BE HEARD BY THE TAX COMMISSION —BOARD OF COMPLAINTS OF LUCAS COUNTY.

The tax commission is without authority in law to act on an appeal from the decision of the district board of complaints of a district filed with said commission by the auditor of the county constituting such district, prior to January 1, 1916, *and within the thirty day period provided by section* 5609, *G. C., as in force prior to said date of January* 1, 1916, *in a case in which the county auditor was not the complainant to said district board of complaints, or on an appeal from the decision of said district board of complaints filed with said commission by said county auditor since said date of January* 1, 1916, *but more than thirty days after said decision was rendered, or on an appeal from the decision of said district board of complaints filed with said commission by the complainant below since date of January* 1, 1916, *and more than thirty days after said decision was rendered.*

The tax commission has authority in law to act on an appeal from the decision of said district board of complaints filed with said commission since said date of January 1, 1916, *but within said thirty day period, if said appeal was filed with said commission by the county auditor, as the complainant below, or by any other person or officer authorized to file said complaint with said district board of complaints by provision of section* 5602, *G. C., as in force prior to said date of January* 1, 1916, *taken in connection with the provision of section* 26 *of the General Code, or if said appeal was filed by said county auditor, not as the complainant below but as the successor of the district assessor or district board of assessors, under provision of section* 1 *of the Parrett-Whittemore law, so-called, as found in* 106 *O. L.,* 246.

If, however, upon an investigation by the tax commission of all the facts and circumstances of any of the above cases, and upon a careful consideration of the same said tax commission determines that in such case an appeal from the decision of said district board of complaints within said thirty-day period was prevented by the fraudulent act or wilful misconduct of the district board of assessors or said district board of complaints, or of any member of either of said boards, in such case, insofar as said fraudulent act or wilful misconduct prevented the filing of said appeal within said thirty-day period, said limitation will not prevail.

COLUMBUS, OHIO, March 17, 1916.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—In your letter under date of February 15th you request my opinion as follows.

"On the hearing of numerous appeals from the decision of the board of complaints of Lucas county, motions were made in divers cases as to the jurisdiction of the commission for the following reasons:

"1. Appeals were filed by the auditor, who was not a complainant below; said appeals being filed prior to January 1, 1916, and within thirty days from the decision of the board of complaints.

"2. Appeals were filed by the auditor, who was not a complainant below; said appeals being filed since January 1, 1916, and more than thirty days after the decision of the board of complaints.

"3. Appeals were filed by the auditor who was not a complainant below; said appeals being filed since January 1, 1916, but within thirty days from the decision of the board of complaints.

"4. Appeals were filed by parties who were complainants below; said appeals, however, being filed more than thirty days after the decision of the board of complaints.

"The commission respectfully requests your opinion as to what ruling it should make on the various grounds stated."

You have submitted for my examination a transcript of testimony taken by your commission in a hearing held at the office of the prosecuting attorney of Lucas county, for the purpose of investigating certain rumors of fraud and irregularity on the part of the taxing officials of said county in connection with certain reductions made by the district board of complaints in the valuations of property as returned for taxation by the district board of assessors of said county.

In arriving at the conclusions hereinafter expressed in answer to your foregoing inquiry, I would not be understood as expressing any opinion upon the evidence disclosed in the aforesaid transcript as to whether there was in fact such fraud or irregularity in connection with said reductions as would justify your commission in holding that in any or all of the cases referred to in your inquiry in which an appeal was not taken to your commission within thirty days from the decision of the district board of complaints, as provided in section 31 of the Warnes law so-called, as hereinafter set forth, the filing of said appeal was prevented by said fraud or irregularity.

I am of the opinion, however, that in making the investigation above referred to your commission acted within the scope of its authority, and if, upon a careful consideration of all the facts and circumstances of each particular case, your commission determines that in such case an appeal from the decision of said district board of complaints within said thirty day period was prevented by the fraudulent act or willful misconduct of said district board of assessors or district board of complaints, or of any member of either of said boards, then I am of the opinion that in such case, in so far as said fraudulent act or willful misconduct prevented the filing of said appeal within said thirty day period, said limitation would not prevail.

I call your attention to the following provisions of sections of the Warnes law, so-called, 103 O. L., 786-804, as in force prior to January 1, 1916, the date when the act of the general assembly, known as the Parrett-Whittemore law, became effective:

Section 14 of said act (section 5592, G. C.):

"It shall be the duty of the board of complaints to hear all complaints relating to the assessment of both real and personal property. It shall have power to lower or raise the assessments of all property submitted to it for review, or it may order a re-assessment by the original assessing

officer. At any hearing before the board, the assessing officer may appear to defend his assessments. Either party may appeal to the tax commission of Ohio from the decision of the board. * * *"

Section 18 of the said act (section 5596, G. C.):

"The district board of complaints shall have power to investigate all complaints against assessments on the tax list, with respect to the amount of property listed as well as with respect to the valuation at which the same is listed. The power of the board shall extend to all cases in which real estate or personal property has been assessed for taxation for the current year, and to addition and corrections made during the next preceding year to the tax lists of previous years, but not to assessments, additions or corrections made by the tax commission of Ohio."

Section 21 of said act (section 5599, G. C.):

"On or before the first day of July, annually, the district assessor shall give ten days' notice, * * * that the tax lists for the current year have been completed and are open for public inspection in his office, and that complaints against any valuation or assessment, except the valuations fixed and assessments made by the tax commission of Ohio, will be heard by the district board of complaints. * * *"

Section 24 of said act (section 5602, G. C.):

"Complaints against any valuation or assessment on the tax list for the current year may be filed with the county auditor before the meeting of the district board of complaints or thereafter during its session. Any *tax payer* may file such complaint as to the valuation or assessment of his own or other's property, and the county commissioners, the prosecuting attorney, *county auditor,* county treasurer or any board of township trustees, any board of education, mayor or council of any municipal corporation in the county shall have the right to file such a complaint."

Section 25 of said act (section 5603, G. C.):

"The county auditor shall lay before the district board of complaints all complaints filed with him. The board shall investigate all such complaints and may increase or decrease any valuation or correct any assessment complained of, and *no other.*"

Section 27 of said act (section 5605, G. C.):

"The district board of complaints shall not increase any valuation complained of without giving reasonable notice to the person in whose name the property affected thereby is listed, and affording him an opportunity to be heard. * * *"

Section 29 of said act (section 5607, G. C.):

"The district board of complaints shall certify its action to the district assessor, who shall correct the tax lists and duplicates according to the deductions and additions ordered by the board, in the manner provided

for by law for making corrections thereof. If the tax list and duplicate have been delivered to the county auditor, the district assessor shall certify such corrections to him and he shall enter such corrections on his tax list and the treasurer's duplicate."

Section 31 of said act (section 5609, G. C.):

"An appeal from the decision of a district board of complaints may be taken to the tax commission of Ohio, *within thirty days after the decision of such board, by the district assessor, or by any complainant, as provided in section twenty-four of this act.* Such appeal shall be taken by written notice to that effect filed with the tax commission and with the county auditor, who shall thereupon certify to the commission a copy of the record of the board of complaints, pertaining to the original complaint, together with the minutes thereof, and all evidence, documentary or otherwise, offered in connection therewith. Upon receipt of notice of appeal, the county auditor shall notify all parties interested, and shall file proof of such notice with the tax commission of Ohio."

It appears that the district board of complaints of Lucas county, in the exercise of the authority conferred upon it by the above provisions of the statutes, acted upon certain complaints duly filed with said board, and that appeals from the decisions of said district board of complaints have been filed with the tax commission.

The jurisdiction of the tax commission to hear said appeals and act upon them is challenged by motions filed in the several cases, and you ask to be advised as to what ruling should be made on the various grounds set forth in your inquiry.

Considering first those appeals from the decisions of the district board of complaints of Lucas county, filed with the commission by the auditor of said county, prior to January 1, 1916, and within thirty days from said decisions of said district board of complaints, in cases in which said county auditor was not complainant to said district board of complaints, I am of the opinion that in such cases your commission is without jurisdiction to hear said appeals, and the motions filed in said cases should be sustained, for the reason that, in said cases, the county auditor, not having been the complainant below, was without authority in law to file said appeals. If in said cases the county auditor, in the exercise of the authority vested in him by the above provision of section 5602, G. C., as in force prior to January 1, 1916, had complained to the district board of complaints that the several valuations of property involved in said cases, as returned for taxation by the district board of assessors, were not returned at their true value in money, I think that his right to appeal to your commission from the decisions of said district board of complaints, under authority of section 5609, G. C., as in force prior to said date of January 1, 1916, could not be questioned.

By the plain terms of the provisions of the first part of said section 5609, G. C., the right to appeal from the decision of the district board of complaints to the tax commission was limited to the district assessor or the complainant as provided in section 24 of the act (section 5602, G. C.). The county auditor, not having been the complainant below, could not therefore file said appeals. Inasmuch as neither the district board of assessors nor the complainant below appealed to your commission from the decisions of the district board of complaints, within thirty days after said decisions in said cases were rendered, I am of the opinion that this failure to exhaust the administrative remedy afforded by the provisions of

said section 5609, G. C., foreclosed any judicial remedy, and that said decisions of said district board of complaints are therefore final.

As to those appeals from the decisions of said district board of complaints, filed with the tax commission by said county auditor since January 1, 1916, and more than thirty days after said decisions were rendered, in cases in which said county auditor was not the complainant to the district board of complaints, I am of the opinion that in said cases your commission is without jurisdiction to hear said appeals, and that the motions, filed in said cases, should be sustained.

I do not base this conclusion upon the fact that the said appeals were filed since said date of January 1, 1916, when the repeal of the Warnes law became effective, nor upon the fact that the county auditor was not the complainant below, but upon the fact that said appeals were not filed within the thirty day period provided in said secion 5609, G. C., as in force prior to said date of January 1, 1916.

I am of the opinion that, in any of said cases, the complainant below had the right to appeal from the decision of the district board of complaints to your commission within said thirty day period even though said period extended over into the month of January, 1916, such right being afforded to said complainant by the provisions of section 26 of the General Code which provides:

> "Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions, or proceedings, unless so expressed, nor shall any repeal or amendment affect causes of such action, prosecution, or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act."

The filing of said complaint with the district board of complaints and the appeal from the decision of said a "proceeding" within the meaning of the above provision of said section 26, G. C.

> Cincinnati v. Davis, 58 O. S., 225.
> State ex rel. v. Cass, 32 C. C., 208..
> Affirmed without report, 84 O. S., 443.

It is equally clear that, in any of said cases, the district board of assessors had this right to file an appeal with your commission within said thirty day period, at any time prior to said date of January 1, 1916, and if said thirty day period extended over into said month of January, 1916, I am of the opinion that the county auditor, who by the provision of section 1 of the Parrett-Whittemore law, 106 O. L., 246, is authorized to complete any of the unfinished business of the district board of assessors, would have had the right under provision of said section 26, G. C., to file said appeal after said date of January 1, 1916, and within said thirty day period.

The fact remains, however, that this action was not taken within said thirty day period. I am therefore compelled to reach the conclusion that, in so far as the tax commission is concerned, the decisions of the district board of complaints in said cases are final, and that inasmuch as the right to appeal to your commission was not exercised within said thirty day period, no judicial remedy is now available. This conclusion is in harmony with an opinion of my predecessor, Hon. Timothy S. Hogan, rendered to your commission under date of December 14, 1914,

as found in the annual report of the attorney-general for said year, at page 1539 of said report.

It follows from what has already been said that, as to those appeals from the decisions of the district board of complaints, filed with the tax commission by said county auditor since January 1, 1916, but within said thirty day period, even though said county auditor was not the complainant below, said county auditor, in such cases, succeeds the district board of assessors by virtue of the above provision of section 1 of said Parrett-Whittemore law, and therefore had the right to file said appeals. I am of the opinion therefore that, in these cases, the motions filed with your commission and praying that said cases be dismissed on the ground that your commission has no jurisdiction to hear said appeals are not well taken and should be overruled.

In cases of appeals from the decisions of said district board of complaints, filed with the tax commission by the complainants below, more than thirty days after said decisions were rendered, I am of the opinion, for reasons already stated, that your commission is without jurisdiction to hear said appeals and that the motions to dismiss, filed with your commission in said cases, should be sustained.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1392.

BOARD OF EDUCATION—CENTRALIZATION ADOPTED—BOARD MAY SECURE SITES AT DIFFERENT POINTS IN SUCH DISTRICTS AND ERECT SUITABLE BUILDINGS.

Where the qualified electors of a rural school district vote in favor of centralization under provision of section 4726, G. C., 104 O. L., 139, the board of education in proceeding to centralize the schools of said district, may, in the exercise of its sound discretion, secure sites at different points in such district and erect suitable buildings thereon for the accommodation of its pupils.

COLUMBUS, OHIO, March 17, 1916.

HON. F. B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—In your letter of March 2nd, you request my opinion as follows:

> "The following question has been submitted to this department:
> "Conditions: A rural school district has voted to centralize in accordance with section 4726.
> "Query: May the board of education erect buildings at more than one point in a township and still conform to the provisions of this section 4726, G. C.?
> "This department would like to have your opinion on this question which is frequently asked."

Section 4726, G. C. (104 O. L., 139), provides:

> "A rural board of education may submit the question of centralization, and, upon the petition of not less than one-fourth of the qualified electors

of such rural district, or upon the order of the county board of education, must submit such question to the vote of the qualified electors of such rural district at a general election or a special election called for that purpose. If more votes are cast in favor of centralization than against it, at such election, such rural board of education shall proceed at once to the centralization of the schools of the rural district, *and, if necessary, purchase a site or sites and erect a suitable building or buildings thereon.* * *"

It will be observed that the above provision of section 4726, G. C., makes it mandatory upon the board of education of a rural school district to proceed at once to centralize the schools of such district if, upon the submission of the question, more votes are cast in favor of centralization than against it.

Said provision of the statute, however, vests in said board of education the discretion to determine whether it is necessary, for the purpose of centralizing said schools, to secure one or more sites and erect a suitable building or buildings thereon.

The question naturally arises whether said board of education may, in the exercise of its discretion, secure sites at different points in the district and erect buildings on such sites for the accommodation of its pupils.

I find upon investigation that practically the same provision of the statute as above set forth in section 4726, G. C., was formerly found in section 3927-1 of the Revised Statutes (94 O. L., 317).

Said section 3927-1, R. S., provided as follows:

"A township board of education may submit the question of centralization, and upon the petition of not less than one-fourth of the qualified electors of such township district, must submit such question to a vote of the qualified electors of such township district, and if more votes are cast in favor of centralization than against it, at such election, it shall then become the duty of the board of education, and such board of education is required to proceed at once to the centralization of the schools of the township, and, *if necessary,* purchase a site or sites and erect a suitable building or buildings thereon; * * *"

In the case of State ex rel. Haines v. Board of Education, 15 O. C. D., 424, the court, in interpreting the above provision of section 3927-1, R. S., held:

"It is only when the board deems it necessary to purchase a site and erect a building thereon that the act requires them to do so, and there is nothing in the act itself preventing the original board, before the building is erected or commenced, from reconsidering the action taken, and resolving to centralize the schools not in one but in two places. It may have made a mistake in the first instance and the very discretion vested in it by the act carries with it the power and duty to correct that mistake. If the original board may reconsider its action in this respect, then its successor, being clothed with all the powers of the old board, may exercise them, with a like discretion, subject, however, to the rights of a party to any contract the former board may have made. It may be said that successive boards may thus undo all that their predecessors have done, prevent the centralization of the schools and ultimately defeat the will of the people; but it is only the natural result of an elective system of government and which is in reality the expression of the will of the people through its chosen representatives. Such boards cannot legally refuse to centralize the schools be-

cause the law makes this duty imperative, but the mode and manner of performing it is discretionary, and if the duty is not performed by the old board such discretion is vested in its successor."

Cases may be readily conceived in which the accommodation of pupils attending the centralized schools and their economic transportation would require the location of said schools at different points in the district.

I am of the opinion, therefore, in answer to your question that, where the qualified electors of a rural school district vote in favor of centralization, the board of education, in proceeding to centralize the schools of said district, may, in the exercise of its sound discretion, secure sites at different points in such district and erect suitable buildings thereon for the accommodation of its pupils.

I might add that the board of education of a rural school district may effect this same result under provision of section 7730, G. C. (106 O. L., 398), without a vote of the people by suspending all of the schools in said district and conveying the pupils attending such schools to centralized schools established by said board of education at such points in said district as said board in the exercise of its discretion may determine. It would probably be necessary, however, for said board of education, in the exercise of the authority vested in it by provision of section 7625, G. C., to submit to the electors of said district the question of issuing bonds for the purpose of securing the necessary funds to provide suitable buildings for said centralized schools.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1393.

FOREIGN RAILROAD COMPANY—REAL ESTATE ACQUIRED FOR NEW RIGHT OF WAY—LEASE OF SAME TEMPORARILY—NOT LIABLE FOR EXCISE TAX ON THAT PART OF EARNINGS FROM SUCH PROPERTY.

A foreign railroad company which does no intrastate transportation business is not liable for excise taxes on that part of receipts or earnings from property acquired and held by it with a view to use as a right of way, but not actually used as such, and which has been leased temporarily so as to produce rent.

COLUMBUS, OHIO, March 17, 1916.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—There has been certified to me for collection a claim of the state of Ohio against the Louisville & Nashville Railroad Company (P. U. No. 4318) for excise taxes on account of intra-state business for the year 1915.

It is well known, of course, that the Louisville & Nashville Railroad Company's ordinary transportation business in Ohio is entirely interstate, the company having nothing excepting its terminals in this state. The present claim, however, is not founded upon transportation activities, but owes its existence to the fact that the company had during the year in question accumulated receipts by virtue of the following transactions:

The company acquired for right of way purposes in the city of Cincinnati certain tracts of real estate, some of which it purchased and some of which it leased.

The sole purpose of the company in making these acquisitions was to procure land on which to build tracks and perhaps other terminal facilities. The purpose of the company failed of achievement because of the fact that it was unable to complete the acquisition of the real estate necessary for its right of way. The real estate being on its hands, in the meantime the company leased that which it had purchased and subleased that which it had originally leased. Assurance is given by the company to the effect that such leasing was solely for the purpose of making the property for the time as productive as possible, and that as a matter of fact no real profit accrued to the company as a result of the transaction. Moreover, the company does not conduct any managerial or strict business activity with respect to the property so owned or controlled by it. The rentals which the company receives constitute the "earnings" upon which the tax has been computed.

I am of the opinion, for the following reasons, that this claim is not collectible:

In the first place, I am convinced that under the facts as stated the company does not appear in these transactions as "doing business." It is clear, of course, that the receipts are from a source other than the operation of a utility or anything incidental thereto. They must be claimed as taxable earnings, if at all, under favor of section 5418 of the General Code, which provides as follows:

> "The term 'gross earnings' shall be held to mean and include the entire earnings *for business done* by any person or persons, firm or firms, copartnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated, from the operation of any public utility, or incidental thereto, or in connection therewith. The gross earnings *for business done* by an incorporated company, engaged in the operation of a public utility, shall be held to mean and include the entire earnings *for business done* by such company under the exercise of its corporate powers, whether from the operation of the public utility itself or from any other *business done* whatsoever."

While this section undoubtedly has the effect of enlarging the liability of incorporated public utilities in so far as it has proper application, yet it is not broad enough in its scope to include every species of income which such a company may receive in the exercise of its corporate powers, but only that which arises from "business done."

It is the understanding of this department that the supreme court observed this distinction in arriving at its decision in the recently decided, but unreported, case of Ohio Traction Company v. The State, 92 O. S. 529, in which it was held that receipts or earnings from mere passive investments, not attributable in any way to business management and operation, are not within the scope of the statute.

From the facts as stated it appears that the property is not being used for the business purposes for which it was acquired by the company, nor indeed for any other business purpose whatsoever, but that the company is acting with respect to it as a mere owner rather than in a business way.

I am impelled by the foregoing considerations to the conclusion that the charge against the Louisville & Nashville Railroad Company is not collectible. It should, therefore, be cancelled.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1394.

PUBLIC UTILITIES—INVENTORIES AND VALUATIONS—AUTHORITY OF PUBLIC UTILITIES COMMISSION TO REQUIRE FILING SUCH LISTS UNDER SECTION 499-8, G. C., 103 O. L., 808, AND ALSO ITS AUTHORITY UNDER AMENDED SECTION 499-8, G. C., 106 O. L., 225—OTHER SECTIONS OF PUBLIC UTILITY LAW CONSTRUED.

Authority conferred upon public utilities commission by section 499-8, *G. C., to promulgate its order No.* 176, *requiring public utilities and interurban railroads to make and file with it lists, inventories and valuation of their property, commission, within the proper exercise of its discretion, extending the time stated in said order for the making and filing of such lists, inventories and valuation. Municipality desiring valuation of any public utility is specially authorized to ask for such valuation through the request of the council of such municipality, under favor of section* 499-8, *G. C.*

Section 499-8 *to* 499-14, *G. C., and sections* 614-49 *and* 614-50; *and sections* 4000-1 *to* 4000-5, *G. C., construed.*

COLUMBUS, OHIO, March 17, 1916.

The Public Utilities Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—You submit for my opinion thereon the following facts and inquiries:

"On the 19th day of March, 1914, the public utilities commission of Ohio adopted and promulgated its administrative order No. 176, copy of which is hereto attached and made part hereof, under favor of section 499-8 of the General Code of Ohio. (103 O. L., page 808.)

"Since the 19th day of March, 1914, the commission has granted from time to time extension, upon application, for the filing of such inventories and appraisements. Approximately one-half of the utilities amenable to said order have filed their inventories and lists of property as provided for in said order.

"On May 5th, 1915, the legislature amended section 499-8 of the General Code of Ohio (105-106, O. L., page 225).

"The commission respectfully requests your official opinion concerning this order and the statute under which it was promulgated, as follows:

"First. Was the public utilities commission of Ohio legally authorized to make, promulgate and require compliance with said order No. 176?

"Second. If the commission had and has such legal authority, and the order should be valid for the purpose of ascertaining the reasonableness and justness of rates and charges for the service rendered by public utilities or railroads of this state, or for any other purpose authorized by law, has the commission the legal authority to require a public utility or interurban railroad, within the state of Ohio, to make and file with it such inventory and appraisement, when the question of the reasonableness and justness of rates and the charge for the service rendered by the public utility or railroad is not an issue or object?

"Third. When the purpose is not to ascertain the reasonableness and justness of rates and charges for the service rendered by public utilities or railroads of this state, and there has been no request of the council of any municipality that the commission, after hearing, determine that such a valuation is necessary, has the commission the legal authority to either require

the public utility or interurban railroad to make and file the inventory and appraisement, or at its own instance to make an inventory and appraisement?

That part of said order No. 176, the consideration of which is necessary to answer the questions you submit, is as follows:

"The commission having under consideration the investigation and ascertainment of the value of the property of public utilities and of interurban railroads of the state of Ohio, for the purpose of ascertaining the reasonableness and justice of the rates and charges for service rendered by such public utilities and interurban railroads, and for other purposes authorized by law, and it appearing that the value of the property of such public utilities and interurban railroads should be investigated and ascertained, and that rules and regulations prescribing the details of the inventory of the property of each such public utility and interurban railroad are necessary, and it appearing further that public utilities and interurban railroads are required by law to co-operate with and aid the commission in investigating and ascertaining the value of the property of such public utilities and interurban railroads. It is, therefore,

"ORDERED, That all public utilities and interurban railroads operating, doing business or holding property, except messenger and signalling companies, in the state of Ohio be, and they each and all are hereby notified, directed and required to provide and furnish to the commission lists and inventories of all the kinds and classes of property with the value of each kind and class owned, operated or leased by each such public utility and interurban railroad. It is further

"ORDERED, That the lists, inventories and valuations herein required to be provided and furnished shall be in the form and detail following: * * *"

This order was issued at Columbus, Ohio, on the nineteenth day of March, nineteen hundred and fourteen, and provided that the lists, inventories and valuations therein required should be filed in duplicate at the office of the commission at Columbus, Ohio, on or before the first day of August, nineteen hundred and fourteen. The order also provided that the public utilities and interurban railroads of the state, to which it was made to apply, might obtain extensions of the time designated in the order for the filing of such inventories and that in accordance therewith, extensions have been made from time to time, until at present, as stated in your inquiry, approximately one-half of the public utilities subject to said order have filed such inventories and valuations with the commission.

This order was promulgated under authority of section 21 of act of April 18, 1913, section 499-8, G. C., which section is as follows:

"The commission, for the purpose of ascertaining the reasonableness and justice of rates and charges for the service rendered by public utilities or railroads of this state, or for any other purpose authorized by law, *shall* investigate and ascertain the value of the property of *every* public utility or railroad in the state, used and useful for the service and convenience of the public. At the request of the council of any municipality, the commission shall also investigate and ascertain the value of the property of any public utility used and useful for service and convenience of the public where the whole or major portion of such utility is situated in such municipality. Every public utility or railroad shall furnish to the

commission, its engineers, experts or other assistants from time to time and as the commission may require maps, profiles, contracts, reports of engineers and other documents, records and papers or copies of any or all of the same, in aid of any investigation or ascertainment of the value of its property, and shall grant to the commission or its agents free access to all of its premises and property and its accounts, records and memoranda whenever and wherever requested by any such duly authorized agent, and every public utility or railroad is hereby directed and required to co-operate with and aid the commission in the work of the valuation of its property in such further particulars and to such extent as the commission may require and direct. The commission shall have such power to make all rules and regulations, as to it may seem necessary, to ascertain the value of each and every utility or railroad in the state." (103 O. L., page 808.)

On May 5, 1915, this statute was amended to read as follows:

"The commission for the purpose of ascertaining the reasonableness and justice of rates and charges for the service rendered by public utilities or railroads of this state, or for any other purpose authorized by law *may* investigate and ascertain the value of the property of *any* public utility or railroad in this state, used or useful for the service and convenience of the public. At the request of the council of any municipality the commission *after hearing and determining that such a valuation is necessary may* also investigate and ascertain the value of the property of any public utility used and useful for the service and convenience of the public where the whole or major portion of such utility is situated in such municipality. Every public utility or railroad shall furnish to the commission, its engineers, experts or other assistants from time to time and as the commission may require maps, profiles, contracts, reports of engineers and other documents, records and papers or copies of any or all of the same, in *aid* of any investigation and ascertainment of the value of its property, and shall grant to the commission or its agent free access to all of its premises and property and its accounts, records and memoranda whenever and wherever requested by any such duly authorized agent, and every public utility or railroad is hereby directed and required to co-operate with and aid the commission in the work of the valuation of its property in such further particulars and to such extent as the commission may require and direct. The commission shall have such power to make all rules and regulations, as to it may seem necessary, to ascertain the value of each and every utility or railroad in the state." (106 O. L., page 225.)

Said section 499-8, General Code, as enacted April 18, 1913, authorized and required the public utilities commission of Ohio to make an investigation and valuation of the property of the public utilities and railroads of this state for the purpose of ascertaining the reasonableness and justice of the rates and charges for the service rendered by them, or for any other purpose authorized by law. Said section also conferred the mandatory authority upon the commission, at the request of council of any municipality, to investigate and ascertain the value of the property of any public utility used and useful for service and convenience of the public, where the whole or major portion of such utility is situated in such municipality.

Sections 499-9 to 499-14, inclusive, and sections 614-49 and 614-50, of the General Code, and being of the act of April 18, 1913, authorized the commission to

prescribe the details of the inventory of the property of each public utility or railroad of the state, as authorized to be made by said section 499-8, General Code, and upon completion thereof to thereafter keep the inventory up to date by showing all extensions and improvements, or other changes in the condition and valuation of the property of all public utilities and railroads in the state and to ascertain the value of said extensions and improvements and changes as might from time to time be made.

Sections 614-24 to 614-26, inclusive, of the General Code, and other related sections of the act of May 31, 1911 (102 O. L., 549), being an act changing the name of the railroad commission of Ohio to that of the public service commission of Ohio, defining the powers and duties of the latter commission with respect to public utilities, conferred upon the commission the right to investigate and determine the value of all the property, including the value of its physical property, of every public utility within its jurisdiction, actually used and useful for the service and convenience of the public, whenever it deemed the ascertainment of such valuation necessary in order to carry into effect any of the provisions of the said act.

It thus appears that by said act of April 18, 1913, the legislature changed the policy of the state with reference to the valuation of public utilities as was provided for in said act of May 31, 1911, thereby making it mandatory that the public utilities commission ascertain the value of all the property of every public utility or railroad in the state, used and useful for the service and convenience of the public. These mandatory sections were enacted April 18, 1913, and, pursuant to authority by them conferred upon it, the public utilities commission of Ohio issued said order No. 176 of the nineteenth day of March, 1914.

The wording of this order is so similar to the wording of said section 499-8, by authority of which it was promulgated, it would seem that for the purposes and objects of the order as therein declared, it would be valid if the statute is valid. There is nothing on the face of said order that would, in my opinion, make it legally unreasonable.

That the state has the right to regulate those businesses, in which the public has an interest, has long since been the law. Legislation laying down rules in first instances for the course in which those who engage in these businesses must follow, has always been regarded as due process of law, if kept within proper bounds. This principle was fully recognized in the case of Munn v. Illinois (96 U. S. 113).

Consistently reconciling the division of powers of government, our courts have held valid a multitude of statutes in which the legislature, after laying down rules and principles as substantive law, has been content to leave the execution and detail to other officers, such as administrative bodies. The power of the legislature to establish a commission, with power to fix rates and to do the reasonable things required in order to ascertain the values upon which reasonable rates may be fixed, has not been successfully challenged since the courts upheld such a conferred power by the legislature in the railroad commission cases, reported in 116 U. S., 307.

Section 2 of article XIII of the Ohio constitution of 1851 with 1912 amendments prvided that:

> "Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed. Corporations may be classified and there may be conferred upon proper boards, commissioners or officers, such supervisory and regulatory powers over their organization, business and issue and sale of stocks and securities, and over the business and sale of the stocks and securities of foreign corporations and joint stock companies in this state, as may be prescribed by law. Laws may be passed regulating the sale and conveyance of other personal property, whether owned by a corporation, joint stock company or individual."

It is unnecessary to argue at length or to cite additional authorities in order to reach the conclusion that the statute in question, properly interpreted and applied, is valid. The question as to whether or not the application of the order and the enforcement thereof, within a certain time, or at any time, would make it an unreasonable order, or amount to the taking of property without due process of law or without just compensation, would be one of fact to be determined with reference to each particular case.

It appears that while the order is general in its terms as to public utilities and interurban railroads, it was served directly upon, and service thereof acknowledged, in writing, by the utilities and interurban railroads of the state. The result of such service is that the order was made special as to each utility and railroad coming within the scope of its provision and acknowledging receipt of service thereof.

That the legislature intended that the commission should have the means of obtaining full information with reference to a public utility, when a question of public service is being considered by it with reference to such, is further evidenced by section 614-35, G. C., which is as follows:

> "Each such utility shall furnish to the commission in such form and at such times as the commission may require such accounts, reports and information as shall show completely and in detail the entire *operation* of the public utility in furnishing the unit of its product or service to the public."

This section has to do primarily with operation, but operation and resultant service are factors in valuation and rate making.

I come now to a consideration of the amendments to said section 499-8, G. C., as adopted May 5, 1915. It will be noted that in the amended form of the statute the language "shall investigate and ascertain the value of the property," was changed to "may investigate and ascertain the value of the property," thus leaving it optional with the commission as to whether or not it would make a valuation for any of the purposes set forth in the statute. Again, the phrase "of every public utility or railroad" was changed to "of any public utility or railroad," this making it clear, to my mind, that the legislature intended the commission to ascertain the value of the property of any public utility or railroad of this state only when in its discretion such a valuation should be made for any of the purposes enumerated in the section.

The provision of the statute relating to valuation at the request of a municipality was made to read as follows:

> "At the request of the council of any municipality the commission, after hearing and determining that such a valuation is necessary, may also investigate and ascertain the value of the property of any public utility used and useful for the service and convenience to the public where the whole or major portion of the utility is situated in such municipality."

Here we have a special provision, that when a municipality desires to have a valuation made of the property of certain public utilities, there must be a request therefor by the council of any such municipality and the commission upon hearing shall determine whether or not there is a necessity for such valuation.

These amendments of May 5, 1915, to said section 499-8, G. C., have changed the mandatory provisions thereof, with reference to valuation by the commission, and returning to the policy with reference thereto adopted by said act of May 31, 1911, have again left it to the discretion of the commission, in each particular case, to

determine whether or not a valuation of the property of a public utility or railroad in this state shall be made for any one of the purposes named in said section.

Said order No. 176 was promulgated and became effective under the mandatory form of said section 499-8, G. C., as enacted April 18, 1913, and is, therefore, valid and continuing until modified or revoked by the commission in the exercise of the discretion conferred upon it, in these respects, by the amendment to said section 499-8, G. C., as adopted May 5, 1915.

For answer to your first inquiry, I advise that the public utilities commission of Ohio was authorized to make, promulgate and require compliance with said order No. 176.

As to your second inquiry, I call your attention to the amendment to said order No. 176, adopted by your commission January 14, 1916, as follows:

> "First. That, pending the further order of the commission, any public utility or interurban railroad, upon application by it, may be granted an extension of time until January 1, 1917, within which to file its inventory and list of property.
>
> "Second. That any public utility or interurban railroad hereafter furnishing list, inventory and valuation, as required by said order No. 176, may furnish same either as of July 1, 1914, or as of any subsequent date certain."

This so-called amendment to said order does not effect any change in the method of the commission with reference to requiring the lists, inventories and valuations therein required. It is proof that the commission is still enforcing the order as made under the mandatory form of said section 499-8.

While the authority of the commission to act under the order is limited to its terms, it appears therefrom that the commission has under consideration the value of the property of all public utilities and of all interurban railroads in the state of Ohio, "for the purpose of ascertaining the reasonableness and justice of the rates and charges for service rendered by such public utilities and interurban railroads, and for all other purposes authorized by law." Hence, there are no public utilities or interurban railroads in Ohio to which your second inquiry can apply; and this is true also with reference to your third inquiry.

Since submitting these formal inquiries, you have advised me orally that they arise out of the requests of some of the officers of the city of Toledo, Ohio, unofficially made, that the commission require the Toledo Railways & Light Company to furnish forthwith to the commission lists, inventory and valuation of all of its property pursuant to said order No. 176, notwithstanding the extension of the time granted in the amendment thereto, as above set forth, and that no request for such valuation has been made by the council of said city of Toledo. You further advise me that there is no question pending before your commission as affecting the reasonableness and justice of any of the rates or charges made, or to be made, by the said Railways & Light Company for its public service, except as appears in said order No. 176.

If the city of Toledo desires to have made the list, inventory and valuation of the property of the Toledo Railways & Light Company at any time other than that in which the commission is proceeding to have such list, inventory and valuation made and filed with it, the method therefor, as specially provided by the legislature, is full and complete as appears in the provisions of said section 499-8, G. C., hereinbefore quoted.

If the city of Toledo desires to have made the inventory and valuation of the property of said the Toledo Railways & Light Company for the purpose of de-

termining whether or not it will acquire the same, your commission is fully authorized to make such inventory, appraisal and valuation upon request of the city, in the manner provided for in sections 4000-1 to 4000-5, inclusive, of the General Code of Ohio, 103 O. L., page 726.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1395.

APPROPRIATION TO CITY OF COLUMBUS—"REPAVING HIGH STREET FROM BROAD TO STATE IN FRONT OF STATE GROUND" ITEM, COST AND EXPENSE OF CONSTRUCTING WATER MAIN IN HIGH SREET, INCLUDED.

From the appropriation to the city of Columbus for "repaving High street from Broad to State in front of state ground" the state's proportionate share of the cost and expense of constructing water line in High street may be paid.

COLUMBUS, OHIO, March 18, 1916.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Under date of February 29th you submitted for my opinion the following inquiry:

"The general assembly appropriated a sum of money for the improvement of High street in Columbus, as follows:

"'Repaving High street from Broad to State in front of state ground, $5,000.00.' (104 O. L., 217.)

"In the act of May 27, 1915 (106 O. L., 827), is the following:

"Any monies * * * appropriated to the city of Columbus for paving contiguous to state property, against which no liabilities shall have been incurred prior to July 1, 1915, shall be available for expenditures, at any time prior to July 1, 1917, for the purposes for which they were originally appropriated * * *.'

"The city of Columbus presents to us vouchers as follows:

"For 'cost and expense of improving High street, from Livingston avenue to the south end of the superstructure of the North High street viaduct, 660 feet front on High street ---------- $2,731.66
'Credit for curb ---------- 338.25

'Net assessment ---------- $2,393.41'

"For 'cost and expense of constructing water line in High street, from Livingston avenue to the North High street viaduct, 660 feet frontage on High street ---------- $1,617.00'

"We are in doubt whether the second voucher can be paid under the above mentioned appropriation. Will you kindly advise us?"

The appropriation to which you refer, made in 104 O. L., 217, read as follows:

"CITY OF COLUMBUS

"Repaving of High street from Broad to State in front of state ground ---------- $5,000.00"

Under the final clause of said act it was provided that the money appropriated in the bill containing the above appropriation should be paid upon the approval of a special auditing committee, and said committee was authorized and directed "to make careful inquiry as to the validity of each and every claim herein made, and to pay only so much as may be found to be correct and just."

In an opinion rendered to you by my predecessor, Hon. Timothy S. Hogan, on November 28, 1914, it was held as follows:

> "Under familiar rules of law it has been decided that there is no authority to make a valid assessment against property belonging to the state, or at least that there is no method of payment other than by appeal to the legislature.
>
> "Such being the case it is apparent that the legislature has decided to recognize the moral obligation of the state to bear its proportionate share of the cost of the improvements referred to, and for that purpose has set aside the amounts as specified heretofore. * * * The legislature having determined, as it appears to me, that the state should stand its proportionate share of the assessment upon the improvements specified, it should only pay the same after the amount thereof has been determined in the same manner as the amounts to be paid by other abutting property owners are determined, and that as soon as the same is so determined the claim should be presented to the special auditing committee, which committee should go over carefully and allow the same."

Mr. Hogan's opinion, therefore, was that the five thousand dollars which was appropriated for the purpose of repaving High street was a sum set aside out of which the state's proportionate share of the cost of repaving High street should be paid, and not that the entire five thousand dollars should be paid at all events. In this conclusion I am in hearty accord.

Such being the fact, the question then to be determined is whether or not the appropriation for repaving High street shall include not only the state's share of the expense of repaving High street, but also the state's share of placing a water line in said High street.

Under the provisions of section 3812, G. C., a municipal corporation is given the power to levy and collect special assessments. Said section provides that the council of any municipal corporation may assess upon the abutting, etc., property in the corporation "any part of the entire cost of an expense connected with the improvement of any street * * * by grading, draining, curbing, paving, repaving, repairing, constructing sidewalks, * * * retaining walls, sewers, drains, * * * water mains or laying of water pipe, etc."

In other words, under section 3812, G. C., a municipality is authorized to improve any of its streets in the manner above indicated, and I do not doubt that in the improvement of a street all of such matters may be taken care of in one improvement.

After the receipt of your inquiry I requested the city attorney of Columbus, to advise me relative to the construction of the improvement on High street, and have received from him a letter as follows:

> "In answer to your request for information as to the method which was used in constructing High street water main and the High street paving, proper, I beg to state that both were constructed under the provisions of sections 3812, G. C., et seq. There were separate proceedings for the water main and the paving, but they were carried on simultaneously. I quote the title and first sections of the ordinances determining to proceed:

"'An Ordinance No. 28102.

"'Determining to proceed with the improvement of High street, from Livingston avenue to the south end of the superstructure of the North High street viaduct in the city of Columbus, Ohio.

"'BE IT ORDAINED by the council of the city of Columbus, state of Ohio:

"'Section 1. That it is hereby determined to proceed with the imporvement of High street, from Livingston avenue to the south end of the superstructure of the North High street viaduct, by laying water mains with valves and appurtenances.'

"'An Ordinance No. 28103.

"'Determining to proceed with the improvement of High street, from Livingston avenue to the south end of the superstructure of the North High street viaduct in the city of Columbus, Ohio.

"'BE IT ORDAINED by the council of the city of Columbus, state of Ohio:

"'Section 1. That it is hereby determined to proceed with the improvement of High street, from Livingston avenue to the south end of the superstructure of the North High street viaduct by grading, draining, curbing and paving the roadway with asphalt or wood block.'

"You will notice that these ordinances bear consecutive numbers. They were introduced in council on the same evening. I also note that the estimated assessments, both for the water main and the paving proper, were filed with council on the same date, to wit, January 17, 1916. I am informed by our engineering department that the general assembly, preliminary to its passage of the act making the appropriation, was furnished an estimate of the state's share of the cost of the whole improvement, to wit, $5,000. It was, I think, generally known at the time that the amount $5,000 was a larger amount than was necessary to simply cover the cost of the paving proper. The engineering department in making the estimate had in mind both the cost of the water main and the paving."

It appears, therefore, that the city of Columbus undertook to make two improvements in the said High street—one by laying water mains and the other by grading, draining, curbing and paving the roadway.

Although council undertook to make the improvement of High street under two separate ordinances, nevertheless, the improvement itself can well be considered as one. The appropriation by the legislature is for such amount as to apparently include the entire improvement made, and although the legislature in making the appropriation used the word "repaving," nevertheless, I am of the opinion that a strictly technical meaning should not be given to such word, but that it should be read as if the word "improving" had been used.

The letter from the city attorney of Columbus indicates that the engineering department of the city in making up the estimate which was submitted to the general assembly for the sum of five thousand dollars had in mind both the cost of the water main and of the paving.

I am, therefore, of the opinion that the voucher calling for the cost and expense of constructing the water line in High street, can be paid from the appropriation of five thousand dollars.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1396.

MUNICIPAL CORPORATION—UNDER ORDINANCE PASSED BY COUNCIL OF ALLIANCE, VACATING PARTS OF STREETS THE STATE HAS ACQUIRED PROPER TITLE TO PARTS OF STREETS SO VACATED.

Under ordinance passed by council of Alliance, vacating parts of streets the state has acquired proper title to parts of streets so vacated.

COLUMBUS, OHIO, March 18 1916.

HON. BYRON L. BARGER, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—Under date of March 3rd you submitted for my opinion the following letter:

> "Pursuant to your decision of September 8, 1915, relative to the Alliance armory site, I secured the record of the deed for said site and the recorded deed has been returned by the recorder of Stark county to this office.
>
> "In further compliance with your said decision, I signed and forwarded to City Solicitor Morris, of Alliance, the petition for vacation of parts of certain streets. The city solicitor informed me that said vacation has been accomplished, and the evidence thereof has been sent to me by the city clerk of Alliance, and is herewith forwarded.
>
> "Please advise whether or not the state of Ohio has acquired proper title to the parts of streets mentioned in enclosed transcript of proceedings, under Alliance ordinance 2007, and has such title properly added said parts of streets to the armory site described in your opinion of September 8, 1915."

Enclosed with your letter was a copy of the ordinance referred to, in the following language:

> "An ordinance to vacate the following strips of land, to wit: A strip of land twelve feet in width running along the south side of said Hester street and lying immediately north of and adjacent to the north lot line of said lot number 240 between Mechanic avenue and the west right-of-way line of the New York Central Railroad Company; a strip of land 11 feet in width running along the east side of Mechanic avenue and lying immediately west of and adjacent to the west lot line of said lot number 240 from Hester street to Ely street, and a strip of land 9 feet in width running along the north side of Ely street and lying immediately south of and adjacent to the south lot line of said lot number 240 from Mechanic avenue to the west right-of-way line of the New York Central Railroad Company, said strips of land lying immediately north, west, south and adjacent to the west portion of said lot number 240, in the city of Alliance, Ohio.
>
> "WHEREAS, on the 13th day of September, A. D. 1915, a petition by the owner of the west portion of lot number 240 in the city of Alliance, Ohio, and lying in the immediate vicinity of Hester, Mechanic and Ely streets in the city of Alliance, Ohio, was duly presented to council, praying that the following strips of land, to wit: A strip of land 12 feet in width running along the south side of said Hester street and lying imme-

diately north of and adjacent to the north lot line of said lot number 240 between Mechanic avenue and the west right-of-way line of the New York Central Railroad Company, a strip of land 11 feet in width running along the east side of Mechanic avenue and lying immediately west of and adjacent to the west lot line of said lot number 240 from Hester street to Ely street, and a strip of land 9 feet in width running along the north side of Ely street and lying immediately south of and adjacent to the south lot line of said lot number 240 from Mechanic avenue to the west right-of-way line of the New York Central Railroad Company, said strips of land lying immediately north, west and south and adjacent to the west portion of said lot number 240 in the city of Alliance, Ohio, be vacated; and notice of the pendency and prayer of said petition has been given as required by law, by publication in the Alliance Daily Review, a newspaper of general circulation in the corporation for six consecutive weeks ending October 23, 1915, and,

"WHEREAS, council upon hearing is satisfied that there is good cause for such vacation as prayed for, that it will not be detrimental to the general interest and ought to be made, now therefore,

"BE IT ORDAINED BY THE COUNCIL OF THE CITY OF ALLIANCE, STATE OF OHIO:

"Section 1. That the following strips of land, being a portion of Hester, Mechanic and Ely streets, to wit: A strip of land 12 feet in width running along the south side of said Hester street and lying immediately north of and adjacent to the north lot line of said lot number 240 between Mechanic avenue and the west right-of-way line of the New York Central Railroad Company; a strip of land 11 feet in width running along the east side of Mechanic avenue and lying immediately west of and adjacent to the west lot line of said lot number 240 from Hester street to Ely street, and a strip of land 9 feet in width running along the north side of Ely street and lying immediately south of and adjacent to the south lot line of said lot number 240 from Mechanic avenue to the west right-of-way line of the New York Central Railroad Company, said strips of land lying immediately north, west, south and adjacent to the west portion of said lot number 240 in the city of Alliance, Ohio, be and the same are hereby vacated.

"Section 2. That this ordinance be and remain in force from and after the earliest period allowed by law.

"Passed November 15, 1915.

"Arthur A. Reeves, President of Council.

"ATTEST: Chas. O. Silver, Clerk.

"Approved November 16, 1915.

"W. P. Barnum, Mayor.

"Published in Review, 11-17-24.

"February 7, 1916.

"I hereby certify that the foregoing is a true and correct copy of ordinance number 2007, passed November 15, 1915, and that the same was published in the Alliance Daily Review, a newspaper of general circulation in the city of Alliance, Ohio, November 17, 1915, and November 24, 1915.

"Chas. O. Silver, Clerk of Council, City of Alliance, Ohio.

"March 11, 1916.

"I hereby certify that no referendum petition has been filed against the above ordinance, No. 2007.

"Chas. O. Silver, Clerk of Council, City of Alliance, Ohio."

Section 3725, of the General Code, provides as follows:

"On petition by a person owning a lot in the corporation praying that a street or alley in the immediate vicinity of such lot may be vacated or narrowed, or the name thereof changed, the council of such municipality, upon hearing, and upon being satisfied that there is good cause for such change of name, vacation or narrowing, that it will not be detrimental to the general interest, and that it should be made, may declare by ordinance such street or alley vacated, narrowed, or the name thereof changed. And council may include in one ordinance the change of name, or the vacation or narrowing, of more than one street, avenue or alley."

I am of the opinion that the ordinance is in conformity with the statute and that, therefore, the state has acquired proper title to the parts of the streets mentioned, and that said parts of streets have been properly added to the armory site described in my opinion of September 8, 1915.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1397.

NEWSPAPER—ADVERTISEMENTS DEEMED BY PUBLIC OFFICERS TO BE OF GENERAL INTERST TO TAX PAYERS UNDER SECTION 6252, G. C., ARE TO BE PAID FOR AT RATE FIXED IN SECTION 6251, G. C.

Advertisements deemed by the county auditor, treasurer, probate judge or commissioners to be of general interest to tax payers under section 6252, G. C., and ordered published, are to be paid for at the rate fixed in section 6251, G. C.

COLUMBUS, OHIO, March 18, 1916.

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

GENTLEMEN:—Under date of February 23rd you submitted for my opinion the following inquiry:

"Section 6251, General Code, provides the maximum price that may be paid per square for the publication of advertisements, notices and proclamations *required* to be published by a public officer, and section 6254, General Code, defines what a square is.

"Section 6252, General Code, seems to authorize the auditor, treasurer, probate judge or commissioners to cause publication of such other advertisements of general interest to the taxpayers as the officers may deem proper.

Question: Where any of these officers deem it necessary to publish a brief notice, can such be regarded as being one required by law which must come within the price per square mentioned in section 6251, General Code, or may the publisher, for printing these, render a bill at so much per line according to the commercial rates of the paper in which same is published?"

An examination of the statutes discloses that the original act fixing the prices of legal advertising is found in 73 O. L., page 75. The first section of said act provided:

> "That publishers of newspapers shall be allowed to charge and entitled to receive for the publication of all advertisements, the price or rate for which is not now fixed by law, which by law are required to be published by any public officer or officers of counties, cities, villages, townships, schools, benevolent or other public institutions, *and all notices and publications known as official advertisements,* notices relating to the estates of deceased persons, *and all notices and publications generally known as legal advertisements,* and all advertisements appertaining to any public interest and required by law to be printed in any newspaper in this state, the following sums, to wit: For the first insertion, one dollar for each square; and for each additional insertion authorized by law, or by the officer or person so ordering, fifty cents for each square, fractional squares to be estimated at the same rate for space occupied; and in advertisements containing tabular or rule work, an additional sum of fifty per cent. may be charged in addition to the before mentioned rates."

The second section of said act provided:

> "That hereafter all proclamations by sheriffs for elections; orders fixing times of holding courts; treasurer's notice of rates of taxation; bridge, pike, and ditch notices; notices to contractors, and such other advertisements or notices of general interest to the tax payers, as the auditor, probate judge, treasurer and commissioners may deem proper, shall be published in two newspapers, etc."

This was the condition of the statutes until the same were changed in the codification of the statutes made in 1880. At that time the codification committee changed the language of the said statutes so as to read as follows:

Revised Statutes:

> "Section 4366. Publishers of newspapers may charge and receive for the publication of advertisements, notices, and proclamations, the price or rate for which is not otherwise fixed by law, required to be published by any public officer of the state, or of a county, city, village, hamlet, township, school, benevolent, or other public institution, or by a trustee, assignee, executor, or administrator, the following sums, to wit: For the first insertion, one dollar for each square, and for each additional insertion, authorized by law or the person ordering the insertion, fifty cents for each square, fractional squares to be estimated at the same rate for space occupied; and in advertisements containing tabular or rule work, an additional sum of fifty per cent. may be charged in addition to the foregoing rates.
>
> "Section 4367. Every proclamation for an election, order fixing the time of holding court, notice of rates of taxation, bridge, pike, and notice to contractors, and such other advertisements of general interest to the tax payers as the auditor, treasurer, probate judge, or commissioners may deem proper, shall be published in two newspapers of opposite politics, if there be such published in the county; but this chapter shall not apply to the publication of the notices of delinquent tax and forfeited land sales."

An examination of sections 6251 and 6252 of the General Code, will disclose

that the said sections are practically a re-enactment of sections 4366 and 4367, R. S., above quoted.

The original act as found in 73, O. L., 75, fixed the rate of legal advertising for publication of all advertisements which by law were required to be published —all notices and publications known as official advertisements—all notices relating to the estates of deceased persons—all notices and publications known as legal advertisements—and all advertisements required by law to be printed, and the rate fixed was one dollar for each square for the first insertion, and fifty cents for each additional square.

There is no doubt that the act as originally enacted covered the advertisements of general interest which were deemed by the county auditor, treasurer, probate judge or commissioners proper to be published; but does the statute as it now exists apply to such advertisements?

Section 6251, G. C., provides the rate for advertisements required to be published by a public officer of the state, etc. The original act stated "by law required to be published," but also referred to advertisements that were not strictly required by law to be published.

Does the language "required to be published by a public officer" as used in section 6251, G. C., mean that it must be required by law to be published only, or does it likewise mean that it might be required by the public officer to be published?

The statute is ambiguous, and, under the established interpretation of statutes in Ohio relative to codification, if a statute as codified is ambiguous resort may be had to the original statute in order to clear the ambiguity.

Referring to the statute as originally enacted, there is no doubt that such an advertisement as that concerning which you inquire would fall within the legal rate for advertising. There is doubt as to whether it would or would not under the condition of the statutes as found in the codification of 1880 and the codification of 1910.

Applying the rule as above stated, that the original statute may be consulted in order to solve an ambiguity, I am of the opinion that advertisements of general interest to the tax payers, deemed proper to be published by the auditor, treasurer, probate judge and commissioners, fall within the legal rate of advertising fixed in section 6251, G. C.

That the above is the proper construction of section 6251, G. C., is further shown by the fact that the rate fixed states that for the first insertion the price shall be one dollar per square, "and for each additional insertion, authorized by law or the person ordering the insertion, fifty cents for each square."

If we were to read the provision "required to be published" as "required by law to be published," then there would be no authority whatsoever for any officer or other person to order additional insertions.

The fact that the phrase "or the person ordering the insertion" was retained in the law, both in its codification of 1880 and in its present form, clearly establishes the fact that the same effect is to be given thereto as was to be given to the law as enacted in 73 O. L., 75.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1398.

MUNICIPAL CORPORATION—COUNCIL CHANGES GRADE OF STREET AFTER CONTRACT HAS BEEN LET AT A UNIT PRICE FOR ALL EXCAVATION—CONTRACTOR NOT REQUIRED TO MAKE ADDITIONAL EXCAVATION AT PRICE BID IN ORIGINAL CONTRACT.

Council having in resolution of necessity established grade of street and contractor having bid a unit price for all excavation on the improvement contemplated, if council subsequently changes the grade of the street the additional excavation caused thereby is not under the price bid for excavation in the original contract.

COLUMBUS, OHIO, March 20, 1916.

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

GENTLEMEN:—Under date of February 28th you submitted for my opinion the following inquiry:

"In a certain contract for the improvement of a street by grading, curbing, paving, building sewers with necessary accessories and the laying of sidewalks, the contract providing for payment at unit prices, it was found necessary during the progress of the work to alter the grade of the street for a distance of 300 feet in order to make the grade conform to that of an intersecting street. By an error the grades of the two streets were established on lines which did not meet. This alteration was made in proper form by the passage of an ordinance of council.

"This change of grade was such as to increase the quantity of excavation to the extent of 1,800 cu. yds., and the service director of the city executed a supplementary contract with the contractor, after the work was done, for 1,800 cu. yds. of *rock* excavation, agreeing to pay for such *extra* excavation at the rate of $2.00 per cu. yd., the price fixed in the proposal and original contract being 29 cents per cu. yd. for *all* excavation. Settlement was finally made on the basis of the supplementary contract at $2.00 per cu. yd., or $3,600.00.

"The following are quotations from the specifications, (which were made a part of the contract) for this work:

"'SECTION 8.

"'The director of public service reserves the right to make any additions or alterations in plans or specifications, by giving written notice to the contractor setting forth the same. If such change or alteration involves the omission of any material or work called for by the original plan or specifications, any claims for loss or profit, or any other cause growing out of any such omission, is hereby expressly waived.

"'SECTION 9.

"'If such change or alteration involves labor or material on which a price is fixed in this contract, that price shall govern. If the price of such labor or material is *not* so fixed, the sum to be allowed for such materials and labor shall, before the work is proceeded with, be agreed upon and fixed in a written contract, etc.

"'SECTION 31.

"'Whatever earth, loam sand, clay, shale, rock, paving, macadam, iron pipe, iron work, sewer pipe, brick, or any other material is to be excavated, moved or filled in embankment to whatever extent within the limits of any proposed improvement, such earth, loam, etc., and any other material shall be known and classified as earth, and such classification shall extend to the word excavation whenever it may appear in these specifications, or in any proposal, contract, bond or writing, pertaining to the improvement which these specifications govern.

"'SECTION 41.

"'The price bid for excavation or embankment shall include the excavation and removal of all earth of every kind necessary, and all rock, cinder, shale, boulders, and the removal of all stumps, etc.'

"*Question* 1: Under the specifications quoted, which were a part of said contract, was it the duty of the director of service to require the contractor to construct the improvement including the *extra* excavation caused by the change of grade for the specific price mentioned in his original bid and contract, or was it said director's duty, upon the change of grade being ordered, to require that a supplementary contract be entered into for said *extra* excavation at such price as may be agreed upon between him and the contractor, which price in this instance was at an increased price over that fixed in the original contract?

"*Question* 2: If it be held that for the extra excavation the contractor should have received the price stipulated in his unit bid for excavation, contained in his original contract, and not that fixed in the supplementary contract, would the fact that he *has been paid* the price fixed in the supplementary contract bar a finding for recovery?"

Section 3814 of the General Code provides that in making a public improvement, to be paid for in whole or in part by special assessment, the council of a municipality shall declare the necessity thereof by resolution; and section 3815, G. C., provides what such a resolution shall contain. Among other things, the said resolution shall determine "what shall be the grade of the street * * * to be improved." And said resolution shall also approve the plans, specifications, estimates and profiles for the proposed improvement. A notice of the passage of such resolution is required to be served upon the owner of each piece of property to be assessed, under the provisions of section 3818, G. C.

The contract as let to the contractor in the matter concerning which you inquire was let on the basis that the grade of the street was determined in the resolution of necessity, and the plans and specifications were prepared on the basis that said grade was so established in the resolution.

When the contractor made his bid at a certain price for excavation work, and the specifications contained the provision found in section 8 thereof, to the effect that the director of public service reserved the right to make any additions or alterations in plans or specifications, by giving written notice to the contractor setting forth the same, and that found in section 9:

"If such change or alteration involves labor or material on which a price is fixed in this contract, that price shall govern."

It must be presumed that such provisions in the specifications on which the con-

tractor bid were founded on the proposition that the grade for the street improvement had been established by council.

In construing the contract entered into by the contractor with the municipality it must be first determined what effect should be given to section 9 of the specifications, the grade of the street having already been determined; that is to say, whether or not a fair interpretation of the contract would embrace any or all changes or alterations which the director of public service might make, even including a change of grade, or whether it was only those changes and alterations that would be made in the contract as the work progressed, but not so radical in their nature as a change of grade.

I am inclined to the opinion that the provisions of sections 8 and 9 do not go to the extent of binding the contractor to make such extra excavation as was made necessary by a change of the grade at the price fixed in his original contract.

In some jurisdictions it has been held that whenever council, after a contract for an improvement had been let, made a change of grade it voided the entire contract so let, and it was necessary to proceed *ab initio* with the new change of grade. In such cases, however, the change of grade was over the entire improvement, and not simply at one end as in the case under discussion; nor does it appear in the decisions whether or not there was any statutory authority for any change or alteration in the original contract.

See Warren v. Chandos et al., 115 Cal., 382.

Syllabus:

"The supervisors have no power to authorize a change in the amount of assessment constituting a lien, by increasing or diminishing the work to be done by a contractor for a street improvement, and where they lowered the grade of a street after the letting of a contract under a resolution of intention fill it to a higher grade, the improvement to fill it to the lower grade not being specified in the resolution of intention, nor in the contract, the supervisors had no jurisdiction to order such improvement, and there was no contract therefor, and no basis for a valid assessment for such improvement."

Furthermore, in the case under consideration neither the director of public service nor the contractor assumed that the provision relative to the price to be paid for additions and alterations would apply to such a radical change as was necessitated by the change of grade, for the reason that the director of public service agreed to pay and did pay, and the contractor received, a price in excess of that fixed in his original bid.

It appears from the question submitted that the contract for the extra excavation due to the change of grade was made after the work was done, and that the same was not made in compliance with section 4331, G. C. Therefore, the requirements of the statute in that regard were not complied with. However, the contractor has received his money, and there is no intimation that the amount paid to him was excessive for the amount of work done, but was the price that was agreed upon between himself and the director of public service as being the proper price. The city has received the benefit of the work done and the contractor has received pay for the work so done. This brings the case, as I view it, within the principle laid down in the case of State v. Fronizer, 77 O. S., 7.

Answering your questions specifically, I am of the opinion in answer to your first question that under the specifications quoted, which were a part of the contract mentioned, it was not the duty of the director of public service to require the contractor to construct the improvement, including the extra excavation caused by the change of grade, for the specific price mentioned in his original bid and

contract. The contractor having received the price fixed by himself and the director of service for the extra excavation due to the change of grade, and assuming that the price therefor is not so excessive as to indicate fraud, no recovery can be had against him for the amount received.

An answer to your second question is not necessary, for the reason that I have held that the extra excavation was not required to be done at the price fixed in the original contract.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1399.

COUNTY TREASURER—DUPLICATE PAYMENT OF TAXES—CONSTITUTES TRUST FUND—SUGGESTIONS AS TO HOW MONEY CAN BE REFUNDED.

Money received from the duplicate payment of taxes constitutes a trust fund to be held by the county for the repayment of those who under a mistake of fact made said duplicate payments in the first instance. The bureau of inspection and supervision of public offices should require a complete detailed report of such payments at each examination of the treasurer's office.

COLUMBUS, OHIO, March 20, 1916.

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

GENTLEMEN:—I beg to acknowledge receipt of your letter of March 8, 1916, submitting the following inquiries:

> "Is a county treasurer required by law to account for double payments of taxes or assessments erroneously received by him? Do duplicate payments so made to him become public moneys within the meaning of section 286, G. C., as amended 103 O. L., 507?
>
> "If you hold in the affirmative, should he report such collections as collections that are required by section 2642, G. C., to be credited to the undivided general tax fund, to be refunded by the county auditor under section 2589, G. C., when the person, entitled to same, demonstrates his right to recover by reason of erroneous payment?
>
> "If you hold in the negative, how shall the county treasurer dispose of such moneys? How shall the examiners of this department report on same, in either event, as to findings in regard to same?
>
> "We feel justified in asking for your written opinion upon these questions for the reason that the examiners of this department report that duplicate payments of taxes and assessments in the larger counties of the state amount, in the aggregate, to very large sums of money."

It is apparent from your statement and from information gained from personal interviews with your examiners that the duplicate payment of taxes in many counties is becoming a matter of serious concern to county officials as well as to your department. It appears that said payments have reached such proportions in many counties as to imperatively require the adoption of some plan for the proper disposition of the same in the absence of any statutory regulations providing for their disposal.

It is well to observe that no statutory provisions have been made for the disposition of these funds because under the plan or scheme of the statutory law

it was not anticipated that such payments could occur. I refer in this connection to section 2594, G. C., which provides that when payment of either half of taxes is made the treasurer shall write in the blank space required to be left on each duplicate opposite such taxes the word "paid." This provision of said section does not mean that the entry of this word shall be made in this column the next day after such taxes are paid or at some future time. This provision means and requires that such entry shall be made when the taxes are paid. If this is done, as it was intended it should be done, duplicate payment of taxes could not possibly occur because it would be discovered instantly. It seems, therefore, incredible that such payments, even if the provisions of this law were observed in a reasonable manner, could amount to many thousands of dollars each year in certain counties, as the examinations of your department show in the case.

Referring now to your inquiry in reference to section 286, G. C., as amended 103 O. L., 507, we find its provisions which are pertinent to said inquiry are as follows:

> "The term 'public money' as used herein shall include all money received or collected under color of office whether in accordance with or under authority of any law, ordinance or order, or otherwise, and all public officials, their deputies and employes, shall be liable therefor."

Unquestionably money collected in any manner by a county treasurer for taxes, whether received and paid under a mistake of fact or law, is collected by said treasurer under color of office. I have no hesitancy, therefore, in saying that duplicate payments of taxes, paid and received under a mistake of fact, constitute public money within the meaning of this section. Such payments, therefore, are proper subjects for the attention of your examiners when making the annual examination required by law in the office of each county treasurer. But it must be understood that this statute does not thereby make such payments public money in the sense that the money received therefrom may be used by the county for public purposes or may be credited to any fund of the county to be used for public purposes. The money so received from duplicate payments of taxes becomes, is and must continue to be until exhausted a trust fund for the benefit of those who created it by mistake and who are entitled to be repaid from it upon proof of such mistake and their consequent right to such repayment. For this reason I am of the opinion, in answer to your second inquiry, that it would not be proper to report this money under the provisions of section 2642, G. C., nor should it be credited in any event to the undivided general tax fund. As before observed, there are no statutory provisions applicable to this situation, and I, therefore, advise that this money be held by the county treasurer until his semi-annual settlement with the county auditor. In the meantime each treasurer should make every possible effort to return all duplicate payments to those who are entitled to the same. At the time of making the semi-annual settlement whatever amount of such payments remains in the hands of the treasurer should be reported by him to the auditor and turned into the county treasury to be credited to a special trust fund and thereafter all claims against such fund should be paid upon the allowance of the county commissioners; said allowance to be made upon the written request of the treasurer and upon proof that the party making the claim is rightfully entitled thereto.

I further advise that your examiners be instructed at each examination of the treasurer's office to make a detailed report of this fund showing who has made the payments which created it and the amount each has paid. In this manner a publicity will be given which will doubtless result in advising many persons of their mistake and result in their recovery of what rightfully belongs to them.

It must be understood, however, that the foregoing plan is offered merely as a

suggestion. Other plans may be adopted if so desired. Under the provisions of section 277, G. C., the auditor of state is fully authorized to prescribe and require a system of accounting and reporting for all county offices and other offices named in section 274, G. C. This section, therefore, gives your department ample power to provide any plan it may choose to adopt for the reporting and accounting of the moneys under consideration here. I must advise, however, that no system should be adopted for such accounting that does not recognize the trust character of this fund and which does not require the treasurer to turn the same into the county treasury at stated intervals and which does not also provide for a complete detailed report of said fund at the time of the annual examination of the office of each county treasurer.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1400.

TEACHER IN PUBLIC SCHOOLS MAY NOT MAKE UP FOR A DAY LOST DURING TERM OF TEACHING ON WASHINGTON'S BIRTHDAY—SECTION 7687, G. C., CONSTRUED.

A teacher in the public schools may not, under authority of section 7687, G. C., make up for a day lost during the term by teaching on the 22nd day of February (Washington's birthday).

COLUMBUS, OHIO, March 20, 1916.

HON. ARCHER L. PHELPS, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—I have your letter under date of March 7th, which is as follows:

> "In Bristol township rural school district, this county, the schools were not opened on Friday after the Thanksgiving holiday, 1915, it being understood between the teachers and the board of education that this day should be made up later; on Washington's birthday, February 22nd, by permission of the board of education, the teachers in this school district, attempted to make up the day lost after the Thanksgiving holiday by teaching on Washington's birthday. The question is now raised as to whether or not the teachers are entitled to two days' pay for teaching on Washington's birthday, thereby making up the day lost after the Thanksgiving holiday.
>
> "Section 7687, G. C., provides in part as follows:
>
> "'Teachers in the public schools may dismiss their schools without forfeiture of pay on the * * * twenty-second day of February * * *'
>
> "The evident purpose of this statute is to secure the observance of the respective holidays therein mentioned. The legislature did not give the board of education the power to say whether or not schools should be kept open on the days mentioned, but left the decision of this question to the teachers themselves, with the express provision that if the teacher did dismiss the school, they should be paid for that day's time. If, on the other hand, the teacher elected to teach on that day, he would of course be entitled to the day's pay.
>
> "In my opinion, however, under the language of this statute, the teacher has no right to two days' wages for teaching on a holiday, and that is precisely what it amounts to if a teacher may be permitted to make up lost time on one of the holidays mentioned in section 7687.

"The manifest intent of the statute is to secure a dismissal of the schools on the holidays mentioned, to the end that these important days in our yearly calendar may be properly observed, and a reverence for the same established in the mind of the youth. To secure this end, the teacher is given authority to dismiss the school without forfeiture of pay. This is clear; it is equally clear that if the teacher elects to keep the schools in operation on that day, he is then entitled to one day's pay. I can find no authority under the language of this section or elsewhere supporting the proposition, that if a teacher elects to teach on a holiday, that he is thereby entitled to two days' pay.

"I will appreciate your opinion in this matter."

I concur in the reasoning advanced and in the conclusion reached by you in answer to the question submitted.

It seems clear to my mind that to hold that a teacher has authority under the above provision of section 7687, G. C., to make up for a day lost during the term by teaching on the twenty-second day of February would be to sanction as legal a practice which would defeat the manifest purpose of said statute.

I am of the opinion, therefore, that your question must be answered in the negative.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1401.

WEIGHTS AND MEASURES LAWS—NO PROVISION OF LAW FOR MANUFACTURER OF PAPER MILK BOTTLES TO FILE BOND GUARANTEEING STANDARD MEASUREMENTS.

There is no provision of law which enables a manufacturer of paper milk bottles to file a bond with an official as a guarantee that its bottles are up to the standard required and thereby obviate the necessity for inspection and sealing.

COLUMBUS, OHIO, March 20, 1916.

The Board of Agriculture, Dairy and Food Division, Columbus, Ohio.

GENTLEMEN:—Permit me to acknowledge receipt of your request for an opinion, which is as follows:

"The Ohio weights and measures specifications provide that all bottles or containers used within the state shall be inspected and sealed, and any bottles or containers which fail to hold the standard measurements should be confiscated or destroyed.

"This department has before it a request from the J. R. Van Wormer Co., Toledo, Ohio, asking that they be permitted to file a bond with the state as an assurance that all paper milk bottles made by them will be of the required standard and the usual routine of sealing abolished. We are informed by this company that the measurements must be exact to the 100th of an inch and if by chance there should be an error of this amount the folding machine would not fold the bottle. In all our inspection of these bottles we have never found one to be in excess or deficiency

"This department approved the issue of a bond and the authority of sealing same to be granted the manufacturer.

"Will you kindly submit your opinion as to whether this would be a lawful act under the present weights and measures laws?"

I have carefully examined the laws of the state relative to weights and measures, as well as the specifications which are issued by your board to the various inspectors and serve as their guide in the conduct of their office. Nowhere in the law do I find any provision for the giving of a bond such as is contemplated by the Van Wormer Company, of Toledo, Ohio, and I am at a loss to see wherein anything would be accomplished by such an action on the part of that company. If one of the bottles of the Van Wormer Company was found to be in violation of the law, the same procedure would necessarily have to follow as in the case of any other individuals, partnership or corporation violating the weights and measures law.

It is, therefore, my opinion that your board is without authority to accept the bond of the Van Wormer Company, referred to, and the action of that company in giving it would be without any force or effect in so far as it applied to the enforcement of the weights and measures law.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1402.

BLIND RELIEF—ONE NEED NOT BE TOTALLY BLIND TO RENDER HIM ELIGIBLE—QUESTION AS TO WHETHER SUCH PERSON WOULD BECOME PUBLIC CHARGE—SECTION 2965, G. C.

One need not be totally blind to render him eligible to receive relief under the provisions of section 2965, G. C. A condition of blindness which makes one unable to maintain himself from becoming a public charge is required.

COLUMBUS, OHIO, March 21, 1916.

HON. LINDSEY K. COOPER, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—Your letter of March 7th, in which you ask for an opinion as to the operation of section 2965 of the General Code, has been received. With it you enclose copy of an opinion which you have just rendered to the county commissioners on this question. Your letter and the copy of opinion are as follows:

"I have rendered the enclosed opinion to the county commissioners of this county, and they are anxious for me to submit to you section 2965, General Code, for an opinion, especially on the following proposition: Does a person have to be absolutely blind and unable to see at all, before he is entitled to any relief, or, if the person has so lost his eyesight as to be unable to provide himself with the necessities of life, for that reason, and has the other necessary qualifications entitling him to relief, can relief be legally afforded him? * * *

"Thanking you in advance for the favor of your opinion on this question, I am, * * *

"OPINION

"*To the Honorable Board of County Commissioners of Lawrence County.*

"GENTLEMEN:—Replying to your verbal enquiries relative to blind relief, will say:

"Section 2967, General Code (as amended 103 Ohio Laws, 60), provides in part:

" 'No certificate of qualification of drawing money hereunder shall be granted until the board of county commissioners shall be satisfied from the evidence of at least two reputable residents of the county, one of whom shall be a registered physician, that they know applicant to be blind and that he has the residential qualifications to entitle him to the relief asked.'

"Section 2965 of the General Code, provides:

" 'Any person of either sex who, by reason of loss of eyesight, is unable to provide himself with the necessities of life, who has not sufficient means of his own to maintain himself, and who, unless relieved as authorized by these provisions would become a charge upon the public, or upon those not required by law to support him, shall be deemed a needy blind person.'

"Section 2966 of the General Code, provides:

" 'In order to receive relief under these provisions a needy blind person must become blind while a resident of this state, and shall be a resident of the county for one year.'

"It is, therefore, my opinion that a person does not have to be totally blind in order to be entitled to relief, but if he has lost his eyesight to the extent of being unable by reason of that fact to provide himself with the necessities of life, and has the other necessary qualifications to entitle him to relief, he may lawfully be granted relief.

"Section 2966 above quoted is as plain as language could make it, that is, that no person is entitled to relief who became blind at any time before he came into this state, and that he must be a resident of the county for one full year immediately preceding any relief granted."

A reading of section 2965 of the General Code, supra, will at once show conclusively that the blindness comprehended by that section is of a comparative nature, and what might be blindness in one to bring that person under the statute would not necessarily be blindness in another.

It is, therefore, my opinion that it is not necessary that one be totally blind in order to entitle him to receive relief as a needy blind person. If he is so blind as to make it impossible for him to maintain himself from becoming a public charge he would be entitled to relief under the statute, all the other conditions being present. I concur in the conclusion expressed in your opinion.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1403.

COUNTY COMMISSIONERS AND TOWNSHIP TRUSTEES—NO STATUTORY PROVISION IN PURCHASING CULVERT PIPE AND ROAD MACHINERY TO LET CONTRACTS FOR SAME BY COMPETITIVE BIDDING.

There is no statutory provision which requires county commissioners or township trustees, in purchasing culvert pipe and road machinery, to let the contracts for the same by competitive bidding.

COLUMBUS, OHIO, March 21, 1916.

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

GENTLEMEN:—I have your communication of February 15, 1916, in which you submit the following inquiries:

"(1) Can county commissioners make legal purchases of culvert pipe and road machinery without advertising for bids? If not, please give conditions as to advertising, etc. Also please advise as to the amount, if any, that they may purchase at any one time without advertising for bids.

"(2) Can township trustees make legal purchase of culvert pipe and road machinery without advertising for bids? If not, please give conditions as to advertising, etc. Also please advise as to the amount, if any, that they may purchase at any one time without advertising for bids."

Section 157 of the Cass highway law, section 7200, G. C., contains the following provision:

"The county commissioners may purchase such machinery or other equipment for the construction, improvement, maintenance or repair of the highways, bridges and culverts under their jurisdiction, as they may deem necessary, which shall be paid for out of any taxes levied and collected for the construction, improvement, maintenance and repair of roads, as provided in this chapter."

The same section also contains the following provision:

"Nothing herein shall prevent any township or two or more townships from purchasing for the exclusive use of the township or townships such machinery, tools and equipment as may be deemed necessary by the trustees thereof, but before such purchase the suggestions of the county highway superintendent shall be considered. Such machinery, tools and equipment shall be paid for by the trustees of the township or by the trustees of two or more townships, if for the joint use of two or more townships, out of any funds available for road maintenance and repair. Such township or townships may join with an incorporated village for the purchase of machinery, tools and equipment for their joint use."

Section 230 of the Cass highway law, section 7214, G. C., contains the following provision:

"The county commissioners or township trustees may contract for and

purchase such material as is necessary for the purpose of constructing, improving, maintaining or repairing any highways, bridges or culverts within the county. * * *"

The Cass highway law contains a number of provisions requiring the letting of contracts at competitive bidding. Section 63 of the act, section 3298-4, G. C., requires the township trustees to let contracts for road improvements to the lowest and best bidder after advertisement in the manner provided in said section. Section 124 of the act, section 6945, G. C., requires county commissioners to award contracts for road improvements to the lowest and best bidder after advertisement for bids in compliance with the terms of the section. Section 156 of the act, section 7199, G. C., provides that if in the opinion of the county commissioners it is advisable to provide for the improvement, maintenance and repair of any portion of the highways of the county by contract, such contract, if the cost and expense exceeds two hundred dollars, shall be let by competitive bidding. There are other sections of the act which require competitive bidding, but all of the sections which require the letting of contracts by competitive bidding relate to construction, improvement, maintenance or repair by contract.

Where commissioners or trustees proceed to construct, improve, maintain or repair a highway by contract, they have no occasion to purchase material or machinery, the necessity for such purchase arising only where the commissioners proceed by force account. I am unable to find in the Cass highway law any provision which requires the commissioners, where they determine to proceed by force account and must, therefore, purchase material and machinery, to let the contracts for such material and machinery by competitive bidding, and I know of no general provision of law requiring them to so proceed.

I, therefore, advise you that there is no statutory provision which requires county commissioners or township trustees, in purchasing culvert pipe and road machinery, to let the contracts for the same by competitive bidding. While there is no legal requirement as to letting contracts for material and machinery by competitive bidding, it is my view that under ordinary circumstances the interests of the public will be best served by inviting bids and awarding the contracts to the lowest responsible bidder, in making the purchases referred to by you in your communication.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1404.

TREASURER OF STATE—WHEN SUCH OFFICER MAY CREATE COLLECTION ACCOUNT IN SOME BANK—LIMITATIONS OF STATUTES APPLICABLE TO DEPOSITORIES OF ACTIVE AND INACTIVE FUNDS.

1. *The limitations of section* 330-1, *G. C., apply only to the depositories of inactive funds.*

2. *The General Code fixes no limitation as to the amount which a depository of active funds may receive, except such limitations provided in section* 330-3, *G. C.*

3. *Section* 744-12, *G. C.*, 106 *O. L.*, 505, *does not limit the amount of state funds which may be deposited with any depository.*

4. *The treasurer of state, as incidental to the proper discharge of his duties, is authorized, during the heavy collection periods of each year when active depositories are filled to capacity, and until he is able to place the state funds in inactive depositories, to create a collection account in some local bank, which properly secures him and the state funds, for the purpose of depositing therein and securing the collection of checks and drafts received by him.*

Funds of the state should, however, be kept in such collection account only until the treasurer is able to transfer the same to properly qualified depositories.

COLUMBUS, OHIO, March 21, 1916.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of February 21st, in which you request my opinion as follows:

> "Reference is hereby made to sections 321 to 330-11, inclusive, of the General Code, and, specifically, to 330-1 thereof, which reads as follows:
>
> "'Section 330-1. No bank or trust company shall have on deposit at any one time more than its paid in capital stock, and in no event more than three hundred thousand dollars ($300,000.00) as an inactive deposit. (102 v. 33, Sec. 12.)'
>
> "QUESTION:
>
> "1. Does this section above quoted apply to inactive deposits or depositories only, and,
>
> "2. If so, what limitations as to amounts that may be deposited are placed on active depositories?
>
> "3. Is section 744-12 (O. L. 106, page 505) applicable to deposits of the state treasury?"

Section 330-1, of the General Code, quoted in your letter, by its specific terms, applies only to "inactive deposits" and fixes a definite limit upon the amount of inactive deposits which may be made in any bank or trust company.

There is no limit as to the amount which may be deposited as an active deposit, except such as created by the provisions of section 330-3 of the General Code, which is as follows:

> "The treasurer of state before making such deposits shall require that each and every approved bank or trust company deposit with him United States government bonds, bonds of this state, county, township, school district, road district, or municipal bonds of this state at not less than their par value, in an amount equal to the amount of money to be

deposited with such banks or trust companies, or surety company bonds, which when executed shall be for an amount equal to the amount deposited plus 5%, conditional for the receipt and safe-keeping and payment over to the treasurer of state or his written order of all moneys which may come into the custody of such bank, or trust company under and by virtue of this act, and the interest thereon when paid shall be turned over to the bank or trust company so long as it is not in default. And further, said bonds so given shall include a special obligation to settle with and pay to the treasurer of state for the use of the state interest upon daily balances on said deposit or deposits, at the rate bid for, but not less than 3% per annum for inactive deposits and 2% per annum for active deposits (on a 365 day basis) payable quarterly on the first Monday of February, May, August and November of each year, or any time when withdrawals are made or the account is closed."

Under the above section the security furnished by the bank or trust company must at all times be equivalent to the amount deposited, plus five per cent. This section is applicable to active as well as inactive deposits.

Section 744-12 (106 O. L., page 505) referred to in your letter, is as follows:

"That whenever any of the funds of the state, or any of the political subdivisions of the state, shall be deposited under any of the depository laws of the state, every corporation, person, partnership and association coming within the purview of this act shall be permitted to bid upon and be designated as depositories of such funds, upon furnishing such surety or securities therefore as is prescribed by the laws of the state of Ohio; provided, however, that there shall not be deposited with any such corporation, person, partnership, or association by any such political subdivision an amount in excess of five hundred thousand dollars."

The above section, excepting the proviso following the semicolon, which limits the amount that may be deposited with any such "corporation, person, partnership or association," is applicable to state funds. The limitation in the proviso refers solely to the funds deposited by a political subdivision of the state and does not apply to or affect the deposits of state funds.

Although I have specifically answered your questions as asked, yet from the information secured since receiving your request at a conference in your office at which, together with yourself and the members of your inspection and accounting force, the treasurer of state and two special counsel from my office were present, I do not believe that the situation which prompts your questions is cleared up or made easier of solution by the answers just given.

It seems that there are three qualified depositories of active state funds in Columbus, the principal one having a capital stock of $500,000.00, another having a capital stock of $400,000.00, and the third having a capital stock of $25,000.00. The amount of active deposits which each of these banks can have at any time is therefore limited by the amount of securities of the character prescribed in said section 330-3 of the General Code, which such bank is able to and did put up with the treasurer of state.

It is represented that none of said active depositories have been able to put up with the treasurer of state securities in excess of the amount of their respective capital stocks, and therefore that there has been no time when the treasurer of state was authorized to deposit with any of said banks an amount in excess of its capital stock.

The period commencing about November 15th and ending about January 1st, is the heaviest collection period of each year in the office of the treasurer of state. The collections during this period, amounting at times to more than $1,000,000.00 per day, are far in excess both of the amount which the treasurer is obliged to pay out upon warrants of the auditor of state and of the amount which he can lawfully place with the depositories of active funds. It therefore follows that until the excess over expenditures can be placed with depositories of inactive funds he must keep such collections, which are made largely in the shape of checks and drafts, in his safe, or he must convert such checks and drafts into cash and keep this cash in his safe, or he must create a temporary collection account with some bank until he is able to place the money so collected with depositories of inactive funds, or until the daily expenses have so reduced the active deposits that a transfer can be made to the depositories of such funds.

The first of these plans results in keeping checks and drafts in the safe of the treasurer of state for days, and sometimes weeks, before the same are presented for payment. This plan is contrary to every accepted principle of good business, and subjects the treasurer to liability for loss by reason of the possible failure, during the time such checks and drafts are so held, of the drawer of a check or draft or the bank upon which it is drawn, or both,, for which the treasurer has no security of any kind. I therefore cannot approve its adoption.

The second plan, i. e., to convert the checks, drafts, etc., into cash and keep such cash in the safe until it can be placed in qualified depositories, is subject to the objection that the collection of a large number of such checks and drafts if done directly by the treasurer would entail an enormous amount of extra work, and occasion additional administration expense, while if done through the agency of a bank employed simply to collect, and not in the ordinary course of business as a depository, would naturally result in the necessity of paying the bank a commission to take care of its collection expenses. Since the treasurer receives several thousand checks and drafts per day during this period, and the average amount of each check is small, (more than three thousand checks each of $5.00 or less having been received in a single day), it follows that this collection expense would be unusually high and exceed by many times the interest which the amount so collected would earn, even if the treasurer were able to immediately find place for it in a properly qaulified depository. This plan would also take out of circulation and place in the vaults of the state treasurer at certain periods several million dollars of currency. The state would reap no benefit from this course, because no interest would be received on such sums, and it would in addition be contrary to the plain provisions of section 326 of the General Code, which section is as follows:

> "The treasurer of state shall not keep at any one time more than fifty thousand dollars ($50,000) as a reserve in the treasury vault, and all other moneys of the state shall be deposited as hereinafter provided."

By the last of these three plans, which is the one adopted by the present treasurer, all checks and drafts are immediately deposited and collected in the usual course of business, and the account is withdrawn as rapidly as the funds can be placed in any qualified depository, the bank carrying the collection account secures the treasurer of state from loss by depositing with him securities other than those required by section 330-3 of the General Code, but which are of ample value.

It is true that the state receives no interest from this collection account until the funds therein can be placed in a qualified depository, but the same is true of either of the other plans. If the checks and drafts are carried and not cashed, the

state loses the interest, and the banks upon which the same are drawn profit by the use of the money, and without giving any security; if the cash is kept in the safe no interest is received. The state is, therefore, in the same position so far as interest receipts are concerned under all of the three plans. The treasurer's books show that during the entire time this collection account was maintained, the depositories of active funds were filled to the amount permitted by the securities deposited by them. His correspondence shows that honest effort was persistently made to place this money with depositories of inactive funds, but with little success, because money during that period was plentiful and not worth to the banks qualified as inactive depositories the amount of interest bid by them; they, therefore, upon various pretexts refused to receive funds offered them.

Although there is no provision of the General Code directly authorizing the creation and use of such collection account deposit, yet by reason of the exigency resulting from the unusual situation existing during the period of time referred to, I believe that the treasurer of state was justified in following the plan adopted by him. It was in accordance with accepted business methods, and was apparently an honest endeavor to solve the situation which was not anticipated and not provided for in the depository law. It is true that any of the several possible methods of solving the difficulty is liable to abuse in the hands of a dishonest treasurer, but so long as an honest effort is made to place such funds as rapidly as possible with qualified depositories of inactive funds, and so long as the active depositories are filled to capacity the state does not suffer and the treasurer is able to secure himself and the funds of the state.

I am therefore of the opinion that the treasurer of state was authorized, in view of the situation confronting him during the temporary period of heavy collections in his office, to establish and maintain a collection account as hereinbefore described. Funds of the state, however, should be kept in such account only until the treasurer is able to transfer the same to properly qualified depositories.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1405.

BOARD OF ADMINISTRATION—HAS AUTHORITY TO ACT AS COMMISSION IN LUNACY—MAY TRANSFER PATIENTS FROM A PENAL INSTITUTION TO LIMA STATE HOSPITAL WITHOUT INTERVENTION OF PROBATE COURT—VICE VERSA.

Under the provisions of senate bill No. 106, 103 *O. L.*, 681, *being sections* 1841-1 *to* 1841-5, *G. C., inclusive, the Ohio Board of Administration is vested with authority to sit as a commission in lunacy and to transfer insane patients from the Ohio state reformatory or the Ohio penitentiary to the Lima state hospital, without the intervention of the probate court. No question can be raised as to the depriving of the persons transferred of their liberty without due process of law, as the limit of time for which they may be held in the Lima state hospital, under the transfer made by the Ohio Board of Administration, is fixed by the term of sentence of the court committing them to the institution from which they were transferred.*

COLUMBUS, OHIO, March 22, 1916.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I have your request for an opinion, concerning the transfer of

insane convicts from the penitentiary and reformatory to the Lima state hospital, which request is as follows:

> "We have been transferring patients from the penitentiary and the reformatory to Lima under sections 2216 to 2222 inclusive, of the General Code of Ohio Laws. However, I am of the opinion that the board can, and I believe should, act under senate bill 106, page 681 of 103 Ohio Laws, which was passed April 9, 1913, and approved May 5th of the same year. It seems to me that our authority is fixed under this act for the transfer of all patients, whether from a penal institution to the Lima state hospital or from a benevolent institution to that hospital, or for their return, and if this is true it seems to me that a saving is thereby effected to the state."

Sections 2216, 2217, 2220 and 2221 read as follows:

> "Section 2216. When the physician of the penitentiary or reformatory reports in writing to the warden or officer in charge thereof, that in his opinion a convict confined therein is insane, such warden or officer shall apply to the probate court of the county in which the institution is located, for an examination to be made of such convict by two physicians of at least three years' practice in the state, not connected with the penitentiary or reformatory, and to be designated by the court. If satisfied after a personal examination, that the convict is insane, they shall so certify in the form and manner prescribed for the commitment of insane persons to state hospitals."
>
> "Section 2217. Such warden or officer shall apply to the court for an order transferring the convict to the Lima state hospital, accompanying his application with the medical certificate of lunacy. If satisfied that the convict is insane, the court shall issue an order of transfer, and the warden or officer shall thereupon cause the convict to be transferred to the Lima state hospital and delivered to the superintendent thereof with the certificate of lunacy and order of transfer.
>
> "Section 2220. An insane convict under indeterminate sentence, transferred from the penitentiary or the reformatory to the Lima state hospital, shall be detained at such hospital for the maximum term of sentence provided by law for the offiense of which the convict was convicted, unless sooner restored to reason.
>
> "Section 2221. When an insane convict confined in the Lima state hospital, whose term of sentence has not expired, has been restored to reason, and the superintendent of the hospital so certifies in writing, he shall be transferred forthwith to the penitentiary or reformatory from which he came. The officer in charge shall receive such convict into the penitentiary or reformatory."

It will be noted from a reading of the sections quoted above that full machinery is provided for the transfer of inmates of the penitentiary or reformatory to the Lima state hospital upon their becoming insane while under sentence. At the time these laws, as quoted above, were passed, the Lima state hospital was not under the jurisdiction and control of the Ohio Board of Administration, nor was your board vested with any authority to transfer inmates from either of the two penal institutions to the Lima state hospital, other than that given you by these sections. Since the completion of the Lima state hospital and its having been turned over to your board, under whose charge it is managed, a different situation

exists, in that inmates of the Lima state hospital bear the same relation to the board of administration as inmates of the penitentiary, reformatory, or other state institutions, in so far as custody, control, etc., are concerned.

In your letter you refer to senate bill No. 106, page 681, 103 O. L., which is sections 1841-1, 1841-2, 1841-3, 1841-4 and 1841-5, of the General Code, and inquire whether or not under its provisions you are authorized to transfer patients from the penitentiary or reformatory to the several state hospitals without the intervention of the probate court. The contention of your board is doubtless based primarily on the provisions of section 1841-2, of the General Code, 103 O. L., 681, which is section 2 of senate bill No. 106, referred to above, and is as follows:

> "All persons committed to any institution under the control and management of the Ohio Board of Administration shall be considered as committed to the control, care and custody of such board. Upon resolution, duly entered upon the minutes of the board, any person committed to one of such institutions may, for reasons set forth in such resolution, be transferred to any other institution; provided that, except as otherwise provided by law, no person shall be transferred from a benevolent to a penal institution."

The authority of the board of administration to act in connection with the transfer of insane prisoners from the penitentiary or reformatory to the Lima state hospital would, under section 1841-2, quoted above, be clear and indisputable and no question could be raised concerning such authority save and except for one thing, and that is the continuance of sections 2216, et seq., of the General Code, which have not been repealed and which are apparently in conflict with the provisions of senate bill No. 106, referred to above. However, in view of the circumstances and conditions surrounding the erection and operation of the Lima state hospital, attention should be directed to the purpose to be accomplished through that institution.

The main purpose of the Lima state hospital is to secure to the unfortunate criminal insane medical attention and environment to the end that their condition may be improved to the best possible extent and, in addition thereto, another purpose of the Lima state hospital is to make possible the removal from the other state hospitals for insane such inmates thereof who may exhibit dangerous or homicidal tendencies, as referred to in section 1993 of the General Code, as amended at page 448 of 103 O. L., which section is as follows:

> "The superintendent of a state hospital for insane may make application to the Ohio Board of Administration for an order of transfer to the Lima state hospital of any or all inmates thereof that exhibit dangerous or homicidal tendencies, rendering their presence a source of danger to others. The board, upon satisfaction that such order is advisable, may order the transfer of such persons to the Lima state hospital."

It will be noted, therefore, that the Lima state hospital has two principal functions to perform in the care of unfortunates, who, either through their own act or through natural causes, become wards of the Ohio Board of Administration: (1) The providing for medical care and attention, and (2) the segregation of such of the dangerous wards of the board who, for reasons of safety to themselves and other inmates, are sent to the Lima state hospital. In the case of the transfer from the state hospital for the insane of patients exhibiting dangerous or homicidal tendencies, there has already been an inquest by a probate court,

hence no question would be raised concerning the detention of such persons or the depriving them of their liberty without due process of law.

In the case of the transfer of inmates from the penitentiary or reformatory, it will be noted that such inmates, if transferred to the Lima state hospital, could not be deprived of their liberty in the Lima state hospital for any longer time than it would be taken from them if kept in the penitentiary or reformatory under the sentence of the court which committed them, it being expressly provided in section 1995 of the General Code, that if an inmate of the Lima state hospital is insane upon the expiration of the sentence under which he was committed, an inquest shall then be held to determine as to what disposition shall be made of him.

Section 1995 of the General Code is as follows:

> "If the insanity of an inmate, serving sentence, in the hospital, continues upon the expiration of his sentence, within five days after the expiration of such sentence, the superintendent shall make application to the probate judge of the county in which the institution is situated for an order to retain such person in the hospital until he is restored to reason and mail a written notice that he has made such application to one or more friends or relatives of the inmate, if their address is known."

I have been informed that senate bill No. 106, referred to above, originated through the efforts of your board to provide economical means of transferring patients from one of the institutions in your charge to another, and that the only possible reason that could be assigned for the failure of the general assembly to repeal the sections of the law specifically providing for the transfer of insane persons from the penitentiary or reformatory to the Lima state hospital, was the fact that at the time senate bill No. 106 was enacted, and for some time thereafter, the Lima state hospital continued to be under the management and control of the board of commissioners for the erection of the Lima state hospital, and there was no absolute certainty as to when it would come under the management and control of your board. However, it was provided by section 8 of the act, for the erection of the Lima state hospital, to be found at page 237, 98 O. L., as follows:

> "Admission of inmates during the period of construction. Inmates may be admitted to the Lima state hospital after the work of construction has progressed to such an extent that they may be safely and properly kept. Said inmates are to be admitted as hereinafter provided, but preference shall first be given to insane criminals."

Therefore, pending the transfer to your board of the management and control of the Lima state hospital, when the inmates of the various institutions under your care, custody and control might be transferred to the Lima state hospital, under the provisions of senate bill No. 106, referred to above, the machinery which had been previously provided for the transfer was allowed to stand, it being assumed that upon your board taking control of the Lima state hospital it would then proceed under the provisions of senate bill No. 106, which authorizes the board to sit as a lunacy commission and conduct the arrangements for the transfer of inmates from one of its institutions to another, without resort to the probate court.

Opinion No. 685, rendered by this department under date of August 5, 1915, to Dr. C. F. Gilliam, superintendent of the Columbus state hospital, Columbus, Ohio, dealt with the question of the transfer of inmates of the reformatory and

penitentiary to the Lima state hospital, and it was held in that opinion that the transfer would have to be made under the provision of section 2216, et seq., of the General Code, supra. However, at that time the Lima state hospital had not been placed under the control and management of your board, hence the authority given by senate bill No. 106 was not operative.

The plan and procedure which has been provided by senate bill No. 106 is a sensible one, economical in its administration, and from the fact that the power to pass upon the condition of the inmates of the various institutions is lodged with the physicians and others in charge of the inmates daily, it is fair to assume that the very best judgment will be used at all times, owing to the superior advantages which those in daily contact with the inmates have over the physicians who might be selected casually for the inquest.

Under the existing state of the law, two means are provided for the transfer of patients from the penitentiary and reformatory to the Lima state hospital, viz.: The plan prescribed in sections 2216, et seq., of the General Code, and the plan proposed by senate bill No. 106, referred to. Every right of the inmate is preserved by senate bill No. 106, and, in addition thereto it has many advantages over the more cumbersome method which was made necessary before the board of administration had control of the Lima state hospital. So that while senate bill No. 106 does not, in words, repeal the other laws relating to the transfer of inmates from the penitentiary and reformatory to the Lima state hospital, it is my opinion that at the present time, and ever since October 1, 1915, when the board of administration assumed control of the Lima state hospital, it has had power to make the transfers without the intervention of the probate court. It also follows that there is abundant authority in the statutes for the return to the penitentiary or reformatory of such inmates in the Lima state hospital, who may recover their reason while there, that authority being contained in the provision of section 2221 of the General Code, which is as follows:

> "When an insane convict confined in the Lima state hospital, whose term of sentence has not expired, has been restored to reason, and the superintendent of the hospital so certifies in writing, he shall be transferred forthwith to the penitentiary or reformatory from which he came. The officer in charge shall receive such convict into the penitentiary or reformatory."

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1406.

COUNTY COMMISSIONERS—JOINT COUNTY DITCHES—CIVIL ENGINEER APPOINTED BY GOVERNOR—DUTIES—COMPENSATION, HOW PAID—NO AUTHORITY FOR ENGINEER TO EMPLOY ASSISTANTS—SECTION 6537, G. C., 103 O. L., 836, CONSTRUED.

No survey of a joint county ditch petitioned for pursuant to the provisions of sections 6536 and 6537, G. C., 103 O. L., 836, et seq., is authorized to be made prior to the location and establishment thereof.

The duties and authority of a civil engineer appointed by the governor pursuant to the provisions of section 6537, G. C., 103 O. L., 836, are limited to sitting with the commissioners in joint session and voting on all questions relating to the proceedings of such joint board of commissioners in the location of the proposed joint county improvement, and the determination of the necessity thereof pursuant to the provisions of section 6451, G. C., et seq.

There is no authority in law for the employment of assistants to aid in the performance of his duties by a civil engineer appointed by the governor pursuant to said section 6537, G. C., 103 O. L., 836.

Persons employed by a civil engineer appointed under authority of said section 6537, G. C., 103 O. L., 836, may not be paid from the county treasury of either county in which the proposed improvement is located, nor may the compensation of persons so employed be charged against the petitioners if the improvement is rejected.

In case of the rejection of the improvement by the joint board of county commissioners the per diem compensation of the civil engineer appointed by the governor together with his necessary expenses is required to be charged against the petitioners for the joint improvement.

COLUMBUS, OHIO, March 22, 1916.

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

GENTLEMEN:—Yours under date of March 20, 1916, is as follows:

"We would respectfully request your written opinion upon the following questions:

"In the construction of a joint county ditch between two counties, the boards of commissioners failed to agree, whereupon application was made to the governor for the appointment of a civil engineer as provided in section 6537, General Code, as amended 103, O. L., 836. The civil engineer was appointed, and spent two weeks in going over the line of the proposed improvement, using as assistants a deputy surveyor of one county and three deputy surveyors of the other county.

"Question 1. Does the law contemplate that a civil engineer so appointed, should make a survey of the improvement, or does he act as a member of the joint board in rendering a decision?

"Question 2. In this case, how are the assistants employed by him in this work to be paid? In other words, should the one county pay for the one assistant used, and the other county pay for the three assistants used, or is all this cost to be considered as part of the cost of location and construction and assessed against the property owners in case the ditch be granted and constructed?

"Question 3. In case the joint board concludes to dismiss the petition,

who pays the cost thus incurred by the civil engineer, including his own compensation?"

Section 6536, G. C., 103 O. L., 836, provides in part as follows:

"Ditches, drains or watercourses which provide drainage, or, when constructed, will provide drainage, for lands in more than one county, may be located and constructed, enlarged, cleaned, or repaired or boxed or tiled as provided in this chapter and the laws prescribed for constructing, enlarging, cleaning or repairing single county ditches, drains or watercourses, * * *."

Section 6537, G. C., 103 O. L., 836, to which reference is made, provides:

"When a ditch or improvement is proposed, which will require a location in more than one county, or it is sought to improve the channel of a river, creek or run, or part thereof, by straightening, widening, deepening, or changing it, or by removing from adjacent lands, timber, brush, trees, or other substance liable to obstruct it, which improvement as proposed is in more than one county, application shall be made to the board of county commissioners of each of such counties, and the surveyor or engineer shall make a report for each county. * * * A majority of the joint board of commissioners, when in joint session, shall be competent to locate and establish such ditch or improvement, or to grant the order improving the channel of a river, creek, or run, or part thereof. Or in case the members of the said joint board of commissioners when in joint session shall be equally divided on the locating or establishing of such ditch improvement, or the granting the order for improving the channel of a river, creek or run or part thereof, by straightening, widening, deepening or changing it, or by removing from adjacent lands timber, brush, trees or other substance liable to obstruct it; said joint board shall certify that fact to the governor of the state of Ohio, who shall within twenty days appoint an experienced civil engineer who is not a resident of either county or interested in the proceedings had under this act, nor employed at any time upon any public work done under the direction of the commissioners of any such county. Said civil engineer shall thereupon be competent to sit with said commissioners in joint session and vote on all questions relating to such proceedings as fully and completely as any commissioner of said joint board. The compensation for said civil engineer shall be ten dollars per day and his necessary expenses, provided, he shall not be paid for more than twenty days in any one proceeding. The said compensation and expenses shall be paid as part of the expenses of the proceedings if the improvement is ordered, and against the petitioners if rejected by said joint board. * * *"

The foregoing sections are a part of chapter 2, title III of part second of the General Code. An examination of this chapter fails to disclose specific provision under which a joint county ditch, authorized by the provisions of said section 6536, G. C., supra, to be constructed, may be established. For such provision for the proceedings in the establishment and location of such joint county ditch we are then, by the terms of said section, referred to "the laws prescribed for constructing, enlarging, cleaning or repairing single county ditches, drains or watercourses."

Section 6451, G. C., relative to the establishment and location of single county ditches provides in part as follows:

> "The county commissioners shall meet at the place of beginning of the ditch, as described in the petition, on the day fixed, as provided in this chapter, and hear the proof offered by any of the parties affected by said improvement, and other persons competent to testify. They shall go over and along the line of the improvement, and by actual view of the ditch and the premises along and adjacent thereto which are to be drained or benefited thereby, determine the necessity thereof, and may adjourn from time to time, and to such place as the necessity of the work may require. * * *"

The provisions of this section define the powers, duties and authority of the joint board of county commissioners and the civil engineer, appointed and authorized to sit with them under the provisions of said section 6537, G. C., supra, in the location and establishment of joint county ditches under proceedings authorized by sections 6536 and 6537, supra, et seq. That is to say, if all the proceedings necessary to confer upon the joint board of county commissioners jurisdiction to determine the necessity of the joint improvement have been regularly had, it then devolves upon such joint board to determine that question pursuant to the provisions of said section 6451, G. C., supra, and in the event the members of such joint board are equally divided upon the question of the location or establishment of such improvement and that fact is certified to the governor, he is required to appoint a civil engineer whose powers and duty it is to sit with such joint board and to vote upon all questions relating to the proceedings authorized by said section 6451, G. C., for the determination of the location and establishment of such proposed improvement. They shall meet at the place of beginning of the proposed ditch, hear proof offered by any parties affected by said improvement, or other competent persons, go over and along the line thereof and by actual view of the ditch and the adjacent premises drained thereby determine the necessity of such proposed improvement.

No authority is found for the employment of assistants by the joint board, and the engineer appointed to sit with the members would certainly have no more authority than the board itself in the absence of express provision therefor. No such express provision is found and the nature of the duties imposed upon the joint board and engineer in this regard is not such as to suggest either the necessity or the occasion for the employment of assistants. Neither previous to nor in the determination of the necessity of the proposed improvement or its general location is there requirement of or authority for making any survey thereof. It is only after a finding by the commissioners in favor of the establishment of the ditch or drain and an entry of such finding upon their journal that there is provision or authority for directing a survey of the proposed improvement according to the provisions of section 6454, G. C., as follows:

> "If the county commissioners find for the improvement, they shall cause to be entered on their journal an order directing the county surveyor to go upon the line described in the petition, or as changed by them as provided in this chapter, and survey and level it, and set a stake at every hundred feet, numbering down stream, note the intersections of lines and boundaries of lands, townships and county lines, landmarks, bench-marks and road crossings, and make a report, profile and plat thereof, and estimate the number of cubic yards of earth or other substance to be removed, and the cost per cubic yard for each working section as hereinafter provided, and of each section of one hundred feet."

I am therefore of opinion, in answer to your first question, that the sole authority of a civil engineer, appointed pursuant to the provisions of section 6537, G. C., 103 O. L., 836, is to sit with the joint board of county commissioners and to vote with them on all matters relative to the necessity, establishment and location of the proposed improvement, and that no survey of the proposed improvement by the civil engineer so appointed is contemplated or authorized by law.

This conclusion is a substantial answer to your second inquiry. Since there is no authority for making a survey of a proposed ditch improvement prior to its location and establishment, it follows of necessity that there is no authority in the civil engineer appointed by the governor to employ assistants in the making of such survey. There being no authority in law for the employment of assistants by the civil engineer so appointed, it also follows that assistants employed by him may not be lawfully paid by either county.

The civil engineer appointed by the governor is entitled under the provisions of section 6537, G. C., supra, to compensation for his services in the sum of ten dollars per day for the time actually employed for a period not in excess of twenty days together with his necessary expenses. It will be noted that it is also provided by said section that such "compensation and expenses shall be paid as a part of the expenses of the proceedings if the improvement is ordered, and against the petitioners if rejected by said joint board."

In answer, then, to your third inquiry I am of opinion that if the application or petition for the establishment of a joint county ditch, under section 6536, G. C., et seq., is rejected by the joint board of county commissioners the per diem compensation and necessary expenses of the civil engineer appointed by the governor are required to be charged against the petitioners for the proposed improvement, but that no part of the compensation or expenses of employment of assistants to said civil engineer may be paid by either county or charged against the petitioners for such proposed improvement.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1407.

ROADS AND HIGHWAYS—INTERPRETATION OF SECTION 6928, G. C.—TAX LEVYING SECTIONS 6956-1, 3298-1, AND 3298-18, G. C., ARE SUBJECT TO FIFTEEN MILL LIMITATION—TOWNSHIP TRUSTEES MAY MAKE LEVIES UNDER BOTH SECTIONS 3298-1 AND 3298-18, G. C.—DIFFERENT LEVIES—WHEN TOWNSHIP TRUSTEES MAY SUBMIT QUESTION OF BOND ISSUE FOR ROAD IMPROVEMENT—PARTICULAR ROADS NEED NOT BE DESIGNATED IN MAKING ROAD LEVIES UNDER SECTIONS 3298-1 AND 3298-18, G. C.—PROPERTY ASSESSED WHEN ROAD WAS BUILT MAY BE REASSESSED FOR IMPROVEMENT, REPAIR OR RECONSTRUCTION OF ROAD UNDER SECTION 6906, G. C.

Section 6928, G. C., does not limit improvements under the preceding sections to improvements made by joint boards of county commissioners or by agreement entered into between such joint boards and the trustees of one or more townships.

The levies provided by sections 6956-1, 3298-1 and 3298-18, G. C., are not subject to the ten mill limitation but are subject to the fifteen mill limitation.

Township trustees may make levies under both sections 3298-1 and 3298-18, G. C.

Township trustees may not submit the question of a bond issue for road purposes until budget commission finishes its work.

Township trustees at the time they make levies under sections 3298-1 and 3298-18, G. C., are not required to designate the particular roads upon which the proceeds of the levies are to be expended.

The fact that property was assessed at the time a road was built will not prevent it being again assessed for the improvement, repair or reconstruction of such road under the provisions of section 6906, et seq., G. C.

COLUMBUS, OHIO, March 22, 1916.

HON. DEAN E. STANLEY, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—I have your communication of February 24, 1916, in which you submit a number of inquiries relative to the Cass highway law. You first inquire whether the county commissioners of a single county, under the provisions of section 6906, G. C., et seq., may improve county or township roads, paying the county's proportion of the cost of such improvement out of the road fund of the county, or whether section 6928, G. C., limits improvements under the preceding sections to improvements made by joint boards of county commissioners or by agreement entered into between such joint boards and the trustees of one or more townships.

Section 6906, G. C., being section 85 of the Cass highway law, reads as follows:

> "The board of commissioners of any county shall have power, as hereinafter provided, to construct a public road by laying out and building a new public road, or by improving, reconstructing, or repairing, any existing public road or part thereof by grading, paving, draining, dragging, graveling, macadamizing, resurfacing or applying dust preventives, or by otherwise improving the same. The county commissioners shall have power to alter, vacate or widen any part of such road in connection with the proceedings for such improvement."

Sections 6907 to 6927, G. C., inclusive, being sections 86 to 106, inclusive, of

the Cass highway law, relate to the filing of petitions for road improvements with county commissioners, the duties of county commissioners when petitions for road improvements are filed with them, the power of the county commissioners to act without a petition, the making of surveys, plats, profiles, cross sections, estimates and specifications, the matters of compensation and damages, various methods of dividing the costs and expenses of improvements, the method of making and collecting assessments, the levying of taxes for the county's and township's proportions of the cost and expenses and other similar matters.

Section 6928, G. C., being section 107 of the Cass highway law, reads as follows:

> "The provisions of the preceding sections shall apply to the proportion of the costs and expenses of any improvement to be paid by any county or township in case the road improvement is authorized and constructed by any joint board of commissioners, or by the agreement entered into between such joint boards, and the trustees of any one or more townships."

It is clear that the legislature, by the enactment of section 6928, G. C., did not intend to limit the effect of the preceding sections of the Cass highway law, found in chapter VI thereof. Indeed, the intention of the legislature was quite the contrary. The purpose of section 6928, G. C., was to make applicable to improvements authorized and constructed by joint boards of commissioners, or under agreements between such joint boards and the trustees of one or more townships, certain provisions of the preceding sections of the law, which provisions are primarily applicable to improvements constructed by a single board of county commissioners.

I therefore advise you, in answer to your first question, that section 6928, G. C., does not limit improvements under the preceding sections of the Cass highway law to improvements made by joint boards of commissioners or by agreement entered into between such joint boards, and the trustees of one or more townships. The only effect of the section in question is to make applicable to improvements made by joint boards of commissioners, or made under agreement between such joint boards and the trustees of one or more townships, certain provisions of the preceding sections, which provisions are primarily applicable to improvements carried forward by a single board of county commissioners..

Your second and third questions relate to the question of tax levies, and are answered fully in an opinion today rendered to the Bureau of Inspection and Supervision of Public Offices, a copy of which opinion is enclosed for your information. The questions will, however, be answered briefly herein.

Your second question relates to the tax limits applicable to the levy provided for by section 6956-1, G. C., and I advise you that this levy is not subject to the ten mill limitation, but is subject to the fifteen mill limitation.

Your third question is as to whether township trustees may make levies under both sections 3298-1 and 3298-18, G. C., and as to the limitations upon these levies. The levies provided for by the two sections in question are not the same levies. This is apparent by reason of the fact that section 3298-1, G. C., authorizes a three mill levy, while section 3298-18, G. C., authorizes only a two mill levy. The levy authorized by section 3298-1, G. C., is to be made upon all the taxable property within a township, including that of any municipality therein situated, while the levy authorized by section 3298-18, G. C., is to be made only upon the taxable property of a township outside of any incorporated village or city therein situated. Since the levies are not identical and since the Cass highway law contains no provisions restricting township trustees to one of the two levies, I advise you

that township trustees may make levies under both sections. The levies provided for by both sections are outside the ten mill limitation, but within the fifteen mill limitation.

Your fourth question is as follows:

> "When the levy provided for in section 3298-1 has been made, may the township trustees, if they are then of the opinion that it will be insufficient to care for the roads at that time, issue bonds as provided in section 3298-8?"

This question was fully answered in opinion No. 849 of this department, rendered to the Bureau of Inspection and Supervision of Public Offices, on September 21, 1915, in which it was held that as the Cass highway law did not go into effect until September 6, 1915, and therefore no levy might be made in 1915, under section 60 of that act, section 3298-1, G. C., no election to determine the question of issuing bonds may be held under section 3298-9, G. C., until after the time in the year 1916, when the township makes its levy under section 3298-1, G. C., and it is determined that said levy does not furnish sufficient funds for the construction and repair of the designated roads. The amount produced by a levy under section 3298-1, G. C., cannot be known until the budget commission has completed its work which must be not later than the third Monday in August, unless the time be extended by the state tax commission. The question of a bond issue may not, therefore, be submitted until the budget commission has made its report, and it is known how much will be realized from the levy and how much of the cost of the projected work will have to be met by a bond issue.

Your fourth question is, therefore, to be answered in the negative. A copy of opinion No. 849 will be found at page 32 of a pamphlet which I am mailing you under separate cover.

Your fifth question reads as follows:

> "Are the levies provided for in section 3298-1 and section 3298-18 confined to roads which must be designated by the trustees at the time the levies are made, or may they be used generally upon the county and township roads located within the township?

Section 3298-1, G. C., has been already quoted herein. Section 3298-2, G. C., relates to the placing on the duplicate and collection of taxes authorized by section 3298-1, G. C., and further provides that when collected such taxes shall be paid to the treasurer of the township from which they are collected, and the money so raised shall be under the control of the township trustees of such township "for the purpose of improving the roads of said township, as provided herein."

Section 3298-3, G. C., contains the following provision:

> "The trustees shall designate the road or roads or part thereof within said township to be improved."

I find nothing in the chapter in question which warrants the inference that as to levies made under section 3298-1, G. C., the township trustees are required at the time of the making of the levy to designate the road or roads on which the proceeds of the levy so made are to be expended. The natural inference is that under ordinary circumstances the several steps provided by the statute are to be taken in the order in which they are set forth in the absence of any reason for a different order, and I therefore advise you that as to levies made under section 3298-1, G. C., it is not necessary for the township trustees, at the time of making such levies, to designate the road or roads upon which the proceeds of such

levies are to be expended, and that the proceeds may be used upon any road or roads designated by the trustees at any time subsequent to the making of the levies.

Section 3298-18, G. C., provides that after the annual estimate for each township has been filed with the trustees of the township by the county highway superintendent, they may increase or reduce the amount of any of the items contained in said estimate; and that at their first meeting after said estimate is filed, they shall make their levies for the purposes set forth in the estimate.

The provision relating to the annual estimate of the county highway superintendent for the township trustees is found in section 144 of the act, section 7187, G. C., and reads as follows:

> "The county highway superintendent shall, on or before April 1st of each year, make an annual estimate for the township trustees of each township, for the improvement, maintenance and repair of roads, bridges and culverts, or for the construction of new roads required in said township, and shall submit the same to the township trustees for their action."

There is nothing in the above quoted provision which requires the county highway superintendent in his estimate to set forth the particular roads, bridges and culverts to be repaired or the particular new roads to be constructed, and I therefore reach the same conclusion as to section 3298-18, G. C., as has already been expressed with reference to section 3298-1, G. C., and advise you that the township trustees, at the time they make the levy under section 3298-18, G. C., are not required to designate the particular road or roads to be repaired or improved out of the proceeds of such levy.

Your sixth question reads as follows:

> "Would the fact that property had been assessed at the time a road was built prevent it being assessed for the improvement, repair, or reconstruction of such road under the provisions of Sec. 6906, et seq.?"

I find no provision in the scheme of road improvement provided by section 6906, G. C., et seq., to the effect that the fact that property has been once assessed for a road improvement precludes a second assessment for the improvement, repair or reconstruction of such road, and know of no principle of law which would operate to prevent an assessment for the second improvement. The only provision in the sections in question which has any bearing on the question is found in section 6922, G. C., and is to the effect that in making an apportionment or estimated assessment upon the real estate to be charged therewith of such part of the cost of the improvement as is to be specially assessed, the surveyor (county highway superintendent) may take into consideration any previous assessments made upon such real estate for road improvements. This provision only goes so far as to authorize the surveyor to take into consideration previous special assessment, either for the road now being improved or for any other road, and does not prevent assessing a portion of the cost and expense of improving a road against real estate previously assessed for a former improvement of the same or a different road. Your sixth question is, therefore, to be answered in the negative.

In reply to your seventh question as to whether there is any provision for the issuance of bonds by county commissioners for the improvement of county and township roads, I advise you that bond issues of the character referred to by you are provided for by section 108 of the Cass highway law, section 6929, G. C.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1408.

CASS HIGHWAY LAW—DISCUSSION OF TAX LEVYING SECTIONS—WHETHER OR NOT INTERIOR LIMITATIONS AND TEN AND FIFTEEN MILL LIMITATIONS APPLY TO TAX LEVIES AUTHORIZED TO BE MADE BY TOWNSHIP TRUSTEES AND COUNTY COMMISSIONERS—TAXABLE PROPERTY THAT IS AND IS NOT SUBJECT TO LEVIES AUTHORIZED FOR TOWNSHIP AND COUNTY ROAD PURPOSES—GENERAL DISCUSSION OF TAX LEVYING POWERS AND LIMITATIONS UNDER PROVISIONS OF CASS HIGHWAY LAW.

The tax levy provided by section 3298-1, *G. C., is not subject to the two mill limitation for township purposes and is not subject to the ten mill limitation. The levy in question cannot exceed three mills and is subject to the fifteen mill limitation. The levy is to be made on all the taxable property of a township, including that within any municipal corporation or corporations therein situated.*

The levy referred to in section 3298-13, *G. C., is not subject to the two mill limitation for township purposes and is not subject to the ten mill limitation. The only limitation on this levy is the fifteen mill limitation. The levy is to be made on all the taxable property of a township, including that within any municipal corporation or corporations therein situated.*

The levy provided by section 6926, *G. C., is not subject to the three mill limitation for county purposes and is not subject to the ten mill limitation. The levy itself cannot exceed two mills and is subject to the fifteen mill limitation. The levy is to be made on all the taxable property of a county, including that within any municipal corporation or corporations therein situated.*

The levy provided by section 6927, *G. C., is not subject to the two mill limitation for township purposes and is not subject to the ten mill limitation. The levy itself cannot exceed three mills and is subject to the fifteen mill limitation. The levy is to be made by the county commissioners upon all the taxable property of the township or townships interested, including that within any municipal corporation or corporations therein situated.*

The levy provided by the first paragraph of section 1222, *G. C., is not subject to the three mill limitation for county purposes and is not subject to the ten mill limitation. The levy itself cannot exceed one mill and is subject to the fifteen mill limitation. The levy is to be made on all the taxable property of a county, including that within any municipal corporation or corporations therein situated.*

The levy provided by the second paragraph of section 1222, *G. C., is not subject to the two mill limitation for township purposes and is not subject to the ten mill limitation. The levy itself cannot exceed two mills and is subject to the fifteen mill limitation. The levy is to be made by the township trustees on all the taxable property of the township interested, including the taxable property within any municipal corporation or corporations therein situated.*

The levy provided by sections 1230 *and* 1231-2, *G. C., is not subject to the fifteen mill limitation or any other limitation provided by law. The sections in question authorize and require a levy of three-tenths of one mill on all the property within the state, which levy is in addition to all other levies made for any purpose or purposes and is outside all the tax limitations provided by law.*

The levy provided by section 6956-1, *G. C., is not subject to the three mill limitation for county purposes and is not subject to the ten mill limitation. The levy itself cannot exceed two mills and is subject to the fifteen mill limitation. The levy is to be made on all the taxable property of the county, including that within any municipal corporation or corporations therein situated.*

The levy provided by section 3298-18, *G. C., is not subject to the two mill lim-*

itation for township purposes and is not subject to the ten mill limitation. The levy itself cannot exceed two mills and is subject to the fifteen mill limitation. The levy is to be made by the township trustees on the taxable property of a township outside of any incorporated village or city therein situated.

The levy provided by section 3298-20, G. C., is not subject to the two mill limitation for township purposes and is not subject to the ten mill limitation. The only limitation upon this levy is the fifteen mill limitation and the levy is to be made on all the taxable property of a township, including that within any municipal corporation or corporations therein situated.

The provision for the repair and maintenance fund, under section 6956-1, G. C., of not less than twenty dollars per mile of county road is mandatory, and has the effect of preferring the repair and maintenance fund over the other fund provided by the section. As between the two funds provided by the section the repair and maintenance fund is to be given preference and if any cut is necessary it must be made in the other fund. The provision that the levy under section 3298-18, G. C., must amount to at least twenty dollars per mile of township road is also mandatory.

COLUMBUS, OHIO, March, 22, 1916.

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

GENTLEMEN:—On September 21, 1915, this department rendered to you opinion No. 847, relating to the construction of a number of the provisions of the Cass highway law. The twelfth question submitted by you and answered in the opinion in question read as follows:

> "Is the tax limitation prescribed in sections 105, 238 and 239 ten mills or fifteen mills?"

I advised you, in answer to the above question, that as between the ten mill and fifteen mill limitation the levies in the sections of the Cass highway law, referred to by you, are above the ten mills but within the fifteen mills. It was observed in the opinion in question, however, that the answer therein given was not sufficient without some further explanation of the provisions of the sections in question and that as the Cass highway law did not become effective until after the levies were made in 1915, no levies might be made under the Cass Highway law until 1916, and there was, therefore, no immediate necessity for the interpretation of the tax levying sections of the act, of which there are others in addition to those referred to by you in your question.

I indicated that at a later date I would prepare an opinion for your information, covering the several tax levying sections of the Cass highway law, and I am, therefore, addressing to you a further opinion on the subject in question.

I will refer first to section 60 of the Cass highway law, section 3298-1, G. C., which provides as follows:

> "The board of trustees of any township may levy and assess upon the taxable property of such township a tax not exceeding three mills in any one year upon each dollar of taxable property therein for the purpose of improving, dragging, repairing or maintaining any public road or roads or part thereof. Such levy shall be in addition to the levy of two mills authorized by law for general township purposes, but subject to the limitation upon the combined maximum rate for all taxes now in force."

This levy is, by the terms of the section authorizing the same, expressly excepted from the two mill limitation on the aggregate of all taxes that may be levied

by a township for township purposes. The use of the expression "the combined maximum rate for all taxes now in force," in connection with the other language of the section, establishes a legislative intent to make this levy subject to only two limitations. The levy itself cannot exceed three mills and the levy under this section and under sections 5649-1, 5649-2, 5649-3, 5649-5, 5649-5a and 5649-5b, G. C., cannot exceed fifteen mills. In other words, the levy provided by section 60 of the Cass highway law, section 3298-1, G. C., is not subject to the two mill limitation for township purposes, provided by section 5649-3a, G. C., and is not subject to the ten mill limitation provided by section 5649-2, G. C., but the levy itself cannot exceed three mills and the levy, together with the other levies referred to in section 5649-5b, G. C., cannot exceed the fifteen mill limitation provided by that section. This levy is to be made by the township trustees on all the taxable property of a township, including the property within any municipal corporation situated within the township.

Section 72 of the Cass highway law, section 3298-13, G. C., relates to sinking fund levies for the redemption of the bonds issued by townships under the provisions of chapter 3 of the Cass highway law, and reads as follows:

> "Levies for the payment of principal and interest on bonds issued under the provisions of this act, shall be in addition to the two mills authorized to be levied for general township purposes, but subject to the limitation on the combined maximum rate for all taxes now in force."

It will be noted that the levies referred to in the above quoted section are expressly excepted from the two mill limitation for township purposes and the only limitation expressed in the section is that the levies therein referred to are subject to the fifteen mill limitation provided by section 5649-5b, G. C. The levies are to be made to provide an interest and redemption fund for bonds authorized by a vote of the electors had under authority of sections 3298-9 to 3298-11, G. C., inclusive, the issue of the bonds being authorized by section 3298-8, G. C., In view of the language of the section and the fact that the bonds must be authorized by a vote of the electors, I am of the opinion that the only limitation on the interest and sinking fund levies referred to in section 3298-13, G. C., is the fifteen mill limitation provided by section 5649-5b, G. C. These levies are also to be made by the township trustees on all the taxable property of the township, including the taxable property within any municipal corporation situated in the township.

Section 105 of the act, section 6926, G. C., provides in part as follows:

> "* * * For the purpose of providing by taxation a fund for the payment of the county's proportion of the cost and expenses of constructing, improving, maintaining, dragging and repairing roads under the provisions of this chapter, the county commissioners are hereby authorized to levy annually a tax not exceeding two mills upon each dollar of the taxable property of said county. Said levy shall be in addition to all other levies authorized by law for road purposes, but subject to the limitation on the combined maximum rate for all taxes now in force."

It will be noted that while the section in question provides that the levy therein authorized shall be in addition to all other levies authorized by law for road purposes, yet the levy is not expressly excepted from the three mill limitation for county purposes, provided by section 5649-3a, G. C. An examination of other sections of the act discloses the fact, however, that it must have been the intention of the legislature to exempt this levy from the three mill limitation for county purposes. Section 1222, G. C., authorizes a one mill levy by counties for road purposes and section 6956-1, G. C., authorizes a two mill levy by counties for road purposes.

It will thus be seen that sections of the act other than the one now under consideration provide for maximum levies by counties for road purposes amounting to three mills. It must, therefore, be concluded that it was the intention of the legislature to exempt the levy now under consideration from the three mill limitation for county purposes.

I, therefore, advise you that the levy in question is not subject to the three mill limitation provided by section 5649-3a, G. C., and for reasons already stated it is not subject to the ten mill limitation provided by section 5649-2, G. C. The levy itself cannot exceed two mills, and the levy, together with all other levies referred to in section 5649-5b, G. C., cannot exceed the fifteen mill limitation provided by that section. The levy is, of course, to be made on all the taxable property of the county, including that within any municipalities situated within the county.

Section 106 of the act, section 6927, G. C., provides as follows:

> "For the purpose of providing by taxation a fund for the payment of the proportion of the costs and expenses of such improvement to be paid by the township or townships interested, in which such road may be in whole or in part situated, the county commissioners are hereby authorized to levy a tax, not exceeding three mills in any one year upon all the taxable property of such township or townships. Such levy shall be in addition to all other levies authorized by law for road purposes, but subject to the limitation on the combined maximum rate for all taxes now in force."

It will be noted that while the section provides that the levy therein authorized shall be in addition to all other levies authorized by law for road purposes, yet it is not expressly provided in the section that such levy shall be in addition to the two mill levy authorized by law for general township purposes. Such must have been the intention of the legislature, however, for reasons already given and for the further reason that the section itself authorizes a levy of three mills, while the limitation on levies for township purposes provided for by section 5649-3a, G. C., is only two mills. It is also provided in this section that the levy therein authorized shall be subject to the limitation on the combined maximum rate for all taxes now in force, thus evidencing a legislative intent to except the levy in question from the ten mill limitation and to make it subject to the fifteen mill limitation.

In view of the foregoing, I advise you that the levy authorized by the section in question is not subject to the two mill limitation for township purposes, provided by section 5649-3a, G. C., and is not subject to the ten mill limitation provided by section 5649-2, G. C. The levy itself cannot by the terms of the section exceed three mills and the levy, together with all other levies referred to in section 5649-5b, G. C., cannot exceed the fifteen mill limitation provided by that section. The levy is to be made on all the taxable property within the township or townships interested and in which the road to be improved is in whole or part situated, including the taxable property within any municipal corporation or corporations situated in said township or townships. The levy is to be made by the county commissioners and not by trustees of the interested townships.

The first paragraph of section 215 of the act, section 1222, G. C., reads as follows:

> "For the purpose of providing a fund for the payment of the county's proportion of the cost and expense of the construction, improvement, maintenance and repair of highways under the provisions of this chapter, the county commissioners are hereby authorized to levy a tax, not exceeding one mill, upon all taxable property of the county. Said levy shall be in addition to all other levies authorized by law for county purposes,

but subject, however, to the limitation upon the combined maximum rate for all taxes now in force."

The levy authorized by the above quoted provision cannot, under the terms thereof, exceed one mill. It is expressly provided, however, that the levy in question shall be in addition to all other levies authorized by law for county purposes and subject to the limitation upon the combined maximum rate for all taxes now in force.

In view of what has already been said in the discussion of other sections, it will be sufficient to observe that the levy now under discussion is not subject to the three mill limitation on levies for county purposes, provided by section 5649-3a, G. C., and is not subject to the ten mill limitation provided by section 5649-2, G. C. Said levy cannot exceed one mill and, together with the other levies referred to in section 5649-5b, G. C., cannot exceed the fifteen mill limitation provided by that section. This levy is to be made on all the taxable property of the county, including that within any municipal corporation or corporations situated therein.

The second paragraph of section 215 of the act, section 1222, G. C., reads as follows:

"For the purpose of providing a fund for the payment of the proportion of the cost and expense to be paid by the township or townships for the construction, improvement, maintenance or repair of highways under the provisions of this chapter, the township trustees are authorized to levy a tax, not exceeding two mills, upon all taxable property of the township in which such road improvement or some part thereof is situated; such levy shall be in addition to all other levies authorized by law for township purposes and shall be outside of the limitation of two mills for general township purposes, but subject, however, to limitation upon the combined maximum rate for all taxes now in force."

In view of what has already been said, it is sufficient to observe that the levy authorized by the above quoted provisions is not subject to the two mill limitation for township purposes, provided by section 5649-3a, G. C., and is not subject to the ten mill limitation provided by section 5649-2, G. C. The levy in question cannot exceed two mills and is subject to the fifteen mill limitation provided by section 5649-5b, G. C. The levy is to be made by the township trustees of the interested township or townships upon all the taxable property of such township or townships, including the taxable property within any municipal corporation or corporations, situated within such township or townships.

Section 223 of the act, section 1230, G. C., reads as follows:

"There shall be levied annually a tax of three-tenths of one mill on all the taxable property within the state to be collected as are other taxes due the state, and the proceeds of which shall constitute the state highway improvement fund."

Section 228 of the act, section 1231-2, G. C., reads as follows:

"The annual levy of three-tenths of one mill provided for by this act shall be in addition to all other levies made for any purpose or purposes, and the same shall not be construed as limited, restricted or decreased in amount or otherwise by any existing law or laws."

The above quoted sections authorize and require an annual levy of three-tenths

of one mill on all the taxable property within the state, which levy is in addition to all other levies made for any other purpose or purposes and is not subject to the fifteen mill limitation provided by section 5649-5b, G. C., or any other limitation found in the statutes of the state.

The sections next to be considered are sections 238 and 239 of the act, being sections 6956-1 and 3298-18 of the General Code. Section 6956-1, G. C., being section 238 of the act, reads as follows:

> "After the annual estimate for the county has been filed with the county commissioners by the county highway superintendent, and the county commissioners have made such changes and modifications in said estimate, as they deem proper, they shall then make their levy, for the purposes set forth in said estimate upon all the taxable property of the county not exceeding in the aggregate two mills upon each dollar of the taxable property of said county. The board of county commissioners shall provide annually a fund for the repair and maintenance of bridges and county highways. The repair and maintenance fund so provided shall not be less than twenty dollars for each mile of county highways in said county. Such levies shall be in addition to all other levies authorized by law for said purposes, but subject, however, to the limitation upon the combined maximum rate for all taxes now in force. The provisions of this section shall not, however, prevent the commissioners from using any surplus in the general funds of the county for the purposes set forth in said estimate, or in the repair or maintenance of roads."

The levy provided for by the above quoted section is not subject to the ten mill limitation provided by section 5649-2, G. C., and for reasons already stated is not subject to the three mill limitation for county purposes provided by section 5649-3a, G. C. Said levy cannot exceed two mills and is subject to the fifteen mill limitation provided by section 5649-5b, G. C. The levy is to be made on all the taxable property of the county, including any municipal corporations located therein.

The section in question provides for two separate and distinct funds: (a) for the purposes set forth in the annual estimate of the county highway superintendent; (b) not less than twenty dollars per mile for each mile of county highway in the county for the purpose of a repair and maintenance fund. Estimates of the county highway superintendent are subject to change or modification by the county commissioners, but the commissioners must provide at least twenty dollars per mile for the repair and maintenance fund. The commissioners may, however, provide a part or all of the money for the funds referred to in the section in question from any surplus in the general funds of the county. In my opinion the provision for the repair and maintenance fund, under section 6956-1, G. C., of not less than twenty dollars per mile is mandatory and has the effect of preferring the repair and maintenance fund over the other fund. That is to say, as between the two funds to be raised under the section in question, the twenty dollars per mile for the repair and maintenance fund is to be given preference, and if any cut is necessary, it must be made in the first of the two funds above mentioned.

Section 3298-18, G. C., being section 239 of the act, reads as follows:

> "After the annual estimate for each township has been filed with the trustees of the township by the county highway superintendent, they may increase or reduce the amount of any of the items contained in said estimate, and at their first meeting after said estimate is filed, they shall make their levies for the purposes set forth in the estimate upon all of the taxable property of the townships, not exceeding in the aggregate two mills

in any one year upon each dollar of the valuation of such taxable property in said township outside of any incorporated village or city. Such levies shall be in addition to all other levies authorized by law for township purposes, but subject, however, to the limitation upon the combined maximum rate for all taxes now in force. The amount levied to cover the estimate made for the construction, improvement, maintenance and repair of highways, shall be known as the township highway fund. The provisions of this section shall not prevent the expenditure of any portion of the regular levy of two mills for township purposes, but the levies herein provided for are in addition thereto. Such levy shall amount to at least twenty dollars for each mile of township road within such township."

The levy provided for by the above quoted section is expressly exempted from the two mill limitation for township purposes and is not subject to the ten mill limitation provided for by section 5649-2, G. C. The levy cannot exceed two mills and is subject to the fifteen mill limitation. This levy is to be made only on the taxable property of a township outside of any incorporated village or city therein situated. In my opinion the provision that the levy under this section must amount to at least twenty dollars for each mile of township road is mandatory.

Section 257 of the act, section 3298-20, G. C., reads as follows:

"The trustees of a township may levy a tax in such amount, as they determine, to purchase real property, containing suitable stone or gravel, and the necessary machinery for operating the same, when deemed necessary for the construction, improvement, or repair of the public roads within the township to be under the control of the trustees or a person appointed by them. The question of levying such tax, for such purpose, and the amount asked therefor shall be submitted to the qualified electors of the township at a general election. Twenty days' notice thereof shall be previously given by posting in at least ten public places in the township. Such notice shall state specifically the amount to be raised. If a majority of all votes cast at such election are in favor of the proposition, the tax therein provided for shall be considered authorized. Such tax may be levied in addition to all other taxes for township purposes, but subject, however, to the limitation on the combined maximum rate for all taxes now in force."

The section in question does not fix the maximum rate of the taxes therein provided for, it being provided merely that the trustees may levy a tax in such amount as they determine, provided the same be authorized by a vote of the electors. The section expressly provides that the tax shall be in addition to all other taxes for township purposes and the use of the expression "combined maximum rate for all taxes now in force" indicates that the legislature intended to except this tax from the ten mill limitation, but make it subject to the fifteen mill limitation.

I, therefore, advise you that the fifteen mill limitation provided by section 5649-5b, G. C., is the only limitation upon the tax provided for by the section in question.

The further observation should be made that with the exception of the state levy of three-tenths of one mill provided for by sections 1230, G. C., and 1231-2, G. C., all of the tax levies herein discussed must be regarded as levies made under the several sections referred to in section 5649-5b, G. C., and, together with all other levies, made under the several sections referred to in said section 5649-5b, must not exceed fifteen mills.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1409.

DISAPPROVAL, RESOLUTIONS FOR CERTAIN ROAD IMPROVEMENTS IN LAWRENCE AND SANDUSKY COUNTIES.

COLUMBUS, OHIO, March 23, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of March 17, 1916, transmitting to me for examination final resolutions relating to the following roads:

"Lawrence County—Ohio river road, Sec. 'D,' Pet. No. ——, I. C. H. No. 7.

"Sandusky County—Sandusky-Clyde road, Sec. 'P,' Pet. No. 2891, I. C. H. No. 276."

The resolution relating to the Lawrence county improvement recites that the same was adopted on the 7th day of March, 1916, whereas the certificate of the clerk recites that the same was adopted on the 23rd day of July, 1914. The resolution should be returned to the clerk of the board of commissioners of Lawrence county in order that this discrepancy may be corrected.

The resolution relating to the Sandusky county improvement shows that $17,800.00 is to be paid by the county and $7,700.00 by the state, making a total of $25,500.00. It is recited, however, that the total estimated cost and expense of the improvement amounts to $26,500.00. It will thus be seen that the entire amount to be paid by the state and county is $1,000 less than the total estimated cost and expense. This is probably due to an error in transcribing the resolution and if that be the fact the proper correction should be made.

For the reasons above stated, I am returning the resolutions in question without my approval.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1410.

APPROVAL OF RESOLUTIONS FOR CERTAIN ROAD IMPROVEMENTS IN A NUMBER OF COUNTIES.

COLUMBUS, OHIO, March 23, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of March 17, 1916, transmitting to me for examination final resolutions relating to the following roads:

"Fairfield county (duplicate)—Lancaster-Newark rd., Sec. 'E,' Pet. No. 2320, I. C. H. No. 359.

"Fairfield county (duplicate)—Lancaster-New Lexington rd., Sec. 'F,' Pet. No. 2323, I. C. H. No. 357.

"Greene county—Dayton-Chillicothe rd., Sec. 'P,' Pet. No. 2389, I. C. H. No. 29.

"Greene county—Dayton-Chillicothe rd., Sec. 'P,' Pet. No. 2389, I. C. H. No. 29.

"Ottawa county—Pt. Clinton-Marblehead rd., Sec. 'F,' Pet. No. 2776, I. C. H. No. 440.

"Sandusky county—Fremont-Castalia rd., Sec. 'N,' Pet. No. 2896, I. C. H. No. 281.

"Sandusky county—Fremont-Port Clinton rd., Sec. 'O,' Pet. No. 2892, I. C. H. No. 277.

"Scioto county—Ohio River rd., Sec. 'K,' Pet. No. 2903, I. C. H. No. 7.

"Seneca county—Tiffin-Bellevue rd., Sec. 'O,' Pet. No. 1052, I. C. H. No. 271.

"Seneca county—Upper Sandusky-Bellevue rd., Sec. 'P,' Pet. No. 1048, I. C. H., No. 267.

"Tuscarawas county—Newcomerstown-Urichsville rd., Sec. 'L,' Pet. No. 3001, I. C. H. No. 413.

"Tuscarawas county—Wooster-Canal Dover rd., Sec. 'M,' Pet. No. 3002, I. C. H. No. 414.

"Tuscarawas county—Millersburg-Canal Dover rd., Sec. 'N,' Pet. No. 3005, I. C. H. No. 341.

"Scioto county—Ohio River rd., Sec. 'K,' Pet. No. 2903, I. C. H. No. 7.

"Scioto county—Ohio River rd., Sec. 'K,' Pet. No. 2903, I. C. H. No. 7.

"Wayne county—Wooster-Massillon rd., Sec. 'J,' Pet. No. 725, I. C. H. No. 69."

I find these resolutions to be in regular form and am therefore returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1411.

MUNICIPAL CORPORATION—WHEN IT IS DUTY OF CITY AUDITOR TO ACT AS SECRETARY OF SINKING FUND TRUSTEES.

Under the provisions of section 4509, G. C., it is the duty of the city auditor to act, without additional compensation, as secretary of the trustees of the sinking fund of a city, unless council by ordinance provides for the appointment of a secretary by such trustees, and fixes the compensation, etc., as provided in said section, and in such event the city auditor cannot be appointed as such secretary.

COLUMBUS, OHIO, March 23, 1916.

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

GENTLEMEN:—Your letter of March 18, 1916, asking my opinion, received, and is as follows:

> "If the council of a city, under authority of section 4509, G. C., has empowered the trustees of the sinking fund with the authority to elect a secretary, (said ordinance fixing the duties, bonds and compensation of the incumbent of said position) may said trustees select the city auditor, and if so, may he receive the compensation attached to the position?"

The provisions of law relative to the trustees of the sinking fund in municipalities are found in sections 4506, et seq., of the General Code. Section 4509, G. C., provides as follows:

> "The trustees of the sinking fund, immediately after their appointment and qualification, shall elect one of their number as president and another as vice-president, who, in the absence or disability of the president, shall perform his duties and exercise his powers, and such secretary, clerks or employes as council may provide by an ordinance which shall fix their duties, bonds and compensation. Where no clerks or secretary is authorized the auditor of the city or clerk of the village shall act as secretary of the board."

This section specifically provides the circumstances under which the city auditor may act as secretary of the trustees of the sinking fund, to wit: When council has failed to provide for a secretary. It is a well settled maxim of statutory construction that if an affirmative statute directs how a thing may be done, that thing shall not, even though there are no negative words, be done in any other manner. Harlan v. Roberts et al., 2 Dec. Rep., 473. Applying this rule it follows that it is only when council has failed to provide a secretary for the trustees of the sinking fund that there is any authority for the auditor to act as such secretary, and it would not be competent for the trustees to appoint the auditor.

There is no provision for compensation to be paid to the secretary of the trustees of the sinking fund, except that provided by section 4509, G. C., supra, and the compensation there provided is limited to instances in which council provides for the appointment of a secretary and fixes the compensation. It seems clear that the legislature, in enacting section 4509, G. C., proceeded upon the theory that if it were practicable for the auditor to perform the services mentioned it would not be necessary for the council to provide a secretary and fix compensation therefor.

The result of the foregoing is that when the auditor acts as secretary of the trustees of the sinking fund, he does so merely in the performance of a duty conferred upon him by statute, for which no additional compensation is fixed, and it is well settled that in such cases he is not entitled to such compensation. Jones v. Commissioners, 57 O. S., 189, and cases there cited.

I am therefore of the opinion that if the council of a city, under authority of section 4509, G. C., has empowered the trustees of the sinking fund with the authority to elect a secretary and has fixed the compensation of said position, the trustees may not select the city auditor as such secretary, and in the event that the auditor, under section 4509, G. C., acts as such secretary, he is not entitled to receive compensation therefor.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1412.

APPROVAL, SYNOPSIS FOR INITIATIVE LAW TO PROVIDE FREE TEXT BOOKS IN PUBLIC SCHOOLS.

COLUMBUS, OHIO, March 23, 1916.

MR. C. B. GRONIGER, *Gallia Street, Portsmouth, Ohio.*

DEAR SIR:—You have submitted to me for my certificate a synopsis to be embodied in an initiative petition proposing "An act to provide free text-books and supplies for all pupils in the public schools of Ohio, and creating a state text-book board, and to repeal certain sections of the General Code," said synopsis being in the following words:

> "The law proposed by initiative petition to be submitted to the general assembly of the state of Ohio: 'An act to provide for free text-books and supplies for all pupils in the public schools of Ohio, and to create a state school text-book board, and to repeal sections 7709, 7710, 7711, 7712, 7713, 7714, 7715, 7716, 7717, of the General Code,' is intended to furnish free text-books and supplies for all pupils in the public schools of the state. It is intended thereby to create a state school text board, whose duty it shall be to secure from every publisher, one or more of whose books is used in any of the public schools of the state, and from other publishers, the prices at which they will agree to furnish the books and supplies, beginning August 1, 1917. It shall be left to the board to devise a system of ordering and delivering the books and supplies to the various boards in the state, and of paying the publishers therefor.
>
> "It further provides that all the expense of the board and the cost of the text-books and supplies shall be paid out of the general revenue fund of the state."

I hereby certify that the foregoing synopsis is a truthful statement of the contents and purpose of the above entitled proposed law.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1413.

APPROVAL, RESOLUTIONS FOR ROAD IMPROVEMENTS IN PORTAGE, MAHONING AND BUTLER COUNTIES.

COLUMBUS, OHIO, March 23, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of March 21, 1916, submitting to me for examination final resolutions relating to the following roads:

> "Portage county—Cleveland-Kent road, Sec. 'W,' Pet. No. 2831, I. C. H. No. 460. (Also duplicate.)
>
> "Mahoning county—Youngstown-Salem road, Sec. 'P,' Pet. No. 3128, I. C. H. No. 81.

"Mahoning county—Akron-Canfield road, Sec. 'S,' Pet. No. 3136, I. C. H., No. 87.

"Butler county—Hamilton-Middletown road, Sec. 'H,' Pet. 2121, I. C. H., No. 179."

I find these resolutions to be in regular form and am therefore returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1414.

BOARD OF EDUCATION—WHEN MEMBER OF RURAL BOARD BRINGS ACTION TO ENJOIN ANOTHER MEMBER FROM SERVING ON SUCH BOARD—ATTORNEY'S FEES—NOT PAYABLE FROM SCHOOL FUNDS.

Where a member of the board of education of a rural school district, as a tax payer, brings an action to enjoin another member of said board of education from continuing to serve as such member after his removal from the district, and a permanent injunction is granted, the claim of the attorney representing the plaintiff in said action, for services rendered in connection therewith, may not be allowed by said board of education and paid out of the school funds of said district.

COLUMBUS, OHIO, March 23, 1916.

HON. E. A. SCOTT, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR:—In your letter of March 4th you request my opinion as follows:

"The following are the facts on which I desire your opinion. A member of rural board of education moved into another rural school district and wants to continue as director of the district from which he moved. B member of same board filed a petition in common pleas court asking for injunction and suit is brought by B a tax payer. The injunction is made perpetual and A no longer gets to act as member of board. The attorney for B presented bill to board of education to pay for services. Should board of education pay such a bill?"

Your statement of facts shows that the claim presented to the board of education of the rural school district referred to in your inquiry, by the attorney who represented the plaintiff in the action to enjoin the member of said board of education who removed from said district from continuing to act as such member after said removal, was for services rendered by said attorney to said plaintiff as an individual and as a tax payer, and that said services were not rendered to said board of education.

While it appears that said plaintiff was a member of said board of education, this fact is not material in view of the fact that said board of education made no contract of employment with said attorney and was in no way responsible for the contract between said plaintiff and said attorney.

I find no provision of the statutes authorizing the plaintiff as a tax payer to request the prosecuting attorney of the county to bring the action above referred

to and, upon the failure of said official to comply with said request, authorizing said plaintiff to bring said action and, upon the determination of the same in his favor, allowing his costs including reasonable compensation to his attorney. It follows that even if said plaintiff had made such request upon the prosecuting attorney, upon the refusal of said official to bring said action said plaintiff could not be allowed his costs including reasonable compensation to his attorney out of the funds of the school district mentioned in your inquiry.

If said board of education had determined by resolution to bring said action the prosecuting attorney of the county is its proper legal adviser under section 4761, G. C., and would have been required by provision of said section to represent it in said action.

It is unnecessary, however, to pass on the question of the right of said board of education to call on the prosecuting attorney of the county to represent it in civil actions brought by or against it, or in case of his neglect or refusal so to do, to contract with an attorney to represent it under provision of section 2918, G. C., for the reason already stated that said board of education is in no way responsible for the employment of the attorney mentioned in your inquiry, and is under no legal or moral obligation to pay the claim therein referred to.

Your question is therefore answered in the negative.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1415.

OFFICES INCOMPATIBLE—MEMBER OF COUNTY BOARD OF REVISION—TRUSTEE OF OHIO SOLDIERS' AND SAILORS' ORPHANS' HOME, XENIA, OHIO.

A member of a county board of revision cannot hold the office of trustee of the Ohio Soldiers' and Sailors' Orphans' Home at Xenia, Ohio, the same being prohibited under the provisions of section 5590, *G. C.*, 106 *O. L.*, 270.

COLUMBUS, OHIO, March 24, 1916.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Your favor of March 21st, relative to holding the position of trustee of the Ohio Soldiers' and Sailors' Orphans' Home at Xenia, Ohio, and at the same time being a member of the Lucas county board of revision, to which latter position General W. V. McMaken has just been appointed, has been received, and is as follows:

> "Something like one year ago I appointed to membership on the board of trustees of the Ohio Soldiers' and Sailors' Orphans' Home at Xenia, Ohio, General W. V. McMaken, of Toledo, Ohio. Some weeks ago General McMaken was appointed a member of the Lucas county board of revision by the state tax commission of Ohio. Some question has arisen as to whether under the law he can serve in these two capacities. I therefore very respectfully request your opinion on the following matter: 'Can a person lawfully serve as a member of the board of tax revision for a county of this state and also at the same time as a member of the board of trustees of the Ohio Soldiers' and Sailors' Orphans' Home at Xenia, Ohio?

While it of course has nothing whatever to do with your opinion in the matter I venture to say that I should be sorry indeed to have General McMaken leave either one of these positions. However, whether he is to retain both places is a matter to be determined not by my wishes, but by the law.'"

I note from the statement contained in your letter that General McMaken was appointed about a year ago trustee of the Ohio Soldiers' and Sailors' Orphans' Home at Xenia under the provisions of section 1931-1 of the General Code (103 O. L., 159), and that he has recently been appointed as member of the county board of revision for Lucas county.

Your attention is invited to the provisions of section 95 of the Parrett-Whittemore law, so-called, which is section 5590 of the General Code, to be found on page 270 of 106 Ohio Laws, and which is as follows:

"An assessor, member of a county board of revision or an assistant, expert, clerk or other employe of a county board of revision shall not, during his term of office, or period of service or employment, as fixed by law, or prescribed by the tax commission of Ohio, hold any other public office of trust or profit, except offices in the state militia or the office of notary public."

In view of the express provisions of the section quoted above it is my opinion that a person cannot lawfully serve as a member of the board of revision for a county of this state, and at the same time hold the position of member of the board of trustees of the Ohio Soldiers' and Sailors' Orphans' Home at Xenia.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1416.

BOARD OF EDUCATION—TWO ADJOINING VILLAGE SCHOOL DISTRICTS ARE WITHOUT AUTHORITY TO UNITE FOR HIGH SCHOOL PURPOSES, ONLY.

The boards of education of two adjoining village school districts have no authority in law to unite said village school districts for high school purposes, only.

COLUMBUS, OHIO, March 24, 1916.

HON. GEORGE W. PORTER, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—I have your letter of March 18th, which is as follows:

"Section 7669 of the General Code provides for the uniting of districts for high school purposes.

"I want to know if two adjoining village school districts, one of which is located in Darke county and one in Preble county, can unite for high school purposes.

"The question that puzzles me is that the statute provides that a rural and village school district can unite, but is silent as to whether or not two village school districts can unite for such purposes.

"The other question is, can two village school districts unite for high school purposes, said districts being located in different counties, although these districts join each other?"

Section 7669, G. C., (104 O. L., 229) provides in part:

"The boards of education of two or more adjoining rural school districts, or of a rural and village school district by a majority vote of the full membership of each board, may unite such districts for high school purposes. * * *"

Under the above provision of said section 7669, G. C., the right to unite for high school purposes is limited to the boards of education of two or more adjoining rural school districts, or of a rural and village school district.

I am of the opinion, therefore, in answer to your first question, that the boards of education of two adjoining village school districts may not, under said provision of said statute, unite said districts for high school purposes.

I understand from your second question that the two adjoining village school districts therein referred to are located in different county school districts. This fact, however, would not be material as affecting the answer to your first question.

While the union of said village school districts for all school purposes could be affected under provision of section 4696, G. C., (106 O. L., 397) provided either one or both of said districts are subject to county supervision, I find no provision of the statutes under authority of which the boards of education of said village school districts may unite said districts for high school purposes only. Your second question must therefore be answered in the negative.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1417.

BOARD OF LIBRARY TRUSTEES—LIBRARY FUND—CUSTODIAN OF FUND—SEE OPINION NO. 1059, NOVEMBER 30, 1915.

The fund designated as the library fund in section 7640, G. C., remains in the custody of the treasurer or depositary of the board of education making the levy which creates said fund until it is expended by the board of library trustees.

COLUMBUS, OHIO, March 24, 1916.

HON. C. B. GALBREATH, *State Librarian, Columbus, Ohio.*

DEAR SIR:—I have your letter of March 22, 1916, as follows:

"I have a request for an opinion on sections 7636 and 7637 of the General Code, relative to the organization, powers and duties of a board of library trustees authorized by these sections.

"Should the fund set aside for library purposes under section 7640 be held by the board of library trustees or by the treasurer of the board of education of the school district? I understand that practices of library boards operating under these sections are not uniform in the state, and I

am asking you in the interest of uniformity and an official interpretation of the law to state whether or not the board of library trustees, or a treasurer appointed by said board, may hold the funds to be distributed on warrant of said board 'signed by the president and secretary thereof.'"

Replying to your foregoing inquiries I must advise that the fund designated in section 7640, G. C., is held by and remains in the custody of the treasurer or depository of the board of education making the levy which creates such fund until it is paid out upon warrants issued by the library trustees and signed by the president and secretary thereof as provided in said section..

There is no statutory authority for the election of a treasurer of said board of library trustees, nor is said board by any statutory provision whatever given the custody of said fund.

I am enclosing herewith a copy of opinion No. 1059 rendered to the Bureau of Inspection and Supervision of Public Offices, under date of November 30, 1915, in which the matters covered by your inquiries, as well as the various sections pertaining to the organization of a board of library trustees, are fully treated, which renders unnecessary further discussion here.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1418.

COMMISSIONER OF PUBLIC PRINTING—FRANKLIN COUNTY CONSERVANCY DISTRICT REPORT NOT AUTHORIZED TO BE PRINTED UNDER SECTION 173-2, G. C., 106 O. L., 514.

Only such reports as are to be paid for by funds out of the state treasury are required to be submitted to the commissioners of public printing for approval before publication under section 173-2, G. C., 106 O. L., 514.

COLUMBUS, OHIO, March 24, 1916.

Commissioners of Public Printing, Columbus, Ohio.

GENTLEMEN:—I am in receipt of a communication from the secretary of the Franklin county conservancy district, in which inquiry is made whether publication of the report and recommendations of the engineers of said district must be submitted to the commissioners of public printing for approval before publication of such report can be had, as provided in section 173-2 of the General Code (106 O. L., 514).

Inasmuch as the inquiry refers to a section of the General Code relative to the duties of the printing commission, I am addressing an opinion to you.

Section 173-2, G. C., above referred to, provides as follows:

"No officer, board or commission, shall print or cause to be printed at the public expense, any report, bulletin or pamphlet, unless such report, bulletin or pamphlet be first submitted to and the publication thereof approved by the commissioners of public printing. If such commission shall approve the publication thereof, it shall determine the form of such publication and the number of copies thereof, provided that in all cases the

commissioners of public printing shall cause their action thereon to be entered upon the minutes of their proceedings.

"If such approval is given, the commissioners shall cause the same to be printed, and may authorize such printing to be done at any penal, correctional or benevolent institution of the state having a printing department of sufficient equipment therefor; and when printed, such publications, other than the Ohio General Statistics, shall be delivered to such officer, board or commission for distribution by him or it."

This section is supplementary to section 173 of the General Code, as amended in 106 O. L., 513, and relates only to reports which are to be paid for out of the state treasury and has no reference whatever to such reports as referred to in the letter of the secretary of the Franklin county conservancy district. It is my opinion, therefore, that such report does not have to be submitted to the commissioners of public printing and their approval secured before the same may be published.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1419.

COUNTY BOARD OF EDUCATION—TERRITORY MAY NOT BE TRANSFERRED TO AN ADJOINING COUNTY DISTRICT AFTER PROCEEDINGS TO CENTRALIZE SCHOOLS OF RURAL SCHOOL DISTRICTS HAVE BEEN COMMENCED.

The board of education of a county school district may not, under provision of section 4692, G. C., 106 O. L., 397, transfer territory from a rural school district of the county school district to an adjoining district or districts of said county school district after proceedings have been commenced to centralize the schools of said rural school district.

COLUMBUS, OHIO, March 24, 1916.

HON. FRANK B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—I have your letter under date of March 11th, which is as follows:

"I will ask you to give me your opinion on the question stated below:

"In an attempt to rearrange the territory under the several boards of education in the northwestern section of Madison county a joint committee was apponited by the president of the county board of education to make recommendations in regard to the transfer of territory. This committee, composed of the presidents of the Monroe and Somerford rural boards of education, two members of the county board of education, and the county superintendent, recommended a transfer of certain territory from Somerford and Deercreek rural districts to Monroe rural district, and of certain territory generally known as the Williams district from Monroe rural to Pike rural. The transfer from Somerford and Deercreek rurals to Monroe rural was made on motion of the county board of education. The bounds of the district to be transferred to Pike rural were agreed upon and a map made and the motion was put in the county board of education meeting, but while all members were willing for the transfer to be made, at the request

of the Monroe rural board of education the motion was tabled until thirty days might elapse for the remonstrance to be filed against the transfer from Somerford and Deercreek rurals to Monroe rural, the understanding of all concerned, relying upon the opinion of the attorney-general given to the Pike township board of education through Edmund A. Jones, March 6, 1905, being that the transfer should be made at the end of that period.

"When that period of time had elapsed the call for the centralization election by Monroe rural district had already been made and at the request of the Monroe rural board and with the understanding that the transfer could be made after centralization was voted, action was postponed until the election might have taken place. Pike rural district is already centralized. Under the above conditions can the county board of education now carry out the original understanding and transfer the so-called Williams district from Monroe rural district to Pike rural district?"

I am informed that the transfers of territory from Somerford and Deercreek township rural school districts to Monroe township rural school district were made subsequent to the date when the act of the general assembly (106 O. L., 396) became effective. It follows that in making said transfers the board of education of Madison county school district acted under authority of section 4692, G. C. (106 O. L., 497), which provides in part as follows:

"The county board of education may transfer a part or all of a school district of the county school district to an adjoining district or districts of the county school district. Such transfer shall not take effect until a map is filed with the auditor of the county in which the transferred territory is situated, showing the boundaries of the territory transferred, and a notice of such proposed transfer has been posted in three conspicuous places in the district or districts proposed to be transferred, or printed in a paper of general circulation in said county, for ten days; nor shall such transfer take effect if a majority of the qualified electors residing in the territory to be transferred, shall, within thirty days after the filing of such map, file with the county board of education a written remonstrance against such proposed transfer."

While you state that the bounds of the territory comprising that part of Monroe township rural school district which it was proposed should be transferred to Pike township rural school district, were agreed upon and that a map of said territory was made, it appears that no official action of the county board of education was taken to make said transfer prior to the time when proceedings to centralize Monroe township rural school district were commenced. On the contrary it appears that at a meeting of the county board of education the first action to be taken by said county board under the above provision of section 4692, G. C., for the purpose of making said transfer, i. e., the passing of a resolution by said county board to make said transfer and describing the territory to be transferred, was postponed for thirty days and that during that interim the question of centralizing the schools of Monroe township rural school district was submitted to the qualified electors of said district under provision of section 4726, G. C. (104 O. L., 139).

From the statement of facts in connection with the question submitted to me by your predecessor, Hon. Frank W. Miller, as to the right of the boards of education of Madison and Champaign county school districts to act jointly under provision of section 4696, G. C. (106 O. L., 397), on a petition to transfer a part of said Monroe township rural school district in said Madison county school district to said Champaign county school district, after the centralization proceedings, above re-

ferred to, were commenced, it appeared that the vote of the electors of said Monroe township rural school district on the propositions to centralize the schools of said district and to issue bonds for one or more of the purposes authorized by provision of section 7625, G. C., was in favor of said propositions.

In opinion No. 1299 of this department rendered to you in answer to Mr. Miller's question 1 held that said county boards of education were without authority to act under provision of said section 4696, G. C., on said petition filed with said board of education of said Madison county school district after the commencement of the aforesaid centralization proceedings. Careful consideration was given to the holding of the court in the case of Fulks et al., v. Wright, 72 O. S., 547, which fully supported the conclusion reached in said opinion as above expressed.

While it was held in an opinion rendered by this department to Hon. Edmund A. Jones, state commissioner of common schools, under date of March 6, 1905, that "after a vote upon the question of centralization has been taken as provided by law and results in favor of centralization, the school district is still a township school district and the limitation of three years affects only the question as to the resubmission of the question of centralization and does not in any wise affect the authority of the boards of education to act under sections 3894 and 3895 (of the Revised Statutes) in transferring territory," said opinion was rendered prior to the commencement of the action in the common pleas court in the case of Fulks et al. v. Wright, supra, in which case the holding of the supreme court is contrary to the conclusion in said opinion expressed as above set forth.

In keeping with my former holding and in view of the holding of the court in the case of Fulks et al. v. Wright, supra, I am of the opinion, in answer to your inquiry, that inasmuch as no official action was taken by the board of education of Madison county school district to transfer a part of said Monroe township rural school district to said Pike township rural school district prior to the commencement of the aforesaid centralization proceedings, said county board of education may not now proceed under section 4692, G. C., to make said transfer of territory.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1420.

PROSECUTING ATTORNEYS—NO AUTHORITY TO PRESENT EXCEPTIONS IN MISDEMEANOR CASES TO THE SUPREME COURT—JURISDICTION LIMITED TO FELONY CASES.

Prosecuting attorneys may not under favor of sections 13681, *et seq., G. C., present exceptions to the supreme court in misdemeanor cases. Jurisdiction of the supreme court is limited under said sections to felony cases.*

COLUMBUS, OHIO, March 25, 1916.

The State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—I am in receipt of the following letter from the prosecuting attorney of the municipal court of Cincinnati:

> "The solicitor of Cincinnati, by ordinance, delegates one of his assistants as the prosecuting attorney of the municipal court, and I, having been so appointed, prosecute all cases in that court, both for violation of mu-

nicipal ordinances and for violations of state laws; in other words, all prosecutions in which the state of Ohio is plaintiff are handled by me for the state of Ohio in that court and I receive compensation for my services partly from the city and partly from the county for handling state and city cases.

"Recently I tried the case of state of Ohio v. Ned Rumpf, manager of the Wardmen's Social Club. The testimony presented involved the club question, and I have received a communication from the Hamilton county liquor licensing board enclosing a communication from the state liquor licensing board to the Hamilton county liquor licensing board, dated March 18, 1916, a copy of which is attached hereto. In that letter the subject is considered as to taking said case to the upper courts.

"Under section 13682, G. C., error could not be prosecuted because the case was dismissed in the trial court, but I would like to have your opinion and advice, in the event that the Hamilton county liquor licensing board should want me to present exceptions to the court for filing in the supreme court, whether or not under sections 13681 and 13682, G. C., I, as prosecuting attorney under the solicitor of the city of Cincinnati, could present exceptions to a judge of the municipal court of Cincinnati and present the said exceptions again to the supreme court, as provided in section 13683, G. C. It has never been done within my knowledge, or within the knowledge of any one I know, and I would like to have your opinion as to my right to take exceptions and have the supreme court pass on same."

Enclosed with said request for opinion is a copy of a letter from your board to the Hamilton county liquor licensing board asking that board to take up with the prosecuting attorney the matter of error proceedings in the case referred to.

As this is a matter that relates to the duties of your board I am addressing the opinion to you and sending a copy of same to Mr. Morrisey.

The prosecution referred to by Mr. Morrisey was for a misdemeanor and Mr. Morrisey's question is answered by the case of the State of Ohio v. Mansfield, 89 O. S., page 20, the third branch of the syllabus of which reads as follows:

"Sections 13682, 13683 and 13684, General Code, in so far as they purport to confer upon the supreme court appellate jurisdiction in misdemeanors, are inconsistent with the constitution as amended and, therefore, have no further force or effect. The question of the jurisdiction of this court under the provisions of these sections in felony cases is not involved in this case and is not here decided."

Answering Mr. Morrisey's question specifically, there is no authority under sections 13681 and 13682 of the General Code of Ohio for a prosecuting attorney to present exceptions in a misdemeanor case to the supreme court of the state.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1421.

COUNTY BOARD OF SCHOOL EXAMINERS—WHEN BOARD IS REQUIRED TO GRANT AN APPLICANT A ONE-YEAR CERTIFICATE WHO HAS NOT HAD PREVIOUS TEACHING EXPERIENCE.

The effect of the provision of the first part of section 7822, *G. C.*, 106 *O. L.*, 340, *is to extend the authority of and impose the duty on a county board of school examiners to examine an applicant without previous professional training and without any teaching experience, and if said applicant complies with all the rules and regulations of said board applicable to applicants for a one-year certificate, and if upon investigation said board finds that said applicant is not less than eighteen years of age and is of good moral character and upon such examination in the subjects prescribed by section* 7830, *G. C., to be taught in any elementary school supported wholly or in part by the state in any village or rural school district, said applicant makes the necessary grades required by said examining board for the issuance of a one-year certificate, it becomes the duty of said board of school examiners to issue a one-year certificate to such applicant in compliance with the requirements of the statutes governing the issuance of such certificate.*

COLUMBUS, OHIO, March 25, 1916.

HON. FRANK B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—In your letter under date of March 18, 1916, you request my opinion as follows:

> "Section 7822, General Code, provides with the exceptions stated farther on in the section than the quotation that 'Applicants for a one-year elementary certificate shall be admitted to examination, and if found proficient may be granted a certificate to teach in the public schools * * * without previous professional training. * * *' May a county board of examiners construe this to mean that if such an examinee without professional training secures in the examination the grades regularly required by their rules they may or may not at their discretion issue a teacher's certificate to such person? In other words, they hold that the word 'may' means that the certificate to such person may be denied regardless of the grades obtained on the examination, if they see fit to deny it. Is this construction tenable or is the county board obliged to issue a certificate to such an applicant in case the applicant makes the grades required by their rules and is of good moral character?"

You have quoted that part of section 7822, G. C. (106 O. L., 340) material to your inquiry. The above provision of said statute requires county boards of school examiners to admit to examination applicants without previous professional training. Taken in connection with the further provision of said section that:

> "Applicants for a one-year or a three-year elementary certificate who **have taught in the public schools** for one school year previous to the time of such application, unless said applicant is a graduate of a college or university of approved educational standing, shall possess an amount of professional training consisting of class room instruction in a recognized institution for the training of teachers, not less than the following: * * *"

it is evident that the provision of the first part of section 7822, G. C., as quoted by

you gives to those applicants without previous professional training and without teaching experience the same right to take an examination to qualify for a one-year certificate as is afforded to an applicant for a one-year certificate who has taught in the public schools for one year, previous to his application and who is required by the further provision of the statute to be a graduate of a college or university of approved educational standing or in lieu of this qualification to have the professional training prescribed by the latter part of said section.

Under provision of section 7822, G. C., as amended 104 O. L., 104, and as in force prior to the date when said section as amended in 106 O. L., became effective, all applicants for a one-year or three-year certificate had to possess the amount of professional training prescribed by provision of the latter part of said section as then in force.

I am of the opinion that it was the intention of the legislature in amending said section 7822, G. C., so as to give to those applicants without previous professional training and without any teaching experience the same right to take an examination to qualify for a one-year certificate as is afforded by the further provision of said section as last amended to applicants having one year's experience as teachers and having the additional qualifications prescribed by said further provisions of said statute, and to place the former class of applicants on an equal footing with the latter class of applicants above referred to. It necessarily follows that the county board of school examiners may not discriminate between the two classes of applicants solely on the ground that applicants of the former class are without previous professional training.

The effect of the first part of said section 7822, G. C., as last amended is to extend the authority of county boards of school examiners and to make it their duty to admit to examination the former class of applicants above referred to. While it may be argued that the use of the word "may" in the provision of the first part of said section 7822, G. C., as quoted by you makes said provision of said statute merely directory and permits the county board of school examiners in the exercise of its discretion to refuse to issue a one-year certificate to an applicant of said former class on the sole ground that such applicant is without previous professional training, I think in view of what has already been said that such an interpretation would defeat the plain legislative intent as above expressed.

As has already been stated the effect of the provision of the statute in question is to extend the authority of and impose the duty on county boards of school examiners to examine an applicant of the former class above referred to, and if said applicant complies with all the rules and regulations of said board applicable to said class, and if upon investigation said board finds that said applicant is not less than eighteen years of age and is of good moral character and upon such examination in the subjects prescribed by section 7830, G. C., to be taught in any elementary school supported wholly or in part by the state in any village or rural school district, said applicant makes the necessary grades required by said examining board for the issuance of a one-year certificate, I am of the opinion that it becomes the duty of said board of school examiners to issue a one-year certificate to such applicant in compliance with the requirements of the statutes governing the issuance of such certificate.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1422.

ARTICLES OF INCORPORATION—THE PRINCIPLE THAT A CORPORATION MAY NOT BE ORGANIZED TO DO MANUFACTURING AND MERCANTILE BUSINESS DOES NOT APPLY TO PUBLIC UTILITY COMPANIES—CERTIFICATE OF AMENDMENT OF THE CANTON ELECTRIC COMPANY, APPROVED.

A public utility company incorporated for the main or principal purpose of supplying light, heat and power by means of certain agencies may be authorized, by amendment of its articles of incorporation, to buy or otherwise acquire, as well as produce or manufacture, the service supplied by it.

The secretary of state advised to receive and record the certificate of amendment of The Canton Electric Company.

COLUMBUS, OHIO, March 25, 1916.

HON. CHAS. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of March 22, 1916, requesting my opinion as follows:

> "We are herewith enclosing draft of a proposed amendment to the articles of incorporation of THE CANTON ELECTRIC COMPANY, seeking to amend its purpose clause, to wit:
>
> "'Sixth. The purpose for which the corporation is formed is to produce, buy, acquire, lease, use, furnish, supply, sell, transmit and distribute light, heat and power generated by means of gas, electricity, steam or hot water, or any or all of them, and in connection therewith to construct, acquire, purchase, use, sell, lease, operate or manage any works, plants, constructions or parts thereof for the production, use, transmission, distribution, regulation, control or application of gas, electricity, steam or hot water. The company may conduct its business in the state of Ohio, and, if permitted by law, in other states of the United States. The provisions of this article sixth shall supersede and be substituted for paragraph third of the articles of incorporation of The Canton Light, Heat and Power Company and paragraph third of the articles of incorporation of The Central Heating and Lighting Company.'
>
> "We have refused to accept for filing amendment in such form for the reason that a former attorney-general of Ohio has given an opinion that a manufacturing incorporation is not permitted to engage in the business of buying and selling of the same class of production manufactured by others.
>
> "We are submitting the aforesaid question to you for an opinion.
>
> "P. S. We are also enclosing brief of Lynch, Day, Fimple and Lynch, attorneys for The Canton Electric Company."

Former attorneys-general of Ohio have uniformly held that an Ohio corporation, by reason of the limitations in section 8623 of the General Code, can be organized for only one principal or main purpose with such incidental powers, which may be expressed in its purpose clause, as are necessary to enable it to properly carry out such principal or main purpose.

In the opinion referred to in your letter given by former Attorney-General Ellis on February 5, 1907, to the then secretary of state, Mr. Ellis had under consideration the purpose clause of a corporation which sought to organize to carry on a manufacturing and mercantile business. The conclusion expressed was

that the two purposes were separate and unrelated, and that the corporation could not under the statute acquire both powers.

Under date of December 5, 1910, former Attorney-General Denman rendered an opinion to the then secretary of state, in which he held that,

> "A manufacturing company has undoubted power to supply its customers with articles it manufactures in order to carry out contracts made by it as a manufacturer, but the power to deal generally in certain articles in a mercantile way is quite separate and distinct from that of manufacturing the same article, and the two purposes cannot be joined in one clause."

The Canton Electric Company, in the certificate of amendment presented, seeks, among other things, to secure broader powers in its purpose clause. The principal or main purpose set forth in the proposed amendment is neither manufacturing nor mercantile. The Canton Electric Company is a public utility company, and its main purpose is to "supply light, heat and power" by means of certain agencies. They are related powers which may be exercised by an Ohio corporation. The other language of its purpose clause giving it authority to "produce, buy, acquire, lease, use, furnish, sell, transmit, and distribute" such light, heat and power "generated by means of gas, electricity, steam or hot water, or any or all of them, etc.," are simply incidental to the main purpose of supplying the service referred to, and I have little doubt that the corporation could exercise any of these incidental powers even though not specifically recited in its articles of incorporation.

A corporation such as The Canton Electric Company is subject to control by the Public Utilities Commission, and must of necessity be also subject to the terms and conditions of its local franchise. It is not in any sense a manufacturing corporation nor a mercantile corporation, but, as stated above, is a public service corporation having authority to supply certain kinds of service to a limited body of consumers. Neither the state nor the consumers of the service furnished are concerned in the source from which the service is derived.

I do not believe that the principle laid down in the opinion referred to in your letter, is applicable to the purpose clause contained in the certificate of amendment presented by The Canton Electric Company, and I am of the opinion that said certificate should be accepted and recorded by you.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1423.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, VILLAGE OF EAST VIEW, CUYAHOGA COUNTY, OHIO.

COLUMBUS, OHIO, March 25, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the village of East View, Cuyahoga county, Ohio, in the amount of $15,584.00 for the improvement of Westbury road from

Milverton road to Kinsman road by grading, draining, paving and constructing sidewalks therein, being one bond of $84.00 and thirty-one bonds of $500.00 each."

I have examined the transcript of the proceedings of the council and other officers of the village of East View, relative to the issuance of the above bonds, also the bond and coupon form submitted therewith, and I find the same regular and in conformity with the General Code of Ohio.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of the village of East View.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1424.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, VILLAGE OF EAST VIEW, CUYAHOGA COUNTY, OHIO.

COLUMBUS, OHIO, March 25, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE:—Bonds of the village of East View, Cuyahoga county, Ohio, in the amount of $9,354.00 for the improvement of Westbury road from Milverton road to Kinsman road, by constructing storm and sanitary sewers therein, being one bond of $354.00 and eighteen bonds of $500.00 each."

I have examined the transcript of proceedings of council and other officers of the village of East View relative to the issuance of the above described bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the General Code of Ohio.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of said village of East View.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1425.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, VILLAGE OF EAST VIEW, CUYAHOGA COUNTY, OHIO.

COLUMBUS, OHIO, March 25, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE:—Bonds of the village of East View, Cuyahoga county, Ohio, in the amount of $2,966.00 for the improvement of Westbury road from Mil-

verton road to Kinsman road by constructing a six-inch water main therein, being one bond of $466.00 and five bonds of $500.00 each."

I have examined the transcript of the proceedings of the council and other officers of the village of East View relative to the issuance of the above described bonds, also the bond and coupon form submitted, and I find the same regular and in conformity with the General Code of Ohio.

I am of the opinion that said bonds drawn in accordance with the form presented and executed by the proper officers will, upon delivery, constitute valid and binding obligations of said village of East View.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1426.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, VILLAGE OF EAST VIEW, CUYAHOGA COUNTY, OHIO.

COLUMBUS, OHIO, March 25, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE:—Bonds of the village of East View, Cuyahoga county, Ohio, in the amount of $18,604.00 for the improvement of Birch avenue from Milverton road to Kinsman road by grading, draining, paving and constructing sidewalks therein, being one bond of $104.00 and 37 bonds of $500.00 each."

I have examined the transcript of the proceedings of council and other officers of the village of East View relative to the issuance of the above described bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the General Code of Ohio.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of said village of East View.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1427.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, VILLAGE OF EAST VIEW, CUYAHOGA COUNTY, OHIO.

COLUMBUS, OHIO, March 25, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE:—Bonds of the village of East View, Cuyahoga county, Ohio, in the amount of $11,765.00, for the improvement of Birch avenue from Milverton road to Kinsman road by constructing storm and sanitary sewers, being one bond of $265.00 and twenty-three bonds of $500.00 each."

I have examined the transcript of the proceedings of council and other officers of the village of East View relative to the above bond issue, also the bond and coupon form submitted, and I find the same regular and in conformity with the General Code of Ohio.

I am of the opinion that said bonds, drawn in accordance with the form presented, and executed by the proper officers will, upon delivery, constitute valid and binding obligations of said village of East View.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1428.

APPROVAL, TRANSCRIPT OF BOND ISSUE, JEFFERSON COUNTY, OHIO.

COLUMBUS, OHIO, March 25, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Jefferson county, Ohio, in the sum of $24,000.00 for the purpose of providing funds to pay the cost and expense of improving a part of inter-county highway No. 7 in said county, being forty-eight bonds of $500.00 each."

I have examined the transcript of the proceedings of the county commissioners and other officers of Jefferson county relative to the issuance of the above described bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the General Code of Ohio.

I am of the opinion that said bonds drawn in accordance with the form presented and executed by the proper officers will, upon delivery, constitute valid and binding obligations of said Jefferson county.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1429.

APPROVAL, ARTICLES OF INCORPORATION, THE GREAT WESTERN LIFE INSURANCE COMPANY OF COLUMBUS, OHIO.

COLUMBUS, OHIO, March 25, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of March 20, 1916, enclosing proposed articles of incorporation of THE GREAT WESTERN LIFE INSURANCE COMPANY OF COLUMBUS, OHIO, the consent of the incorporators of The Great Western Life Insurance Company of Lima, Ohio, to the use of the name of The Great

Western Life Insurance Company of Columbus, Ohio, also a check for $100.00, and an uncancelled ten-cent revenue stamp, and requesting my approval thereof as required by section 9341, of the General Code.

I have examined the proposed articles of incorporation of The Great Western Life Insurance Company of Columbus, Ohio, and herewith return the same with my certificate of approval endorsed thereon. I also return the other enclosures above mentioned.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1430.

FARMERS' INSTITUTES—MONEYS RECEIVED BY DEAN OF COLLEGE OF AGRICULTURE OF OHIO STATE UNIVERSITY ARE NOT TO BE PAID INTO STATE TREASURY—IT IS A TRUST FUND.

Moneys received by the dean of the college of agriculture of the Ohio State University under section 9918, G. C., are to be retained by him as a trust fund for the purposes specified in section 9920, G. C., and not paid into the state treasury.

COLUMBUS, OHIO, March 25, 1916.

HON. CARL E. STEEB, *Secretary Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—Under date of December 30, 1915, you wrote me as follows:

> "By act of the legislature (O. L. 106, pp. 356-359) the farmers' institutes were placed under the direction and control of the Ohio State University.
>
> "Appropriations for conducting these institutes were made to the agricultural commission, and at a recent meeting a part of these appropriations was transferred from the state board of agriculture to the Ohio State University.
>
> "The opinion of the attorney-general is hereby respectfully requested on the following points:
>
> "1. In Sec. 9918—When certain conditions have been complied with, the county auditor is required to draw an order on the county treasurer in favor of the *dean of the college of agriculture.*
>
> "A. Has the board of trustees of the Ohio State University authority to receive this money from the dean of the college of agriculture?
>
> "B. If so, does such money come under the so-called Mooney law, and to what fund shall it be credited?
>
> "C. If not, what disposition shall the dean of the college of agriculture make with these orders?"

Section 9918 of the General Code, as found in 106 O. L., 356, provides that when annual farmers' institute meetings have been held in accordance with the rules of the trustees of the Ohio State University, "the dean of the college of agriculture shall issue certificates, one to the president of the farmers' institute society and one to the county auditor, setting forth such facts. On the presentation of such cer-

tificates to the county auditor, he, each year, shall draw orders on the treasurer of the county as follows: One in favor of the dean of the college of agriculture of Ohio State University for one hundred and seventy-five dollars * * *."

Section 9920, G. C., (106 O. L., 357) provides as follows:

> "At the annual farmers' institute meetings held as herein provided, and under the auspices of the trustees of the Ohio State University, the department shall furnish lecturers or speakers whose compensation and expenses it shall pay. A majority of these lecturers and speakers shall be practical farmers."

Both of these sections are but amendments of former laws relative to farmers' institutes.

There is no provision in the law as to the disposition to be made of the orders drawn on the treasurers of the counties in favor of the dean of the college of agriculture, and section 24, G. C., which provides for the payment into the state treasury of moneys, does not cover this matter, as it only seeks to cover state officers, state institutions, departments, boards, commissions, colleges, normal schools and universities. The dean of the college of agriculture is simply an employe of the trustees of the Ohio State University, although he is recognized in various statutes as an independent officer, in that he was made, under the old law, a member of the agricultural commission of Ohio, and thereby the college of agriculture of the Ohio State University was recognized as a distinct department.

There being no specific provision of law as to the disposition of this money after the same reaches the hands of the dean of the college of agriculture, and the amount not being required to be paid into the state treasury under section 24, G. C., an examination of sections 9918 and 9920, G. C., prior to enactment in their present form will disclose the legislative intent.

Section 9918, G. C., as enacted at the time of the codification of 1910, provided that the order for the one hundred and seventy-five dollars should be drawn in favor of the president of the state board of agriculture, and section 9920, G. C., provided that at the annual farmers' institute meetings held as provided therein and under the auspices of the state board of agriculture, *such board* shall furnish lecturers or speakers whose compensation and expenses it shall pay.

These two sections were amended in 1913, at the time of the creation of the agricultural commission of Ohio. It was provided in section 9918, G. C., (103 O. L., 339) that the order on the county treasurer should be in favor of the president of the agricultural commission, and section 9920, G. C., (103 O. L., 339) provided that at the annual farmers' institute meetings held as provided therein and under the auspices of the agricultural commission, *the commission* shall furnish lecturers or speakers whose compensation and expenses it shall pay.

The sections as amended in 1915 (106 O. L., 357) have been hereinbefore set out. It is to be noted that under section 9918, G. C., the order is to be drawn in favor of the dean of the college of agriculture, and section 9920, G. C., provides that at the annual farmers' institute meetings held as therein provided and under the auspices of the trustees of the Ohio State University, *the department* shall furnish lecturers or speakers whose compensation and expenses it shall pay.

The legislature having provided that the order shall be drawn in favor of the dean of the college of agriculture under section 9918, G. C., and under section 9920, G. C., having provided that the department shall furnish the lecturers or speakers, I am of the opinion that the "department" referred to in section 9920, means the college of agriculture, especially so since the statute states that the meetings are to be held under the auspices of the trustees of the Ohio State University, and that the department shall furnish the speakers. Had the legislature intended that

the trustees of the Ohio State University should pay the speakers, it would not, as I see it, have used the word "department," but would have repeated the words "trustees of the Ohio State University." Therefore, I am of the opinion that the orders drawn in favor of the dean of the college of agriculture are not to be turned into the state treasury, but are to be retained by him, and out of the amount so received by him he is to furnish the speakers and lecturers for the annual farmers' institute meetings.

In so answering the above I do not wish it to be understood that the legislature cannot contribute to the fund in the hands of the dean of the college of agriculture by appropriation. If the legislature appropriates to the Ohio State University moneys to be used for the purposes of section 9920, G. C., that money is to be added to the money which is retained by the dean of the college of agriculture as a trust fund, and the two sums may be used in the payment of speakers and lecturers.

Specifically answering your question, therefore, I am of the opinion that the board of trustees of the Ohio State University is not authorized to receive the money in question from the dean of the college of agriculture, but that the dean should hold the same in trust for the uses and purposes for which the same is received.

Your question B, therefore, does not require an answer.

In answer to question C, the dean of the college of agriculture should retain the money so received by him, to be paid out for the furnishing of lecturers or speakers at the annual farmers' institute meetings held under the auspices of the trustees of the Ohio State University.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1431.

AGRICULTURAL EXTENSION FUND—MONEYS RECEIVED BY STATE TREASURER FROM COUNTIES AND FEDERAL GOVERNMENT FOR ABOVE PURPOSE NOT PAYABLE INTO STATE TREASURY—IT IS A TRUST FUND.

Moneys received by the state treasurer from counties and the federal government under the provisions of section 9921-1, G. C., 106 O. L., 356, are not payable into the state treasury, but are to be held by such treasurer as a trust fund for the purposes mentioned in the act.

COLUMBUS, OHIO, March 25, 1916.

HON. CARL E. STEEB, *Secretary Board of Trustees Ohio State University, Columbus, Ohio.*

DEAR SIR:—Under date of December 30, 1915, you wrote me as follows:

"Section 2 of an act passed by the 81st general assembly, May 19, 1915, (O. L. 106, pp. 357-359) establishes an agricultural extension fund and provides for county agent work.

"Sandusky county has just sent to the state treasurer an order for $200.00 under section 9921-4.

"The opinion of the attorney-general is respectfully requested on the following points:

"1. Section 9921-1 states that all monies from counties, etc., shall be set aside and designated as 'the agricultural extension fund,' it also provides that the trustees of the Ohio State University shall expend, in ac-

cordance with law, all moneys in the state treasury to the credit of the agricultural extension fund.

"A. Is the money so received from the counties to be added to the amount already provided for in the general appropriation bill for agricultural extension work?" If so, is it appropriated in this act and now available for use?

"B. Section 9921-4 provides that the auditor of state shall issue a warrant in favor of the Ohio State University. When this is done, what becomes of the money? Is it to be paid back into the state treasury by the university?

"The last sentence of this section provides that if the money is not used before the expiration of two years, it shall revert to the county from which it came.

"How and by whom is the money to be returned?"

Section 9921-1 of the General Code, (106 O. L., 356) to which you refer in your inquiry, provides as follows:

"The state treasurer shall receive and place to the credit of the Ohio State University all moneys appropriated and apportioned to Ohio by the United States * * *. The money so appropriated and apportioned by the United States, together with any money appropriated by the state and any county or counties, to make available the aid extended by the United States in the aforesaid act, shall be set aside and designated as 'the agricultural extension fund,' and used in accordance with the provisions of this act for the extension service of the college of agriculture of the Ohio State University. The trustees of the Ohio State University shall expend, in accordance with law, all moneys in the state treasury to the credit of the agricultural extension fund."

Section 9921-2, G. C. (106 O. L., 357) provides that:

"From moneys appropriated by the state for the employment of agricultural agents, not to exceed three thousand dollars in any one year shall be expended for any county that shall raise at least one thousand dollars for the support of an agricultural agent for one year, and shall give satisfactory assurance to the trustees of the Ohio State University that a like sum shall be raised for a second year, or shall establish and maintain a county experiment farm as provided in the statutes."

Section 9921-4, G. C., (106 O. L., 358) provides that each county of the state is authorized to appropriate annually not to exceed fifteen hundred dollars, for the maintenance, etc., of a county agricultural agent, and the county commissioners are authorized to appropriate said sum of money and transmit the same to the state treasurer, who shall place it to the credit of the agricultural extension fund to be paid for the purposes aforesaid, on warrant issued by the auditor of state in favor of the Ohio State University.

It further provides that:

"If for any reason it shall not be used as contemplated in this act before the expiration of two years, it shall revert to the county from which it came."

A careful examination of section 9921-1, G. C., will disclose that the statute

contemplates that the state treasurer is to receive the money appropriated by the United States government and the money appropriated by the counties, and place it to the credit of the Ohio State University.

Ordinarily, a provision in a statute that the state treasurer is to receive money and place it to the credit of a particular department or institution of the state is construed to mean that the same shall be placed in the state treasury to the credit of a particular department or institution; yet in this instance we must look to the entire act for the intention of the legislature.

In the first place, it must be borne in mind that the moneys paid by the counties and the federal government to the state are not paid to the state by way of revenue to the state, but are paid solely to the state in trust for the specific purposes mentioned; and furthermore, that in so far as the money appropriated by the counties is concerned, it is specifically provided that if the same be not used within two years, it is to be returned to the counties from which it came.

The provision that the money shall be returned within two years, unless the same is used for the purposes specified, is entirely inconsistent with the idea that the money is to be paid into the state treasury. It is only consistent with the idea that the money is not to be so paid, but is to be retained separate and apart from the moneys in the state treasury, in order that, if the same be not used for the purpose for which it was received, it might be returned.

The only right to pay moneys out of the state treasury is by appropriation, and it could well be argued that unless there was a provision that this money was to be returned to the counties from which it came, if not used, it would render the act unconstitutional. It is a familiar rule of law that courts will give to an act a construction which sustains its constitutionality rather than to declare the same unconstitutional, if the act is susceptible of such construction.

I am, therefore, of the opinion that the moneys so received are to be received by the state treasurer as custodian, and are not to be paid into the state treasury, and that the state treasurer shall hold such money in what the legislature has designated as "the agricultural extension fund."

The last sentence of section 9921-1 provides that the trustees of the Ohio State University shall expend, in accordance with law, all moneys in the state treasury to the credit of the agricultural extension fund. This refers solely to the appropriations made by the legislature out of state revenues in aid of the specific purposes for which the statutes were passed, and does not refer to the moneys that are received from either the federal government or the various counties.

This is clearly the intention of the statute for the reason that section 9921-4 provides that the moneys received from the counties shall be paid out on warrant issued by the auditor of state in favor of the Ohio State University.

It would not have been necessary to make the provision just foregoing mentioned if the moneys were to be paid into the state treasury, for the reason that the last sentence of section 9921-1 would have covered the entire matter.

For the foregoing reasons, I am of the opinion that the moneys paid by the counties and the federal government to the state treasurer are to be held by him solely as custodian, and should not be paid by him into the state treasury; and that said moneys should be paid out of such trust fund so held by the state treasurer as custodian on warrant issued by the auditor of state in favor of the Ohio State University, when called upon by the trustees of said university for the same; and that the moneys appropriated by the legislature out of the general revenues of the state for the purposes *mentioned* are to be paid out as provided in section 9921-1, G. C., "in accordance with law."

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1432.

COUNTY CHILDREN'S HOME—REFUSAL OF BOARD OF STATE CHARITIES TO RENEW CERTIFICATE—COUNTY AUDITOR NOT PROHIBITED FROM ISSUING WARRANTS FOR SUPPORT OF HOME FOR BILLS CONTRACTED SUBSEQUENT TO REVOKING CERTIFICATE.

Refusal of the board of state charities to renew its certificate to a county children's home, as provided in section 1352-1, *G. C.*, 103 *O. L.*, 865, *does not operate to prohibit the county auditor issuing his warrants on vouchers drawn against funds appropriated for the support of such home, to pay bills incurred after the expiration of the former certificate of the state board of charities.*

COLUMBUS, OHIO, March 27, 1916.

HON. A. C. MCDOUGAL, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—Your letter of March 17, 1916, asking my opinion, received, and is as follows:

> "The board of state charities, at their session February 3, 1916, refused to renew their certificate of indorsement of the Monroe county children's home, pursuant to sections 1352 and 1352-1 of the General Code, the last certificate having expired February 1, 1916.
>
> "The Monroe county children's home not having been reinstated as an accredited institution, has the county auditor legal authority to draw his warrant on the county treasurer for bills allowed by the trustees of the children's home contracted since the expiration of the last certificate?"

Section 3077, G. C., 103 O. L., 899, provides for the establishment of children's homes by counties, and provides that the question of establishing such home and issuing bonds therefor shall be submitted to a vote of the electors of the county.

Following sections provide the further procedure, the appointment of trustees and superintendents, and fix their duties, compensation, etc.

Section 3104, G. C., 103 O. L., 893, provides as follows:

> "The board of trustees shall report annually to the commissioners of the county the condition of the home, and make out and deliver to the commissioners a carefully prepared estimate, in writing, of the wants of the home for the succeeding year. Such estimate shall specify separately the amounts required for each of the following purposes, to wit: First, maintenance. Second, repairs. Third, special improvements."

Section 3105, G. C., provides as follows:

> "At their regular quarterly meeting at which such estimate is presented to them, the commissioners shall carefully examine the estimate, and if, in their judgment, it is reasonable and ratably within the assessment for the support of the home for the current year, or so much thereof as they deem reasonable and within such assessment, the board of commissioners shall allow and approve, and shall appropriate and set apart such amount for the use of the home. Upon the order of the trustees of the home, the county auditor shall draw his warrant upon the county treasurer, who shall pay such warrant from the fund so appropriated and set apart."

Sections 3090 and 3091, G. C., 103 O. L., 890, provide how children may be admitted to the children's home, to wit, on the order of the juvenile court or of a majority of the trustees, or by transfer from the county infirmary.

Sections 1352 and 1352-1, G. C., 103 O. L., 865, provide in part as follows:

> "Sec. 1352. The board of state charities shall investigate by correspondence and inspection the system, condition and management of the public and private benevolent and correctional institutions of the state and county, and municipal jails, workhouses, infirmaries and children's homes, and all maternity hospitals or homes, lying-in hospitals, or places where women are received and cared for during parturition, as well as all institutions, whether incorporated, private, or otherwise, which receive and care for children. * * *"
>
> "Sec. 1352-1. Such board shall annually pass upon the fitness of every benevolent or correctional institution, corporation and association, public, semi-public or private, as receives, or desires to receive and care for children, or places children in private homes. * * * When the board is satisfied as to the care given such children, and that the requirements of the statutes covering the management of such institutions are being complied with, it shall issue to the association a certificate to that effect, which shall continue in force for one year, unless sooner revoked by the board. No child shall be committed by the juvenile court to an association or institution which has not such certificate unrevoked and received within fifteen months next preceding the commitment. A list of such certified institutions shall be sent by the board of state charities, at least annually, to all courts acting as juvenile courts, and to all associations and institutions so approved. Any person who receives children or receives or solicits money on behalf of such an institution, corporation or association, not so certified, or whose certificate has been revoked, shall be guilty of a misdemeanor, and fined not less than $5.00 nor more than $500.00."

These sections impose a limitation upon the power of the juvenile court to commit children to a children's home which does not have such certificate unrevoked and received within fifteen months next preceding the commitment, and upon the power of the trustees or superintendent of the home to receive children either by way of commitment by a court or otherwise, but do not in terms impose any limitation upon the duty of the commissioners to appropriate funds for the support of the institution, and of the auditor to issue warrants upon vouchers issued against such appropriation by the trustees as provided in section 3105, G. C., supra. Not only is there no specific inhibition against the same, but there is no provision for the disposition of children already in the home, and this strengthens the view that it was not the intention of the legislature that the refusal of the board of state charities to certify, should require that a county children's home should not be further supported by the county for the benefit of children already there.

I am therefore of the opinion that the refusal of the board of state charities to issue its certificate to the Monroe county children's home, as provided in section 1352-1, G. C., supra, does not operate to prohibit the auditor from issuing his warrants on vouchers issued by the trustees of the children's home against the appropriation made by the commissioners for the use of such home, to pay bills contracted since the expiration of the last certificate issued to such home by the board of state charities.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1433.

COMMON PLEAS JUDGE—REIMBURSEMENT FOR EXPENSES WHEN JUDGE HOLDS COURT IN COUNTY OTHER THAN THAT IN WHICH HE RESIDES—CHIEF JUSTICE OF SUPREME COURT DOES NOT ASSIGN JUDGE—EXPENSES PAYABLE FROM STATE TREASURY.

Reimbursement for expenses incurred by a common pleas judge when holding court in a county other than that in which he resides, without the assignment of the chief justice of the supreme court, is payable from the state treasury and not from the treasury of the county in which the services are rendered.

COLUMBUS, OHIO, March 28, 1916.

HON. ROSCOE J. MAUCK, *Judge Common Pleas Court, Gallipolis, Ohio.*

MY DEAR JUDGE:—With due apologies for the mislaying of your letter of February 14th and its enclosures, and with acknowledgment of your letter of the 29th enclosing copies of the former correspondence, I hasten to answer the question which you submit therein.

You call attention to the informal ruling of the chief justice of the supreme court, to the effect that common pleas judges, under the amendment to article IV, section 3 of the constitution and the legislation enacted in pursuance thereof, are entitled to exchange work and to hold court in counties other than those in which they severally reside without a direct assignment by the chief justice, and that while so holding court they are entitled to reimbursement for "expenses incurred by them as otherwise provided by law." You inquire whether the expenses to which such judges are so entitled are payable from the state treasury or from the county treasury.

Manifestly, section 2253, G. C., as amended 104 O. L., 251, is the sole source of authority to receive reimbursement for expenses of this character. That section provides:

> "In addition to the annual salary and expenses provided for in sections 1529, 2251, 2252, 2252-1, each judge of the court of common pleas and of the court of appeals, shall receive his actual and necessary expenses, not exceeding three hundred dollars in any one year, incurred, while holding court in a county in which he does not reside, to be paid from the state treasury upon the warrant of the auditor of state, issued to such judge; each judge of the court of common pleas who is assigned by the chief justice by virtue of section 1469, to aid in disposing of business of some county other than that in which he resides, shall receive ten dollars per day for each day of such assignment, and his actual and necessary expenses incurred in holding court under such assignment, to be paid from the treasury of the county to which he is so assigned upon the warrant of the auditor of such county, and the amount allowed herein for actual and necessary expenses shall not exceed three hundred dollars in any one year."

To me it is obvious that the second part of the section following the semicolon therein is limited in its application to cases in which judges of the court of common pleas are "assigned by the chief justice by virtue of section 1469, to aid in disposing of business of some county other than" those in which they respectively reside. On the other hand, the first part of the section preceding the natural division point is not qualified, but applies to the expenses incurred by a judge "while holding court in a county in which he does not reside."

It follows, therefore, that the authority of the common pleas judge who goes into another county to hold court by agreement with the common pleas judge of such county, or otherwise than by assignment of the chief justice under section 1469, G. C., to receive reimbursement for his expenses is referable to the first part of the section, and that accordingly such expenses so incurred are to be paid from the state treasury upon the warrant of the auditor of state, and are limited in amount, with other expenses so incurred, to three hundred dollars in any one year, provided the judge was elected subsequently to the date on which house bill No. 52 (104 O. L., 250) took effect; and if any such judge was elected prior to that date the limitation upon the amount of such expenses for which he may be so reimbursed is, as pointed out in opinions of this department, copies of which I believe you have received, one hundred and fifty dollars.

Of course, it follows from the premises that the per diem of ten dollars is not payable under the circumstances considered.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1434.

BOARD OF EDUCATION—WHERE PUPIL PLACED IN CUSTODY OF RESIDENT OF DISTRICT BY JUVENILE COURT, ATTENDS CITY SCHOOL—PARENTS WHO RESIDE OUTSIDE OF DISTRICT NOT TO BE CHARGED FOR TUITION—WHAT COURT HAS JURISDICTION IN JUVENILE CASES IN HAMILTON COUNTY.

Where a minor child of the age of thirteen years is taken from the care and custody of its parents, who are nonresidents of a school district within the county, by order of the judge of the juvenile court of such county, and by the further order of said court is placed under the care and control of a person who is an actual resident of such school district, unless otherwise ordered by the court said child becomes the ward of said person, resident of such school district, under provision of section 1672, *G. C.*, 103 *O. L.*, 876, *and as such is entitled to attend the public schools of said district without charge for tuition under provision of section* 7681, *G. C.*, 106 *O. L.*, 489.

Under the provisions of section 1639, *G. C.*, 104 *O. L.*, 176, *in Hamilton county the power and jurisdiction conferred by the statutes as found in the chapter of the General Code relating to juvenile courts is exercised by one of the judges of the court of common pleas of said county in the division of domestic relations.*

COLUMBUS, OHIO, March 28, 1916.

HON. JOHN V. CAMPBELL, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—I have your letter of March 17th, which is as follows:

> "At the suggestion of Mr. Chas. A. Groom, solicitor of the city of Cincinnati, I write to ask your opinion upon the following question: 'Is tuition payable for a pupil attending one of the elementary schools of a city school district where the parents of such pupil reside outside of the school district, but the child has been placed under the care and control of a resident of the district by action of the court of domestic relations of the county?'
>
> "This involves a consideration of section 7681 of the General Code and a determination of whether such child can be considered a 'ward' within the

meaning of that section while the parents are still living and non-residents. We enclose a copy of the solicitor's letter upon this subject."

Mr. Groom's letter above referred to, addressed to you under date of March 16, 1916, reads as follows:

"Mary Ellen Burton, a minor thirteen years of age, has been placed under the care and control of George A. Roundtree, of Sayler Park, by an order of the court of domestic relations in cause No. 12963. In re Mary Ellen Burton, dependant.

"The parents of this dependant reside outside of the school district of this city, and the question has been raised in regard to the payment of tuition. In order that there may be a uniformity of ruling on this subject, which is one that affects every school district in this state, I respectfully request that you, as counsel for the court of domestic relations, request an opinion upon this subject from the attorney-general of Ohio."

Section 7681, G. C. (106 O. L., 489), provides in part:

"The schools of each district shall be free to all youth between six and twenty-one years of age, *who are children, wards or apprentices of actual residents of the district,* * * *."

The latter part of section 1639, G. C. (104 O. L., 176), provides that in Hamilton county the power and jurisdiction conferred by the statutes as found in the chapter of the General Code relating to juvenile courts shall be exercised by the court of common pleas of said county. Said section as amended further provides that:

"In 1914, and every sixth year thereafter, one of the common pleas judges to be elected at said times shall be elected as a judge of the court of common pleas, division of domestic relations,"

and requires that to this judge shall be assigned all juvenile court work arising under said chapter.

From the statement of facts submitted by you it appears that the parents of the child referred to in your inquiry reside outside of the city school district of Cincinnati, and that said child has been placed under the care and control of a resident of said school district by action of the judge of the court of common pleas, division of domestic relations, in the exercise of the jurisdiction conferred upon him by the above provision of section 1639, G. C., as amended, taken in connection with the provisions of section 1642 et seq. of the General Code (103 O. L., 868-879), as found in said chapter of the General Code relating to the power and jurisdiction of the juvenile court.

Section 1643, G. C. (103 O. L., 869), provides that:

"When a child under the age of eighteen years comes into the custody of the court under the provisions of this chapter, such child shall continue for all necessary purposes of discipline and protection, a ward of the court, until he or she attain the age of twenty-one years. The power of the court over such child shall continue until the child attains such age."

Section 1653, G. C. (103 O. L., 872), provides that:

"When a minor under the age of eighteen years, or any ward of the court under this chapter, is found to be dependent or neglected, the judge may make

an order commiting such child * * * to the care of some reputable citizen of good moral character, * * *."

Acting under the above provision of section 1653, G. C., your court of common pleas, in the division of domestic relations, placed the child in question under the care and control of the person referred to in your inquiry. Section 1672, G. C. (103 O. L., 876), provides that:

"If the court awards a child to the care of an association, corporation or *individual*, in accordance with these provisions, unless otherwise ordered, the child shall become a ward, and be subject to the guardianship of such association, corporation or individual. * * *"

The child in question having been placed under the care and control of the person above referred to, and it not appearing that a further order of the court was made disposing of said child, I am of the opinion that under the provision of this latter statute said child became the ward of said person.

Inasmuch as the said Mary Ellen Burton, a minor of the age of thirteen years, was taken from the care and custody of her parents, who are non-residents of the Cincinnati city school district, by order of your court of common pleas in the division of domestic relations, and by further order of said court was placed under the care and control of the person referred to in your inquiry, who is an actual resident of said city school district, I am of the opinion that under the above provision of section 7681, G. C., the said Mary Ellen Burton as the ward of said resident of said city school district is entitled to attend the public schools of said district without charge for tuition.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1435.

ROADS AND HIGHWAYS—NO PROVISION FOR TWO OR MORE TOWNSHIPS TO CO-OPERATE FOR A ROAD IMPROVEMENT UNLESS COUNTY COMMISSIONERS TAKE JURISDICTION AND PAY PART OF COST.

Co-operation by two or more townships may be had only under section 6921, G. C. provided the county commissioners are willing to take jurisdiction and pay some part, of the cost of the improvement.

COLUMBUS, OHIO, March 28, 1916.

HON. CHARLES F. ADAMS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I have your communication of March 9, 1916, which is as follows:

"In Lorain county are several roads on the boundary line of townships, the one in question is a road separating Carlisle and LaGrange townships, and about four miles in length. This road connects two improved roads which were improved under the former road district law 7033-52.

"The width of the road makes it impracticable to build solely in either township, and I have been unable to find authority for agreement between the trustees of Carlisle and LaGrange townships to jointly build this road.

"If any such authority exists will you please indicate where it may be found, and in event that the maximum levy for road purposes produces insufficient funds for this improvement, how can the needed money be raised?"

I beg to advise that the chapter relating to road construction and improvement by township trustees, being chapter III of the Cass highway law, contains no provision for the co-operative improvement by two or more townships of a township line road. The matter may be worked out, however, under chapter VI of the Cass highway law, if the county commissioners of Lorain county are willing to take jurisdiction and pay some part of the cost and expense of the improvement. Under section 6921, G. C., a board of county commissioners may enter into an agreement with the trustees of a township or townships in which a proposed road improvement is in whole or part situated, providing for a division of the cost and expense between the county and the interested township or townships.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1436.

ROADS AND HIGHWAYS—NOTICES REQUIRED BY SECTIONS 6912 AND 6922, G. C.—WHAT SUCH NOTICES SHOULD CONTAIN.

The notices required by sections 6912 *and* 6922, *G. C., need not contain the names of the persons whose property is to be specially assessed or a description of the lands to be assessed.*

In view of the variations in assessment districts possible under section 6919, *G. C., the notice required by section* 6922, *G. C., should contain a statement of the particular method of assessment followed in the making of any given improvement.*

COLUMBUS, OHIO, March 28, 1916.

HON. JOHN H. SCHRIDER, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR:—I have your communication of February 24, 1916, in which you submit the following inquiry:

"Must the notices required by sections 91 and 101 of the Cass highway law, being sections 6912 and 6922, G. C., set forth the names of the persons to be specially assessed and describe the lands to be benefited or assessed."

Section 6912, G. C., reads as follows:

"Upon the completion of the survey for such improvement by the county surveyor, he shall transmit to the commissioners his estimate of the cost and expense of such improvement, together with a copy of his survey, plats, profiles, cross sections, estimates and specifications therefor. As soon as the county commissioners have determined by resolution to construct said improvement, they shall cause to be published in a newspaper published and of general circulation within the county, if there be any such paper published in said county, but if there be no such paper published in said county, then in a newspaper having general circulation in said county, once a week, for two consecutive weeks, a notice that such improvement is to be made

and that the surveys, plats, profiles, cross-sections, specifications and estimates for said improvement are on file in the office of the county commissioners for the inspection and examination of all persons interested therein. Such notice shall state the time and place for hearing objections to said improvement, and for hearing claims for compensation for lands and property to be taken for said improvement, or damages sustained on account thereof, and that unless such claims are filed in writing, with the county commissioners on or before the time fixed for hearing said claims, the same shall be waived, except as to minors and other persons under disability."

The section in question contains no specific requirement that the notice therein required to be published must contain the names of the persons to be specially assessed or a description of their lands. The hearing, notice of which is required by the section in question, is not upon the subject of assessments, but relates to objections to the improvement and to claims for compensation and damages. In fact, at the time the notice required by section 6912, G. C., must be published, no estimated assessment will have yet been made, as the notice required by section 6912, G. C., must be given as soon as the county commissioners have determined by resolution, to construct the improvement, and under the provisions of section 6922, G. C., the surveyor does not make his estimated assessment until the improvement is granted.

I think that, in so far as your inquiry relates to this section, it is determined by the above facts, and by the provision of the following section, section 6913, G. C., to the effect that in the event that land or property is to be taken for the improvement, the notice provided by the preceding section shall state briefly whose lands or property are to be appropriated.

I therefore advise you that in so far as the notice required by section 6912, G. C., is concerned, such notice need not contain the names of the persons whose property is to be specially assessed and need not contain a description of the lands to be so assessed. It is sufficient if the notice be drawn to contain the matter required by section 6912, G. C., and to comply with the provision of section 6913, G. C., to the effect that the notice shall state briefly whose lands or property are to be appropriated.

Section 6922, G. C., reads as follows:

"As soon as the improvement is granted, the surveyor shall make, upon actual view, an estimated assessment upon the real estate to be charged therewith of such part of the cost and expense of said improvement as the county commissioners may have determined at the time of granting such improvement. Such apportionment shall be according to the benefits which will result to such real estate. In making such apportionment, the surveyor may take into consideration any previous special assessments made upon such real estate for road improvements. The schedule of such apportionment shall be filed in the office of the county commissioners for the inspection of the persons interested. Before adopting the estimated assessment so made and reported, the commissioners shall publish once each week for two consecutive weeks in some newspaper published and of general circulation in the county, if there be any such paper published in the county, but if there be no such paper published in said county, then in a newspaper having general circulation in said county, notice that such estimated assessment has been made, and that the same is on file in the office of the county commissioners, and the date when objections, if any, will be heard to such assessment. If any owner of property affected thereby, desires to make objections, he may file his objections to said assessment in writing, with the county com-

missioners before the time for said hearing. If any objections are filed the county commissioners shall hear the same and act as an equalizing board, and they may change said assessments, if in their opinion, any change is necessary to make the same just and equitable, or they may make such changes as are just and equitable even if no objections are filed thereto, after giving notice to the parties whose assessments they propose to change, and such commissioners shall approve and confirm said assessment as reported by the surveyor or modified by them. Such assessments, when so approved and confirmed, shall be a lien on the land chargeable therewith."

The notice required by the above quoted section is very similar in character to the one required by old section 6956-12, G. C., now repealed, and it was never understood that the notice required by that section should include the names of the owners whose property was assessed or a description of their property. The section in question only goes so far as to provide that the notice shall set forth that the estimated assessment has been made, and that the same is on file in the office of the county commissioners, and the date when objections, if any, will be heard to such assessment. This language does not warrant the inference that the legislature intended that the notice should contain the names of the persons to be specially assessed, or a description of their property, especially as former road laws contemplated the publication of notices containing neither the names of owners nor the descriptions of their property.

In view of the foregoing, I advise you that the same rule as to the inclusion of names of owners and descriptions of real estate prevails as to notices under section 6922, G. C., as has already been stated, with reference to notices under section 6912, G. C., and that such notices need not contain the names of the persons whose property is to be specially assessed, and need not contain a description of the lands to be so assessed.

It should be noted, however, that under section 6919, G. C., the portion of the cost of a county road improvement to be assessed, may be assessed against the real estate abutting upon the improvement, or within one-half mile, or one mile, or two miles of either side thereof, or within one-half mile, or one mile, or two miles of either side or terminus thereof. In view of the variations in assessment districts possible under section 6919, G. C., it is my opinion that the notice required to be published by section 6922, G. C., should contain a statement of the particular method of assessment followed in the making of any given improvement. If this is done, notice will be brought to each owner of benefited real estate, of the fact that it is proposed to levy an assessment against his real estate, and that on a certain day he will be heard by the commissioners in case he desires to file objections.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1437.

APPROVAL, TRANSCRIPT OF BOND ISSUE, VILLAGE OF GRAND VIEW HEIGHTS, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, March 29, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the village of Grand View Heights, Franklin county, Ohio, in the sum of $1,600.00, being two bonds—one for $950.00, to be paid by general taxation, and one for $650.00, issued in anticipation of the collection of special assessments for the improvement of Fifth Avenue."

I have examined the transcript of the proceedings of council and other officers of the village of Grand View Heights, relative to the issuance of the above bonds, and I find the same regular and in conformity with the General Code of Ohio.

I am of the opinion that said bonds drawn and executed in accordance with the ordinance authorizing the issuance, will, upon delivery, constitute valid and binding obligations of the village of Grand View Heights.

The bond and coupon form submitted for my approval incorrectly quote the title to the ordinance authorizing the issuance of said bonds, and I am returning the same to Hon. Smith W. Bennett, attorney for the village of Grand View Heights, calling his attention to the mistake, and requesting that correction be made.

When the bonds are presented to the treasurer of state for delivery I suggest that I have further opportunity to examine them.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1438.

COUNTY BOARD OF EDUCATION—FILING OF REMONSTRANCE AGAINST TRANSFER OF TERRITORY UNDER SECTION 4692, G. C., 106 O. L., 397—WHEN NAMES MAY BE WITHDRAWN FROM REMONSTRANCE —WHEN TRANSFER LEGALLY EFFECTED.

The filing with the board of education of a county school district of the remonstrance provided for in section 4692, G. C., 106 O. L., 397, three days before the filing of the map with the county auditor, as therein provided, showing the boundaries of the territory proposed to be transferred by said county board of education, acting under authority and in compliance with the requirements of said section 4692, G. C., is a sufficient compliance with the provisions of said statute and is legal.

Any one of the electors who resides in the territory proposed to be transferred, and who signed said remonstrance, has the right, at any time before the expiration of the thirty day period, provided for in said section 4692, G. C., to withdraw his name from said remonstrance.

If, upon investigation at the expiration of said thirty day period the board of education of said county school district finds that the number of qualified electors residing in the territory proposed to be transferred and remonstrating against such proposed transfer is less than a majority of the qualified electors residing in such territory, and if said county board of education has complied with all the requirements of said section 4692, G. C., the transfer of said territory is legally effected, and becomes a part of the school district to which the same is transferred for all school purposes.

COLUMBUS, OHIO, March 30, 1916.

HON. FRANK B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—In your letter of March 20, 1916, you request my opinion as follows:

> "The county board of education of Madison county annexed certain territory to the Jefferson village school district. A petition sanctioning the action of the county board was signed by 106 voters out of a possible 162. A remonstrance against the annexation of certain territory, signed by 116 voters (62 of whom had signed the first petition), was filed February 15, 1916. The map of said contemplated annexed territory was filed February 18, 1916, three days after the filing of the remonstrance. On March 18, the following was filed containing 53 names of those who had signed the remonstrance:
>
> " 'To the county board of education, Madison county, Ohio.
>
> " 'We, the undersigned having signed a remonstrance against the transfer of territory to Jefferson village school district, having since investigated the matter, hereby withdraw our names from said remonstrance.'
>
> "*Query 1.* Under section 4692, Ohio Laws, was the filing of the remonstrance three days before the filing of the map legal?
>
> "*Query 2.* May those who signed the petition against the remonstrance legally have their names removed from said remonstrance by said act?
>
> "*Query 3.* Thirty days having expired since the filing of the map, is the territory annexed to Jefferson village district by the county board of education now legally part of said village district?"

I am further informed by you that the Jefferson village school district is not exempt from county supervision, and is, therefore, a part of the Madison county school district. The authority of the board of education of said county school district to transfer territory from an adjoining rural school district to said village school district is found in section 4692, G. C. (106 O. L., 397), which provides in part:

> "The county board of education may transfer a part or all of a school district of the county school district to an adjoining district or districts of the county school district. Such transfer shall not take effect until a map is filed with the auditor of the county in which the transferred territory is situated, showing the boundaries of the territory transferred, and a notice of such proposed transfer has been posted in three conspicuous places in the district or districts proposed to be transferred, or printed in a paper of general circulation in said county, for ten days; *nor shall such transfer take effect if a majority of the qualified electors residing in the territory to be transferred, shall, within thirty days after the filing of such map, file with the county board of education a written remonstrance against such proposed transfer.*"

From your statement of facts it appears that after the board of education of said Madison county school district passed its resolution to transfer certain territory to said Jefferson village school district, but before a map, showing the boundaries of the territory proposed by said resolution to be transferred to said village school district, was filed with the auditor of said county, a written remonstrance against said proposed transfer, signed by 116 of the 162 qualified electors residing in said territory, was filed with said county board of education.

While the above provision of section 4692, G. C., by its terms limits the filing of the remonstrance therein provided for to the thirty day period therein mentioned, and I am of the opinion that a remonstrance filed after the expiration of said thirty

day period would be without legal effect in so far as the action of the county board of education under said provision of said statute is concerned, I am, nevertheless, of the opinion that the filing of the remonstrance in question by a majority of the qualified electors residing in the territory referred to in your inquiry, on February 18, 1916, three days before the filing of the map, above referred to, with the county auditor, was a sufficient compliance with the above provision of section 4692, G. C., and that the same was legal.

Your first question is therefore answered in the affirmative.

It further appears, however, that on March 18, 1916, before the expiration of said thirty day period, 53 of the 116 qualified electors who had signed said remonstrance, filed with said county board of education, a written notice to withdraw their names from said remonstrance.

It is clear, that if the 53 electors above referred to, had no legal right to withdraw their names from said remonstrance, the proposed transfer of territory has not been effected under the above provision of section 4692, G. C. On the other hand, it is equally clear, that if said 53 electors had the legal right to withdraw their names from said remonstrance, leaving only 62 of the 162 qualified electors residing in said territory as remonstrating against said transfer at the end of said thirty day period, if said county board of education has complied with all the requirements of said section 4692, G. C., said transfer of territory has been effected. It remains to be determined, therefore, whether the withdrawal of said names was lawfully made.

The evident purpose of the legislature in requiring the filing of the map with the county auditor, showing the boundaries of the territory proposed to be transferred, and the giving of the notice provided for in said section 4692, G. C., is to afford an opportunity to the qualified electors residing in said territory to remonstrate against said transfer if they so desire.

It will be observed that no affirmative action on the part of said electors is required to give the county board of education jurisdiction to act under the above provisions of the statute. After the county board of education has taken all of the steps required on its part to be taken by the provisions of said statute, to effect a transfer of territory, said transfer may still be defeated by a majority of the qualified electors residing in said territory filing the remonstrance provided for in said statute, at any time before the expiration of the thirty day period therein mentioned.

As I view it, it is the duty of the county board of education, at the expiration of said thirty day period, to ascertain whether there is on file the written remonstrance of a majority of the qualified electors residing in the territory proposed to be transferred. If, upon such investigation, said county board of education finds that such a remonstrance, signed by a majority of said electors, is on file, and that none of the persons who signed said remonstrance have withdrawn their names therefrom during said thirty day period, or that the number who have withdrawn their names from said remonstrance taken from the number of those who signed the same, still leaves a majority of the names of said qualified electors remaining on said remonstrance, the transfer of territory, in so far as said proceedings of said county board of education are concerned, is defeated, and no one has a right to complain. If, on the other hand, however, said county board, upon such investigation, finds that less than a majority of said electors have filed a written remonstrance prior to the expiration of said thirty day period, or that a majority of said electors having filed such remonstrance, a sufficient number of those having signed the same have withdrawn their names from said remonstrance so that the number remaining is less than a majority of the qualified electors residing in such territory, then I think that said transfer has been effected, provided said county board of education has complied with all the requirements of the above provision of the statute.

It seems clear to my mind that in view of what has already been said, anyone of said electors who signed the aforesaid remonstrance had the right, at any time before the expiration of said thirty day period, to withdraw his name from said remonstrance for the reason that no rights resulting from the filing of said remonstrance could intervene between the time said remonstrance was filed and the expiration of said thirty day period which would be defeated by the withdrawal referred to in your inquiry.

I think it may be said that the principle underlying the rule governing the right of a person to withdraw his name from a remonstrance filed under the above provision of said section 4692, G. C., is the same as that underlying the rule governing the right of a person to withdraw his name from a petition when the filing of the same is jurisdictional to the right of a board or officer to act upon the proposition therein presented.

As stated by my predecessor, Hon. Timothy S. Hogan, in an opinion as found at page 1632 of the Report of the Attorney-General for the year 1913;

> "It is well settled that names may be withdrawn from a petition at any time before jurisdiction is acquired thereover by the board or officer entitled to exercise the same."

It was held in said opinion that:

> "When a petition for the referendum on a municipal ordinance, therefore, has been filed with the clerk of the village, the names may be withdrawn therefrom at any time prior to the certification of such petition to the board of elections by said clerk."

In support of this conclusion the following cases are cited:

> Hayes v. Jones, 27 O. S., 218.
> Dutten v. Village of Hanover, 42 O. S., 215.
> Cole v. City of Columbus, 2 N. P., n. s., 563.
> Haynes v. Hillsboro, 3 N. P., n. s., 17.
> Norwood v. Board of Elections, 13 C. C., n. s., 465.

As was stated in my former opinion rendered to Honorable C. Q. Hildebrant, secretary of state, under date of May 22, 1915, it is equally well settled by the above cases that after an authority conferred by such petition is once exercised or such petition operates to effect a public right or interest, names may not be withdrawn therefrom.

In view of the foregoing authorities, and in keeping with my former holding, I am of the opinion, in auswer to your second question, that the qualified electors residing in the territory referred to in your inquiry, who signed the aforesaid remonstrance, and who, subsequent to the time said remonstrance was filed, and within the thirty day period provided for in said section 4692, G. C., withdrew their names from said remonstrance, had the right to make such withdrawal.

I am of the opinion, in answer to your third question, that inasmuch as the county board of education of said Madison county school district found, upon investigation, at the expiration of said thirty day period, that the number of qualified electors residing in the territory proposed to be transferred and remonstrating against such proposed transfer, was less than a majority of the qualified electors residing in such territory, if said county board of education has complied with all the requirements of said section 4692, G. C., the transfer of said territory has been legally effected and the same is now a part of said Jefferson village school district for all school purposes.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1439.

ROADS AND HIGHWAYS—ROAD COMMISSIONERS WITHOUT AUTHORITY TO ENTER INTO CONTRACTS AFTER CASS HIGHWAY LAW BECAME EFFECTIVE—FUNDS REMAINING SHOULD BE APPLIED TO INDEBTEDNESS OF ROAD DISTRICT.

Road commissioners appointed under section 7095, G. C., et seq., now repealed, had no authority after the going into effect of the Cass highway law on September 6, 1915, to enter into new contracts for the construction or repair of roads. Where the indebtedness of a road district created under said sections exceeds the funds on hand, such funds should be left in the custody of the county treasurer and applied toward the payment of the indebtedness.

COLUMBUS, OHIO, March 30, 1916.

HON. ALDRICH B. UNDERWOOD, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR:—I have your communication of February 17, 1916, which is as follows:

"The four townships of Medina, Montville, Lafayette and York in this county, are organized into a road district, under section 7095, et seq., of the General Code of Ohio. At various times, bonds have been issued for the building and repair of roads in said district, and at the present time the road commissioners have several thousand dollars on hand for these purposes.

"It is the intention of said road commissioners to continue to do business, and to enter into new contracts, until all moneys are used. They refuse to let their accumulated funds to be diverted to the county road fund, on the asserted argument that they could then be expended in parts of the county other than where raised. The minute book or journal of the road commissioners shows the following proceedings:

" 'September 11, 1915.

" 'Moved by Wolfe and seconded by Blakeslee that the work of improving road No. 17, section 2, be let to Grover C. Woods, and a contract entered into.'

" 'September 18, 1915.

" 'Moved and seconded that all bids on road 17 be rejected and a contract entered into with George Koppes and William Emmons for the improvement of said road.' *Note:* This contract was made and entered into on September 18, 1915, and a copy thereof appears on the records.

" 'Moved by Wolfe and seconded by Blakeslee that the bid of Crocker & Crocker for hauling gravel on road No. 9, being the lowest and best bid, be accepted and a contract entered into. *Note.* This contract is dated October 2, 1915.

" 'Moved by Woods and seconded by Rohrer to improve road No. 14, from the street car line east to what is known as Spitzer's Corners, a distance of about 800 feet.'

"In view of the Cass highway act, particularly section 303, of the saving clause, I write to ask these questions:

"1. What authority, if any, have these road commissioners to enter into new contracts after September 5, 1915, for the construction, or for the repair of roads in said district?

"2. What is to be done with funds on hand belonging to this road district?

"3. If put in the county road fund, could they be expended in townships, other than where raised? In this connection notice section 5654, G. C.

"These matters are causing considerable trouble between the county commissioners and the road district commissioners, and for that reason an early opinion will be greatly appreciated."

Under date of March 27, 1916, in response to my request for additional information, you wrote me as follows:

"Your letter of the 25th inst. at hand, requesting additional information preliminary to the rendering of an opinion relating to the making of contracts by road commissioners under old section 7095, G. C., and to the proper disposition of the funds of such a road district.

"I find that at the time I first asked for your opinion, to wit, about February 17, 1916, that there were $135,000.00 of bonds outstanding and about $10,000.00 of cash on hand in this road district. The February distribution increased the amount of cash on hand to about $18,000.00. The total amount of bonds outstanding at the present time, therefore, ($135,000.00) is considerable in excess of the amount on hand ($18,000.00)."

Section 7095, G. C., referred to by you, which section, together with the succeeding sections, was repealed by the Cass highway law, 106 O. L., 574, provided for the organization of not less than two nor more than four adjacent townships in any county occupying contiguous and compact territory into a road district. A road district so organized was governed and controlled as to pike and road improvement matters by a road commission composed of one member for each township, the members being appointed by the county commissioners on the nomination of the respective trustees.

Proceedings for the establishment of road districts of this character were initiated by petition, and following the organization of such a district the question of the improvement of the public roads of the district by general taxation was to be submitted to a vote. In the event of a favorable vote, the road commissioners were authorized to designate what roads in their opinion should be improved and to determine other similar matters, and to employ an engineer and other assistants and purchase machinery. The compensation of the road commissioners and of their engineer and assistants were payable out of the funds of the road district on the allowance of the county commissioners. Contracts for work and materials were to be made by the road commissioners and payment was to be made therefor on the order of the road commissioners. The road commissioners were authorized to issue bonds of the road district for the purpose of providing money necessary to meet the expense of improving the designated roads. It was provided that when the road commissioners of a road district had determined to improve a road or roads, then in order to provide for the payment of such improvement and to provide for the fund for the redemption of bonds issued by them, the road commissioners should report the facts to the county commissioners, who were required to make a levy on the taxable property of the road district for the cost of the work of improvement and the creation of an interest and redemption fund. The county commissioners were also required to levy a tax on the property of the road district for repairing the roads of the district, the amount thereof, within certain limitations, to be determined by the road commissioners. All funds of the road district were to be received and disbursed by the county treasurer.

From the above it will be seen that where the sections in question were invoked, a separate organization was effected, which organization was distinct from the township and county organizations. It therefore follows that the saving provision of the

Cass highway law applicable to such organizations is found in the latter part of section 303 of that act, which saving provision reads as follows:

> "Wherever under any law repealed by this act any organization now exists for the purpose of improving, repairing or maintaining any public road or roads, such organization shall be not affected by this act and all officers of such organization or organizations shall continue to hold office and exercise the powers heretofore exercised by them. Their successors in office with like powers shall be elected or appointed as heretofore till all contracts and obligations of such organization shall be fully met and complied with and all rights fully conserved. For such purposes such organization or organizations shall have all the rights heretofore exercised by them to hire necessary assistance, clerical or otherwise; to fund or refund any indebtedness and to levy and collect taxes or certify the same for levy and collection; to pay such debts and expenses together with salaries and other expenses of such organization or organizations but no such organization or organizations shall contract any new obligation or obligations after the taking effect of this act, for the construction or repair of additional road or roads or the maintenance or repair of roads already improved. When all obligations existing at the time of the taking effect of this act have been fully met and complied with, such organization or organizations shall cease to exist and all property or funds of such organization or organizations shall be and become a part of the road fund of the county in which such organization or organizations exist. All roads macadamized or paved by any such organization shall be kept improved and in repair by the county highway superintendent at the cost of the county in which the same are located."

In view of the above quoted provision, it is apparent that road commissioners appointed under section 7095, G. C., et seq., now repealed, had no authority after the going into effect of the Cass highway law on September 6, 1915, to enter into new contracts for the construction or repair of roads in their district, it being expressly provided that such organizations should not contract any new obligation or obligations after the taking effect of the Cass highway law, for the construction or repair of additional roads or the maintenance or repair of roads already improved. The above answers fully your first question.

In answering your second question, it should first be observed that the provision to the effect that the funds of an organization of this character shall be and become a part of the road fund of the county in which the organization existed is not by its terms effective until all obligations existing at the time of the taking effect of the Cass highway law have been fully met and complied with.

In view of the facts submitted by you, it becomes unnecessary to answer your third question or to discuss the force and effect of the provision referred to above. It appears that there are outstanding bonds of the road district in question and that the amount of these bonds far exceeds the funds on hand plus the funds which will be received at the August, 1916, settlement. As long as any of the bonds in question are outstanding, it could not be said that all the obligations of the district have been fully met and complied with. The funds on hand belonging to the road district should, therefore, be left in the custody of the county treasurer and applied toward the payment of the interest on the outstanding bonds of the district and toward the redemption of such bonds at maturity. As previously suggested, the facts submitted in your second communication and the conclusion reached as to your second question render it unnecessary to consider the third question submitted by you.

Respectfully,

EDWARD C. TURNER,
Attorney-General.

1440.

JURISDICTION OF CRIMINAL COURT, LIMA, OHIO—JURISDICTION OF MAYOR, CITY OF LIMA AND JUSTICE OF PEACE OF TOWNSHIP IN WHICH CITY IS LOCATED—SELLING INTOXICATING LIQUORS TO A MINOR.

The criminal court of the city of Lima, Ohio, has no jurisdiction of offenses committed in violation of state law, except to discharge, recognize or commit upon hearing when the accused is charged with a felony.

The mayor of the city of Lima, has final jurisdiction of the offense of the sale of intoxicating liquors to a minor by a saloon licensee when committed within the confines of said city.

A justice of the peace of the township in which the city of Lima, Ohio, is located has only such jurisdiction of such offense as is conferred by sections 13422, 13510 *and* 13511, *G. C., where said offense is committed within such township and no jurisdiction of such offense when not committed within his township.*

COLUMBUS, OHIO, March 30, 1916.

The State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—Yours under date of March 22, 1916, is as follows:

> "What are the powers of the criminal court of the city of Lima, Ohio, the mayor of the city of Lima, and a justice of the peace of the township, in which the city of Lima is located, with reference to an affidavit charging a person holding a liquor license in Allen county, Ohio, with the offense of selling intoxicating liquors to a minor?"

The alleged offenses about which inquiry is made, I am further informed by you, were confined to the corporate limits of the city of Lima and to such this opinion will be limited.

The offense of the sale of intoxicating liquors to a minor by a licensee, as referred to in your communication, is defined by section 1261-67, G. C., 103 O. L., 238, as follows:

> "* * * Whoever, being a licensee, sells intoxicating liquors to a minor or allows a minor to play cards or any game of amusement, or to loaf in such saloon, or whoever, knowing that a person is a minor, induces any person, firm or corporation to sell or furnish intoxicating liquors to such minor contrary to law, shall be guilty of a misdemeanor, and for the first offense shall be fined not less than twenty-five dollars nor more than one hundred dollars, and for the second or subsequent offenses shall be fined not less than one hundred dollars or more than five hundred dollars, or shall be imprisoned in the county jail for not less than ten days nor more than six months, or both."

Under the provisions of section 1261-69, G. C., 103 O. L., 239, it is required that at all trials for offenses under laws or ordinances regulating the sale of intoxicating liquors, the court shall, before the trial, take testimony to determine whether or not the defendant is a licensee or the agent or employe of a licensee, and if it appears that such defendant is a licensee or the agent or employe of a licensee, whether the defendant has in fact been convicted of a previous offense and if the defendant be a licensee or the agent or employe of a licensee and has suffered a previous conviction under

any of said laws or ordinances, or it appears that a conviction in the case pending will work a revocation of a liquor license granted in this state, the said defendant shall be entitled to a trial by jury. The offense under consideration is, then, a misdemeanor, upon the trial for the commission of which the defendant may or may not be entitled to a trial by jury.

Consideration may be first given to the jurisdiction of the criminal court of the city of Lima, over the offense in question. This court is established under authority of, and its jurisdiction is defined by, sections 1 and 2 of house bill No. 118, 106 O. L., 112, which provide as follows:

> *Sec.* 1. That there shall be, and is hereby established in the city of Lima, Allen county, Ohio, a criminal court held by a judge, which court shall be styled the criminal court and be a court of record, and shall have jurisdiction of any offense under any ordinance of said city to hear and finally determine the same and impose the prescribed penalty; but cases in which the accused is entitled to a trial by a jury, shall be so tried unless a jury be waived in writing by the accused.
>
> "*Sec.* 2. In felonies committed within the county the court shall have the power to hear the case and discharge, recognize or commit, and, if upon such hearing the court is of the opinion that the offense is only a misdemeanor, and that the court may assume jurisdiction of it under the last section, a plea of guilty of such misdemeanor may be received and sentence and judgment pronounced."

An examination of the foregoing provisions will readily disclose that the jurisdiction of the criminal court of the city of Lima, therein conferred, is limited to offenses committed in violation of the ordinances of said city, and to recognizing, committing or discharging the defendant in cases of felonies committed within the county.

The offense which is the subject of your inquiry, being neither a felony nor a violation of an ordinance of the city of Lima, is, therefore, not subject to the jurisdiction of the criminal court of that city, as conferred by the statutes above quoted. There is no provision in said house bill No. 118, 103 O. L., 112, making applicable to the criminal court of Lima the general statutory provisions conferring jurisdiction upon police courts and governing the procedure therein. In view of the absence of such provision, and the distinguishing title given to this court in the authoriration of its establishment, and the general policy of the law toward a strict construction of the criminal jurisdiction of courts, I am led to conclude that the Lima criminal court is not, for the purpose of determining its jurisdiction, a police court.

This limitation of the jurisdiction of the criminal court of Lima was called to the attention of the legislature by this department prior to the passage of house bill No. 118, which, to say the least, clearly evidences the purpose on the part of the legislature to so limit the jurisdiction of this court to offenses in violation of city ordinances and to discharging, recognizing or committing the accused in felony cases.

There is a striking similarity between sections 1 and 2 of house bill No. 118, supra, and sections 14696 and 14697 of the Appendix to the General Code, establishing and defining the jurisdiction of the criminal court of the city of Canton, Ohio. The only difference to be noted lies in the omission from section 1 of house bill No. 118, of the phrase "and of any misdemeanor committed within the limits of said city," found in said section 14696, G. C., App. From this it follows that the sole difference between the jurisdiction of the criminal court of the city of Canton, as conferred by said section 14696, supra, and that of the city of Lima, as conferred by section 1 of house bill No. 118, is that the former has jurisdiction of misdemeanors committed

in violation of state law within the limits of said city, while there is no such jurisdiction conferred upon the criminal court of the city of Lima.

In the case of State ex rel. v. Oberlin, auditor, the court of appeals of Stark county, at the September term, 1914, held that the criminal court of Canton was essentially a police court within the meaning of section 3056, G. C., which provides for the payment of a certain portion of fines and penalties assessed and collected by the police court for offenses and misdemeanors, prosecuted in the name of the state, to the Law Library Association.

Following this decision, opinion No. 137 of this department, rendered under date of March 11, 1915, held that fines collected in prosecutions in the name of the state in the criminal court of the city of Lorain, should be disposed of in the same manner as if assessed by a police court. The issue before the court of appeals, and the question under consideration in rendering the opinion, involved only a construction of a civil statute (3056 G. C.), which does not directly affect personal rights, and, under the familiar rule of construction, is subject to a somewhat liberal interpretation to the end that its manifest purpose may be fully attained.

It is a well established principle of construction, that words and phrases must oftimes be given a very different interpretation when used in relation to a different subject matter, and it is not, therefore, in conflict or inconsistent with the decision of the court of appeals and the former opinion of this department with reference to the disposition of fines collected in the criminal courts of Canton and Lorain, to say, for the purpose of determining the criminal jurisdiction and power of the criminal court of Lima to punish individuals for criminal offenses that such court is not a police court within the meaning of section 4577, G. C., which defines the jurisdiction of police courts generally, or of the provisions of section 4527, G. C. Since, then, the criminal court of Lima is not a police court within the meaning of the terms of section 4577, G. C., and has no jurisdiction of misdemeanors committed in violation of state law, by virtue of said sections 1 and 2 of house bill No. 118, I am of the opinion that such court has no jurisdiction of the offense mentioned in your inquiry.

In reference to the jurisdiction of the mayor of the city of Lima of the offense under consideration, it will be observed that section 4527, G. C., confers upon mayors of cities not having a police court certain jurisdiction over violations of city ordinances.

Sections 4528 and 4532, G. C., provide as follows:

> "*Section* 4528. He shall have final jurisdiction to hear and determine any prosecution for a misdemeanor, unless the accused is, by the constitution, entitled to a trial by jury, and his jurisdiction in such cases shall be coextensive with the county.
>
> "*Section* 4532. If the charge is the commission of a misdemeanor, prosecuted in the name of the state, and the accused, being entitled to a jury, does not waive the right, the mayor may, nevertheless, impanel a jury, and try the case of the affidavit, in the same manner, and with like effect, as such cases are tried in the court of common pleas on the indictment."

By force of the provisions of section 4528, G. C., supra, the mayor of the city, not having a police court, has final jurisdiction of all misdemeanors committed within the county, when the accused is not under the constitution entitled to a trial by jury. From this, it conclusively follows that, if the affidavit does not charge a second offense, so that the punishment may be only a fine, the defendant has no constitutional right to a trial by a jury, and the mayor has final jurisdiction of the offense. If a second offense is charged, thus rendering the accused liable to punishment by imprisonment, and therefore entitled to a jury trial, then under the provisions of section 4532, G. C., the mayor has jurisdiction, if the accused does not waive the same, to impanel

a jury and try the case on affidavit, as such cases are tried in the common pleas court on indictment. That is to say, the mayor has jurisdiction to impanel a jury and try the case, whether the accused has a constitutional right to a trial by jury by reason of a part of the punishment authorized being imprisonment or the accused has only a statutory right to a trial by jury, under the provisions of section 1261-69, G. C., 103 O. L., 239, hereinbefore referred to. This he may decline to do, however, if, in his opinion, the public interest will be thereby promoted, and having entered that fact on his minutes, upon inquiry, he may discharge, recognize to the common pleas court, or commit in default of bail. (Sec. 4533, G. C.)

As to the jurisdiction of justices of the peace, attention is called to sub-division 8 of section 13423, G. C., 103 O. L., 539, which provides among other things that justices of the peace shall have jurisdiction within their respective counties, in all cases of violation of any law relating to:

> "The selling, giving away or furnishing of intoxicating liquors as a beverage, or keeping a place where such liquor is sold, given away or furnished in violation of any law prohibiting such acts within the limits of a township and without the limits of a municipal corporation."

It will be observed that the jurisdiction here conferred is limited to offenses committed in a township outside the limits of a municipal corporation, which township is dry under the township local option law. The jurisdiction here conferred can not, therefore, attach to offenses committed within the limits of the city of Lima.

There is no special statutory provision conferring jurisdiction of the offense of the sale of intoxicating liquors to a minor within a municipal corporation by a licensee upon justices of the peace, and it therefore follows that the jurisdiction of justices, in such cases, is limited to the general jurisdiction of justices' courts over misdemeanors in violation of state law.

The general jurisdiction and authority of justices of the peace in matters of this character is defined as follows:

> "*Section* 13422: A justice of the peace shall be a conservator of the peace and have jurisdiction in criminal cases throughout the county in which he is elected and where he resides, on view or on sworn complaint, to cause a person, charged with the commission of a felony or misdemeanor, to be arrested and brought before himself or another justice of the peace, and, if such person is brought before him, to inquire into the complaint and either discharge or recognize him to be and appear before the proper court at the time named in such recognizance, or otherwise dispose of the complaint as provided by law. He also may hear complaints of the peace and issue search warrants.
>
> "*Section* 13510: When a person charged with a misdemeanor is brought before a magistrate on complaint of the party injured and pleads guilty thereto, such magistrate shall sentence him to such punishment as he may deem proper according to law, and order the payment of costs. If the complaint is not made by the party injured, and the accused pleads guilty, the magistrate shall require the accused to enter into a recognizance to appear at the proper court as is provided when there is no plea of guilty."
>
> "*Section* 13511: When the accused is brought before the magistrate and there is no plea of guilty, he shall inquire into the complaint in the presence of such accused. If it appear that an offense has been committed and that there is probable cause to believe the accused guilty, he shall order him to enter into a recognizance, with good and sufficient surety, in such amount as he deems reasonable, for his appearance at the proper time and before the

proper court; otherwise he shall discharge him from custody. If the offense charged is a misdemeanor and the accused, in a writing subscribed by him and filed before or during the examination, waive a jury and submit to be tried by the magistrate, he may render final judgment."

It is hardly to be anticipated that the sale of intoxicating liquors to a minor or licensee would be attended by such special or peculiar injury to any particular individual as to admit of the complaint being made by the injured party within the provisions of section 13510, G. C., supra. If the complaint is not made by the injured party and the accused enters a plea of guilty, the authority of the justice of the peace is limited to requiring the accused to enter into a recognizance to appear before the proper court at the proper time, or in default thereof to commit him to the county jail (Sec. 13528, G. C.), unless the accused in writing, subscribed by him and filed before or during the examination, waive a jury and submit to be tried by the magistrate, in which case the magistrate may render final judgment (Sec. 13511, G. C.). If there is no plea of guilty, the justice is required to inquire into the offense in the presence of the accused and if it appear that there is probable cause to believe that the accused is guilty, he shall order him to enter into a recognizance for his appearance at the proper time before the proper court, unless the accused shall, in writing, subscribed by him, waive a jury and submit to be tried by the justice, in which event the justice may then render final judgment.

Attention is called to the provisions of section 1261-71, G. C., 103 O. L., 240, as follows:

"No licensee, agent or employe of a licensee shall be held to answer for an offense under any laws or ordinances regulating the sale or traffic in intoxicating liquors before any probate court; or before any judicial officers whose court is held without the confines of the municipal corporation or township within which the offense is alleged to have been committed, except a judge of the common pleas court."

From this it follows that only justices of the peace, whose court is held within the confines of the city of Lima, would have any jurisdiction of the offense referred to in your inquiry.

Answering your inquiry more specifically, I am therefore of opinion that the criminal court of the city of Lima has no jurisdiction of the offense of the sale of intoxicating liquors to a minor by a licensee. The mayor of the city of Lima has jurisdiction of such offense when committed within the city of Lima. The jurisdiction of a justice of the peace of the township in which the city of Lima is located, is limited as to such offenses committed within the city of Lima and such township to that conferred by sections 13422, 13510, 13511 and 13528, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1441.

JOINT COUNTY ROAD IMPROVEMENT—PROCEDURE TO BE FOLLOWED UNDER SECTION 6930, G. C.—HOW COST AND EXPENSE TO BE PAID.

A petition for a joint county road improvement, filed under section 6930, G. C., must indicate the method of paying the compensation, damages, costs and expenses desired by the petitioners. If such a petition does not specify the method of paying the compensation, damages, costs and expenses desired by the petitioners, the joint board of county commissioners is without jurisdiction to act on the petition.

The respective proportions of the costs and expenses of a joint county road improvement payable by each county must be raised by the same method in each county, which method is to be set forth in the petition when the joint board is acting upon a petition and is to be determined by the joint board when acting without a petition.

COLUMBUS, OHIO, March 30, 1916.

HON. FRANKLIN J. STALTER, *Prosecuting Attorney, Upper Sandusky, Ohio, and* HON. DONALD F. MELHORN, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIRS:—Your joint letter addressed to me under date of January 28, 1916, was received on March 3d, and reads as follows:

"Proceedings for a joint county road improvement are being contemplated by the Wyandot and Hardin county boards of county commissioners, the proposed road improvement being on the county line between Hardin and Wyandot counties. Several legal questions have presented themselves in connection with this improvement that are, we think, of interest over the state generally, and we therefore respectfully solicit your opinion thereon.

"The first question is this: Must a petition for a joint county road improvement, filed under section 109 (G. C. 6930), indicate the method of paying costs and expenses that the petitioners prefer?

"We find nowhere in the statutes anything that expressly requires the method of paying costs and expenses to be stated in a joint county road petition, although such a statement seems to be required in the case of single county road petitions. (Sec. 98, G. C., 6916.)

"The second question really grows out of the first question and is this: The joint board, it seems, has no jurisdiction to grant the improvement prayed for in the road petition, unless 51 per cent. of the persons to be especially assessed have signed that petition (section 109, G. C., 6930). It cannot be determined, however, how many persons constitute the required 51 per cent. until the assessment area (which differs in extent, according to method of paying costs and expenses) is defined. If the petition itself does not specify which method of paying costs and expenses is preferred, and hence does not describe the assessment area, shall the joint board first determine that method, then ascertain whether the 51 per cent. have signed the petition, and then if these two things have been done take up the question whether the proposed improvement shall be granted?

"The third question is this: Whether after the joint board has granted the improvement, each county is at liberty to choose its own method of assessment, or whether the respective proportions of the costs and expenses, payable by each county, must be raised by the same method of assessment in each county?

"The first sentence of section 113 (G. C., 6934), apparently shows that the legislature contemplated the same method of paying the costs and expenses in each county:

" 'The joint board of county commissioners shall, at the time they grant such improvement, determine the method of payment therefor, which may be either of the methods authorized in the case of any improvement under the authority of a single board. * * *'

"That is, the joint board shall determine *the* method of payment, 'which may be either of the methods,' etc. It would seem that the joint board could avail itself of any of the eight methods provided for by section 98 (G. C., 6919), but could not adopt more than one method for the joint improvement. On the other hand, this same section, section 113 (G. C., 6934), also provides for a division between the counties of the costs and expenses of the improvement, and further requires each separate board of commissioners 'in the manner hereinafter specified' (evidently referring to section 119 G. C., 6940), to make its own special assessment necessary to defray its proportion of its said cost and expense. Furthermore, in case a bond issue is necessary to raise the funds to be contributed by each county, section 123, G. C., 6944, requires a separate issue in each county. In other words, the bonds are single county and not joint county obligations. From the sections just quoted in this paragraph, the common sense of the situation would seem to be this: That each county should be allowed to adopt whatever method of paying the costs and expense of the improvement they deem proper, regardless of the method chosen by the other county. But whether this is the law or not we are uncertain.

"We are advising our respective boards of commissioners not to take any action on the petition for this joint county road improvement until we can secure your opinion."

Your first question must, I think, be answered in the affirmative. Section 6919, G. C., which relates to improvements by single boards of county commissioners, provides that at the time an improvement is granted the commissioners shall determine the method of paying the compensation, damages, costs and expenses thereof, but such compensation, damages, costs and expenses are to be paid in the manner specified in the petition when the board is acting upon a petition.

Section 6942, G. C., provides that all the provisions of the statute relating to improvements wholly within one county shall, when applicable, unless otherwise specially provided, apply to improvements authorized by a joint board of commissioners. It is further true, as suggested by you in your discussion of the second question submitted, that a joint board of county commissioners, equally with a single board, would be unable to determine whether fifty-one per cent. of the persons to be specially assessed for an improvement had signed a petition unless the petition specified the method of paying compensation, damages, costs and expenses, inasmuch as the different methods provided by law contemplate radically different assessment districts or areas. I, therefore, advise you that a petition for a joint county road improvement, filed under section 6930, G. C., must indicate the method of paying the compensation, damages, costs and expenses desired by the petitioners.

The answer to your first question constitutes a substantial answer to your second. Your second question may be fully answered by the further observation that if the petition itself does not specify the method of paying the compensation, damages, costs and expenses desired by the petitioners, then the joint board of county commissioners is without jurisdiction to act on the petition.

Coming now to consider your third question, section 6934, G. C., contains the following provision:

"The joint board of county commissioners shall, at the time they grant such improvement, determine the method of payment therefor, which may be either of the methods authorized in the case of an improvement under the authority of a single board."

This provision would seem to vest in the joint board of county commissioners the discretion of determining the method of payment, but the provision must be read in connection with section 6932, G. C., which authorizes joint boards of county commissioners to proceed without petitions, and to initiate road improvements by the adoption of a resolution passed by a unanimous vote of the members. The provision must also be read in connection with the provisions relating to improvements by single boards of county commissioners, and I am of the opinion that the force and effect of this provision is only to vest discretion in the joint board in those cases where it is acting without a petition, and that when a joint board acts upon a petition it must order the compensation, damages, costs and expenses apportioned and paid in the manner specified in the petition.

The language of the provision above quoted is not such as to warrant the inference that the joint board might adopt one method of payment as to one county and another and different method as to a different county. Indeed, the provision is that the joint board shall determine *the* method of payment.

The provision of section 6934, G. C., to the effect that the joint board shall determine the proportion of the cost and expense of the improvement to be paid by the several counties interested therein must be read in the light of the provision of section 6930, G. C., giving joint boards jurisdiction when the proposed improvement is in two or more counties, or along the county line between two or more counties. In other words, a joint board not only has authority to construct a county line road, but also has authority to improve a road partly in one county and partly in another, and in the latter event it is important that the law clothe the joint board with authority to divide the cost in a manner other than upon the basis of an equal contribution by each county. The facts that each board of county commissioners makes the assesments against real estate located within its county, and issues the bonds for the proportion of the cost and expense to be borne by its county, are not sufficient to outweigh the plain inference arising from the language used in the first sentence of section 6934, G. C., to the effect that the joint board of county commissioners is to determine upon and adopt a method of payment, which method is to prevail in all the interested counties.

I, therefore, advise you, in answer to your third question, that the respective proportions of the cost and expenses payable by each county must be raised by the same method in each county, which method is to be set forth in the petition when the board is acting upon a petition, and is to be determined by the board when acting without a petition.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1442.

APPROVAL, TRANSCRIPT OF BOND ISSUE, VILLAGE OF NEW ALBANY, OHIO.

COLUMBUS, OHIO, March 30, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the village of New Albany, Ohio, as follows: One issue of $3,600.00 in anticipation of special assessments to pay the property owners' share of the cost of constructing certain sidewalks, being six bonds of $600.00 each.

"One issue of $500.00 to pay the village's portion of constructing certain sidewalks, being five bonds of $100.00 each."

I have examined the transcript of the proceedings of the council and other officers of the village of New Albany, relative to the issuance of the above described bonds, also the bond and coupon form to be used in the preparation of said bonds, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted, and executed by the proper officials, will, upon delivery, constitute valid and binding obligations of said village of New Albany, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1443.

MUNICIPAL CORPORATION—COUNCIL MERGES DUTIES OF CLERK OF COUNCIL WITH DUTIES OF CITY AUDITOR—NO INCREASE OF SALARY FOR ADDITIONAL DUTIES DURING TERM OF OFFICE.

When a city council, under the provisions of section 4276, G. C., as amended, 106 O. L., 483, merges the duties of clerk of council with the duties of city auditor, the duties of said clerk thereby become and are the duties of said city auditor, and the latter, as such auditor, authenticates and verifies all matters and things required by law to be authenticated by the former.

During the term of office within which said merger is made no increase of salary or compensation may be allowed said auditor for the performance of said additional duties, section 4213, G. C. Council, however, may provide additional assistants for said auditor and fix and pay their compensation.

COLUMBUS, OHIO, March 31, 1916.

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

GENTLEMEN:—I am in receipt of a letter from a city solicitor of a certain city in this state in which he states that on November 2, 1915, Mr. A. was elected auditor of said city; that on January 11, 1916, Mr. A. was by the council of said city elected clerk of council; that as auditor he receives a salary of $800.00 per year and as clerk of council he receives $250.00 per year. The letter then states:

"If the council now passes an ordinance which merely provides that the duties of the offices of auditor and clerk of the council shall be merged, that the auditor, by virtue of his office as such, shall be clerk of the council, saying nothing about salary, what would be your opinion on the following points:

"First. In authenticating legislation and performing similar duties heretofore performed by the clerk of council, should he sign his name as clerk of council, or merely as city auditor?

"Second. Would he be entitled to receive his salary as auditor, and also the salary now paid him as clerk of council? This question is of some practical importance for the reason that it will not be necessary to give him additional assistance, and that if there are no objections we would prefer to allow the salaries to stand as they are at this time, so that if council at some time in the future decides to repeal the ordinance merging the duties of the two offices it will not be necessary to rearrange the salaries again."

Deeming the matters presented in this letter of some importance, I am, in accordance with the established rules of this department, addressing my answer thereto to you.

It is provided in section 4276, G. C., as amended 106 O. L., 483, that:

"In cities having a population of less than twenty thousand the city council may, by a majority vote, merge the duties of the clerk of the waterworks, if any, clerk of the board of control and clerk of the city council with the duties of the city auditor, allowing him such additional assistants in performing such additional duties as council may determine."

When by virtue of these provisions a city council of the class named in said statute, by a majority vote, merges the duties of clerk of council with the duties of auditor, the duties of the former then and thereby become and are the duties of the latter. In other words, after such merger is completed as provided by law all the duties heretofore devolving upon both positions become and are the duties of the city auditor alone. It necessarily follows from this that the city auditor performs and discharges all of such duties when so merged, not as clerk, but as city auditor, and in the latter capacity must certify and authenticate all matters and things which by law are required to be authenticated by the clerk of council as well as the city auditor.

Answering the first question submitted above specifically, I am of the opinion that when a city council, under the provisions of section 4276, supra, by a majority vote, merges the duties of clerk of council with the duties of city auditor, the duties of said clerk thereby become and are the duties of said city auditor and that the latter as such auditor authenticates and verifies all matters and things required by law to be authenticated by the city clerk.

Referring now to the second inquiry as above submitted: it appears from the statement which accompanies said inquiry that the auditor in question was elected on November 2, 1915, and is therefore now serving as auditor of said city by virtue of said election. If the duties of said clerk are now merged by council with the duties of his office, said merger must necessarily be made during the instant term of office. This being so, he may not, therefore, receive additional salary or compensation during said instant term because such additional salary or compensation is prohibited by the terms of section 4213, G. C., which provides as follows:

"The salary of any officer, clerk or employe shall not be increased or diminished during the term for which he was elected or appointed. * * *"

By reason, therefore, of the foregoing provisions of said section 4213, supra, the auditor in question would be precluded from receiving any additional compensation during his present term of office. Council, however, may furnish him assistants to perform said additional duties imposed upon him and may provide and prescribe the compensation to be paid such assistants, but should said auditor elect to perform all such additional duties himself he may not receive any additional compensation therefor during his present term of office.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1444.

REISSUE OF LOST OR DESTROYED BONDS AND CERTIFICATES OF INDEBTEDNESS—INTERPRETATION OF SECTION 2295-5, G. C., 106 O. L., 303—PROCEDURE TO BE FOLLOWED FOR MAKING DUPLICATE COPIES OF SUCH LOST INSTRUMENTS.

Duplicate copies of lost or destroyed securities provided for in section 2295-5, G. C., 106 O. L., 303, may be either written or printed.

Fac-simile copies are not required. An exact copy of the original security shall be made and marked "duplicate," and it would be good practice on the part of the issuing officer of the taxing subdivision issuing the original to attach a certificate as to the duplicate's being a true copy.

Issuing officer should exact satisfactory proof as to loss or destruction of original and is also empowered to exact proper indemnity.

COLUMBUS, OHIO, March 31, 1916.

HON. JOHN V. CAMPBELL, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—Your favor of March 25, 1916, asking for an opinion relative to the operation of section 2295-5 of the General Code (106 O. L., 303), is as follows:

> "We respectively request an opinion from your office as to the proper mode of procedure under house bill 219, passed by the general assembly May 14 1915, and appearing in 106 Ohio Laws, page 303.
>
> "In one of the taxing districts of this county a bond has been lost and the person alleging the loss desires a duplicate. The said act of the general assembly simply provides that whenever bonds, notes or certificates of indebtedness issued by such taxing district are lost or destroyed, the district may reissue to the holder or holders, duplicates thereof in the same form and signed as the original obligations were signed. As a usual thing the plates from which such bonds are printed are destroyed at the time of issue, and in the specific instance in question the officers of the subdivision who signed the bond have all left office and some are dead.
>
> "The following questions, therefore, arise and are submitted to you by us for an opinion:
>
> "1. If a taxing district has issued bonds, either engraved or lithographed, and the plate has been destroyed, which is the usual custom, and the officers of the subdivision who signed the bond have long since left office, and some are dead, how shall the duplicate bond be drawn and signed?

"In the event that the prior officers are living, but not holding office, may they sign the bond; and if they refuse, is there any method of compelling them to do so?

"3. In the event a duplicate of the original lithographed bond is available, does the statute permit the present officers of the subdivision to sign their names thereto as such officers, or may they sign the names of the former officers in the event that they are dead, not available, or refuse to sign?

"4. In the event that the original lithographed form cannot be procured, may manuscript bonds be given instead of lithographed bonds,as the cost of making the new plate would be more than the face value of the bond in most instances?

"5. Who is authorized to pass upon the proof of loss or destruction, and who is to approve the sufficiency of sureties on the bond given as indemnity against loss or liability on account of the obligations lost or destroyed?

"It will be noted that the section requires the reissue to holders of duplicates in the same form and signed as the original obligations were signed. It appears on the face of the act therefore, that if a bond was issued fifteen or twenty years ago, it must still be signed as the original was signed, in order that the statute may be complied with, which, of course, in a large number of cases will be an impossibility on account of deaths and removals.

"I regret to trouble you in this matter but feel that uniformity of procedure throughout the state is desirable and necessary in a matter of this kind, and, feeling grave doubts as to the manner and possibility of carrying this act out in practice, I feel required to submit the matter for your opinion."

Section 2295-5 of the General Code (106 O. L., 303), is as follows:

"Whenever bonds, notes or certificates of indebtedness, issued by a municipal corporation, school district, county, township, or other political subdivision or taxing district of this state, are lost or destroyed, said corporation, school district, county, township, subdivision or district may reissue to the holder or holders duplicates thereof in the same form and signed as the original obligations were signed, which obligation so issued shall plainly show upon its face as being a duplicate of such lost bond, note or certificate, upon proof of such loss or destruction and upon being furnished with a bond of indemnity against all loss or liability for or on account of the obligations so lost or destroyed.

The purpose of the section above quoted is to place in the hands of the owner of a security which has been lost or destroyed as nearly as possible a duplicate of such lost or destroyed security. This purpose is fully accomplished by the furnishing of an exact copy of the original security including the signatures, which copy may be either written or printed. However, the section does not require that the duplicate shall be a fac-simile reproduction of the original security. In other words, the duplicate which is contemplated is the same as a certified copy of any record, and the issuing officer in the preparation of the duplicate should, of course, use the names of the original signers of the security, that is, reproduce the security in the exact form of the original insofar as the contents of the same are concerned.

Therefore, in answer to your first four questions, it is my opinion that by duplicates of lost or destroyed securities referred to in section 2295-5 of the General Code supra, are meant copies of the original record reproduced as nearly as possible in the form of the original. The entire contents of the original security must be recited as originally, but a fac-simile copy is not required. As a suggestion I would say that to make a copy of the original security and to follow the same by a certificate of the

issuing officer to the effect that it was a true copy of the lost or destroyed security would be sufficient.

Coming to your fifth question as to

> "Who is authorized to pass upon the proof of loss or destruction, and who is to approve the sufficiency of sureties on the bond given as indemnity against loss or liability on account of the obligations lost or destroyed?"

it is my opinion that the issuing officer or officers of the taxing subdivision originally issuing the bond should exact such proof as would be satisfactory and conclusive and which would justify the issuance of a duplicate security and that the same officer or officers would be clothed with the power of exacting indemnity against all loss or liability to carry out the purpose of the statutes.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1445.

APPROVAL, TRANSCRIPT OF BOND ISSUE, VILLAGE OF EAST VIEW, OHIO.

COLUMBUS, OHIO, April 1, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

> "RE:—Village of East View, bonds in anticipation of the collection of special assessments for the improvement of Kinsman road from the easterly limits of East View village to the center line of East View avenue, by constructing storm and sanitary sewers therein, amounting to $84,392.00, being one bond of $392.00, and eighty-four bonds of $1,000.00 each."

I have examined the transcript of the proceedings of council and other officers of the village of East View relative to the issuance of the above bonds, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the provisions of the General Code of Ohio.

I am of the opinion that said bonds drawn in accordance with the form submitted, when executed by the proper officers, will, upon delivery, constitute valid and binding obligations of said village of East View, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1446.

STATE HIGHWAY COMMISSIONER—CONTRACT BETWEEN STATE AND THE YOUNT & JACKSON COMPANY—WITHOUT AUTHORITY IN LAW UNDER FACTS SUBMITTED.

Under the facts submitted, there is not now in existence any contract between the state of Ohio and the Yount & Jackson Company for the construction of a certain section of inter-county highway in Geauga county, and the state highway commissioner is at present without authority to enter into such contract. When a proper certificate has been executed by the auditor of Geauga county, and a written agreement on the part of the commissioners of that county to assume in the first instance that part of the cost and expense of the improvement over and above the amount to be paid by the state, has been made and filed in the office of the state highway commissioner, with the approval of the attorney-general endorsed thereon as to form and legality, the state highway commissioner may award the contract to the Yount & Jackson Company, and enter into a contract with that company, provided the company is willing to enter into such contract. If the Yount & Jackson Company is unwilling to enter into such contract, it will be the duty of the state highway commissioner, when the conditions precedent have been fully complied with, to again advertise for bids.

COLUMBUS, OHIO, April 3, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of March 28, 1916, which communication reads as follows:

"Permit me to direct your attention to a copy of a letter under date of March 20, 1916, from the Yount & Jackson Company, requesting a release from the bond submitted with their proposal for the improvement of section 'H' of the Burton-Bloomfield road, I. C. H. No. 447, in Geauga county.

"The facts as I understand them from actual knowledge, correspondence and hearsay, are as follows:

"Under date of September 10, 1915, this department received bids for the improvement of the above mentioned section of I. C. H. No. 447, the estimated cost of the work being $36,008.20, the Yount & Jackson Company proposing to complete the work for the sum of $29,000.00, which was the lowest bid received. These bids were received after due notice by publication without this department having received from the county commissioners a so-called final resolution with the certification of the auditor that the county's share of the cost of the improvement was in the treasury properly accredited. It was our understanding that the industrial commission agreed to purchase bonds issued by the county, and that the money would be in the county treasury and available very shortly after the bids were received. It seems that the prosesuting attorney of Geauga county has had some difficulty with the legislation in connection with the issuance of these bonds, and that the industrial commission has just accepted the bonds, but we are still without proper certification on the final resolution by the auditor of Geauga county.

"The form of agreement between the state and the contractor bears the signature of the Yount & Jackson Company and has the written approval of the board of county commissioners of Geauga county, but has never been signed by the state highway commissioner.

"Viewing the request of the Yount & Jackson Company in the light of the above statement of facts, I respectfully request an opinion from your office as to the duties of this department in the matter."

The attached copy of the letter from the Yount & Jackson Company reads as follows:

> "On September 10, 1915, we were the successful bidder on section 'H' of the Burton-Bloomfield road in Geauga county, and since that time have no end of correspondence with the officials of that county regarding the sale of bonds to cover the county's portion of that improvement, and as six months have now elapsed, and we have not been able to touch the work, which has a completion date of September 1st, this year, and considering the fact that we already have three and one-half miles of other state highway which must be completed by June 1st and August 1st, we feel that we should not be asked to drag this contract out indefinitely, and ask therefore to be released from the bond submitted with our proposal for the work."

An answer to your question involves a consideration of the order in which the several steps looking toward the co-operative improvement of a highway by the state and a county should be taken. Such an improvement is, under the provisions of section 1191, G. C., to be initiated by an application made by the county commissioners to the state highway commissioner. The next step is the approval of the application by the state highway commissioner, in accordance with the provisions of section 1195, G. C., which further provides that he shall certify his approval to the county commissioners. Under section 1196, G. C., it becomes the duty of the state highway commissioner, when he approves an application, to cause a map of the road to be made and also plans, specifications, profiles and estimates for the improvement. Under section 1199, G. C., the state highway commissioner is required, upon the completion of the maps, surveys, profiles, plans, specifications and estimates, to cause the same to be transmitted to the commissioners, with his certificate of approval endorsed thereon. Under section 1200, G. C., the county commissioners, upon the receipt of the surveys, maps, plans, profiles, specifications and estimates, may by resolution adopt the same and provide that the improvement be made, and if they take this action they must transmit a certified copy of their resolution to the state highway commissioner. Under section 1206, G. C., the state highway commissioner, upon the receipt of such certified copy of the resolution of the county commissioners, is required to advertise for bids. It is provided, however, by section 1218, G. C., that no contract shall be let by the state highway commissioner in a case where the county commissioners are to contribute a part of the cost of said improvement unless the county commissioners of the county in which the improvement is located shall have made a written agreement to assume in the first instance that part of the cost and expense of the improvement over and above the amount to be paid by the state, which agreement must be filed in the office of the state highway commissioner, with the approval of the attorney-general endorsed thereon as to form and legality. Since the agreement which the county commissioners are required to made is one involving the expenditure of money, the provisions of section 5660, G. C. are applicable, the section in question reading as follows:

> "The commissioners of a county, the trustees of a township and the board of education of a school district, shall not enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of money, unless the auditor or clerk thereof, respectively, first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate, and in process of collection and not appropriated for any other purpose; money to be derived from lawfully authorized bonds sold and in process of delivery shall, for the purpose of this section, be deemed in the

> treasury and in the appropriate fund. Such certificate shall be filed and forthwith recorded, and the sums so certified shall not thereafter be considered unappropriated until the county, township or board of education is fully discharged from the contract, agreement or obligation, or as long as the order or resolution is in force."

It appears from your statement of facts that on September 10, 1915, when bids for the proposed Geauga county inter-county highway improvement were received, there was not on file in your office, and had not at that time been made any agreement, as required by section 1218, G. C., or, if such an agreement had then been made by the commissioners, a proper certificate had not been made by the county auditor of Geauga county in compliance with the provisions of section 5660, G. C. Although bids were received and opened on September 10, 1915, and a contract was thereafter drawn and was executed by the Yount & Jackson Company, the low bidder, yet the state highway commissioner was without authority at that time to let any contract and is still without such authority, in view of the fact that no proper certificate has yet been made by the county auditor of Geauga county in compliance with the provisions of section 5660, G. C. It may, therefore, be safely asserted that there is not now in existence any contract between the state of Ohio and the Yount & Jackson Company for the construction of the road in question and that your department is still without authority to enter into such a contract. The same conclusion would necessarily be reached if the proceedings were to be regarded as governed by the former law, inasmuch as the pertinent statutory provisions were not substantially changed by the Cass highway law.

Coming now to consider the proper action to be taken by your department, it is apparent that you are without authority to take any action whatever until a proper certificate has been executed by the county auditor of Geauga county, in compliance with the provisions of section 5660, G. C., and until the written agreement on the part of the county commissioners of Geauga county to assume, in the first instance, that part of the cost and expense of the improvement over and above the amount to be paid by the state has been made and filed in your office, with the approval of the attorney-general endorsed thereon as to form and legality. If such certificate and agreement are made, and if the agreement is filed in your office with the proper approval endorsed thereon, it is my opinion that you may then award the contract to the Yount & Jackson Company and enter into a contract with that company, provided the company is still willing to enter into such contract. It appears, however, from the letter of the company that it is very unlikely that the company will now be willing to enter into a contract for the construction of this road, and, in view of the facts above set forth and of the further fact that, as I am informed, this company was, during the fall of 1915, ready and willing at all times to enter into a contract and insistent that it be allowed to begin work on the improvement, I am of the opinion that the company can not at this late date be considered as bound by its proposal made on the 10th day of September, 1915, and that the company and its surety could not at this late date be considered as bound by the terms of its proposal bond to enter into a contract with the state of Ohio for the construction and completion of the improvement in question. The statutes above referred to contemplate that at the time bids are opened for the construction of an improvement under the supervision of your department all preliminary matters will have been disposed of and that the agreement required by section 1218, G. C., and the certificate required by section 5660, G. C., will have been made and filed in your office, with the proper approval endorsed thereon. Section 1206, G. C., provides that contracts shall be awarded by the state highway commissioner to the lowest and best bidder. The state highway commissioner would not, of course, be required to determine on the very day that bids were opened the question of which bidder is the lowest and best bidder.

The law vests in the state highway commissioner a measure of discretion in determining which of several bidders is the lowest and best and contemplates that the commissioner may, after the opening of bids and the determination of the amounts thereof, employ a reasonable time in investigating the financial responsibility of bidders and their skill, experience and business reputation, in order that he may properly exercise the discretion vested in him. It is not contemplated, however, that the state highway commissioner shall receive and open bids in advance of the time when he is authorized to award a contract and hold in abeyance for a long period of time the awarding of the contract, pending such time as the proper agreement and certificate may be filed in his office, with the possible contingency that such agreement and certificate will never be made.

The Yount & Jackson Company had a right to assume, when it filed its bid for the construction of the improvement in question, that all preliminary requirements had been complied with and that the state highway commissioner was authorized to accept the lowest and best bid and enter into a contract. As previously observed, the state highway commissioner would be allowed a reasonable time to make proper investigation and exercise the discretion vested in him to select the lowest and best bidder. It is unnecessary to discuss, in this connection, what might be regarded as a reasonable time for the exercise of this discretion, as the facts in this case are that the contract has not been awarded because the state highway commissioner has been without authority to award the same and the delay has not been due to an investigation on his part of the responsibility of the bidders. Over six months have elapsed since the bids for this improvement were opened and it appears that the state highway commissioner long since determined that the Yount & Jackson Company was the lowest and best bidder. The failure to enter into a contract has been due to the fact that conditions precedent to the taking and opening of bids were not and have not been complied with and I advise you that if the Yount & Jackson Company is now unwilling to enter into a contract and refuse so to do, said company will be within its rights in so refusing and would not be liable on its proposal bond. In such an event it will become your duty, when the conditions precedent have been fully complied with, as set forth above, to again advertise for bids and upon the opening of the same to award the contract to the lowest and best bidder.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1447.

APPROVAL, SYNOPSIS FOR INITIATIVE LAW TO PROVIDE FREE TEXT BOOKS IN PUBLIC SCHOOLS—RESUBMITTED.

COLUMBUS, OHIO, April 3, 1916.

MR. C. B. GRONIGER, *Gallia Street, Portsmouth, Ohio.*

DEAR SIR:—You have resubmitted to me for my certificate a synopsis to be embodied in an initiative petition proposing "An act to provide free text books and supplies for all pupils in the public schools of Ohio, and creating a state text book board, and to repeal certain sections of the General Code," being the same synopsis submitted to me on March 23, 1916, and approved by me in opinion No. 1412 addressed to you on that date, the necessity for such resubmission and approval being that a change has been made in the repealing clause of the proposed bill and the consequent change in the synopsis, said synopsis now being in the following words:

"The law proposed by initiative petition to be submitted to the general assembly of the state of Ohio: 'An act to provide for free text books and supplies for all pupils in the public schools of Ohio, and to create a state school text book board, and to repeal section 7709, 7710, 7711, 7712, 7713, 7714, 7715, 7716, of the general code,' is intended to furnish free text books and supplies for all pupils in the public schools of the state. It is intended thereby to create a state school text book board, whose duty it shall be to secure from every publisher, one or more of whose books is used in any of the public schools of the state, and from other publishers, the prices at which they will agree to furnish the books and supplies, beginning August 1, 1917. It shall be left to the board to devise a system of ordering and delivering the books and supplies to the various boards in the state, and of paying the publishers therefor.

"It further provides that all the expense of the board and the cost of the text books and supplies shall be paid out of the general revenue fund of the state."

I hereby certify that the foregoing synopsis is a truthful statement of the contents and purpose of the above entitled proposed law.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1448.

ROADS AND HIGHWAYS—TOWNSHIP TRUSTEES—APPOINTMENT OF TOWNSHIP HIGHWAY SUPERINTENDENT—HOW REMOVAL OF SUCH APPOINTEE MAY BE ACCOMPLISHED.

A board of township trustees, while in terms authorized by the statute to remove a township highway superintendent only for certain specified causes set forth in the statute, may at any time accomplish the same result and terminate the tenure in office of such township highway superintendent by appointing a successor and such action will be effective and will terminate the authority of the former appointee as soon as his successor so appointed has qualified.

COLUMBUS, OHIO, April 4, 1916.

HON. HUGH F. NEUHART, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR SIR:—I have your communication of February 16, 1916, in which you state that the township trustees of the several townships in Noble county, shortly after September 6, 1915, the date of the going into effect of the Cass highway law, acting under section 75 of that act, section 3370, G. C., divided the townships into road districts and appointed township highway superintendents, who gave bond and qualified as required by law.

You observe that you are unable to find where the law fixes any definite period for which township highway superintendents are appointed and inquire whether a board of township trustees, elected in November, 1915, and who took office in January, 1916, may remove a township highway superintendent or superintendents without cause, on the ground that the old board of trustees had no appointive power that would extend beyond their term of office.

So much of section 3370, G. C., as is pertinent to your inquiry, reads as follows:

"* * * The trustees of the township shall appoint for each road district a superintendent, who shall be known as township highway superintendent and who shall serve until his successor is appointed and qualified. * * * He may be removed by the township trustees or the county highway superintendent for incompetence or gross neglect of duty."

You are correct in observing that a township highway superintendent is not appointed for any definite term. The appointing power is lodged in the township trustees and the power of removal for cause may be exercised either by the appointing power or by the county highway superintendent. The causes for which a township highway superintendent may be removed are enumerated in the statute and it is well settled that where the cause is thus specified, it amounts to a prohibition of a removal for a different cause.

Mechem on Public Offices and Officers, Section 450.

If it were not for another provision found in the language now under consideration, the conclusion would be inevitable that a township highway superintendent, once appointed, holds his office until removed either by the township trustees or the county highway superintendent for one of the causes set forth in the statute. In the view that I take of the law, it is very important, however, to consider the force and effect of the provision that the township highway superintendent shall serve until his successor is appointed and qualified.

Provisions of this character are more generally found in statutes relating to officers elected or appointed for a fixed term, and the object of the legislature in enacting such provisions, and making them applicable to officers elected or appointed for a fixed term, is to prevent vacancies, which vacancies might interfere with the administration of the public business. The language in question could not have been used for that purpose in the statute now under consideration, for the reason that the township highway superintendent does not have a fixed term. If the language "who shall serve until his successor is appointed and qualified" had been omitted from the statute, it would, as before suggested, be clear not only that the term of the township highway superintendent is indefinite, but also that he can be removed only for the causes set forth in the statute. To reach the same conclusion upon the statute as framed would read out of the section the language above quoted, and deny to it any force and effect whatever. It is my view that the language in question was used by the legislature for the purpose of indicating that the incumbency in office of a township highway superintendent might be terminated at any time by the appointment of a successor, and the qualification of such successor. In other words, the provision that the township highway superintendent shall serve until his successor is appointed and qualified, and the provision that he may be removed for certain causes, are entirely independent.

It will be noted that the township highway superintendent may be removed for the causes specified in the statute, not only by the appointing authority, the township trustees, but also by the county highway superintendent. It would not be contended that if the county highway superintendent removed a township highway superintendent for incompetence or gross neglect of duty, such superintendent so removed would continue to hold his office until such time as the township trustees of his township might choose to appoint a successor. Such a construction would, in effect, made the action of the county highway superintendent, in removing a township highway superintendent for cause, subject to the approval of the township trustees, and it is manifest that this was not intended by the legislature.

In view of the foregoing I think it may fairly be concluded that it was the intention of the legislature to authorize the removal of a township highway superintendent for

incompetence or gross neglect of duty at any time, the removal to be made by the township trustees or the county highway superintendent. In case the removal is made by the county highway superintendent for one of the specified causes, there will necessarily be a vacancy in the office until such time as the township trustees may hold a meeting and fill the same. It is even conceivable that in a case where the removal is made by the township trustees, there might be a vacancy in the office for a time, for the reason that the township trustees, after exercising their power of removal for cause, might be unable to agree as to the appointment of a successor. If the township highway superintendent is not removed for cause he holds his office until his successor is appointed and qualified, but it is within the power of the township trustees to at any time appoint a successor to a township highway superintendent in office, and as soon as such successor has qualified the tenure in office of the old township highway superintendent will cease, and the new appointee will become the township highway superintendent for the district in question. In other words, the township highway superintendent may be removed either by the township trustees or by the county highway superintendent at any time for the causes set forth in the statute, or his tenure in office may be terminated by the township trustees at any time by the appointment and qualification of a successor. Any other conclusion would destroy the force and effect of the provision to the effect that the township highway superintendent shall serve until his successor is appointed and qualified. This provision could not have been intended by the legislature to prevent a vacancy occurring by the expiration of a term and the failure of the appointing authority to act, for the reason that the township highway superintendent has no definite term. The only other purpose that can be suggested for the use of the language in question, in view of the fact that the township highway superintendent has no fixed term, and that his term therefore cannot expire, is that the legislature intended to vest in the township trustees the power to at any time terminate the incumbency in office of a township highway superintendent by appointing a successor, and that the tenure of the township highway superintendent in office at the time the new appointment was made should cease as soon as the new appointee had qualified.

I therefore advise you that a board of township trustees, elected in November, 1915, and now in office, while in terms authorized to remove a township highway superintendent only for causes set forth in the statute, may at any time accomplish the same result, and terminate the tenure in office of such township highway superintendent by appointing a successor, and that such action will be effective and will terminate the authority of the former appointee as soon as his successor so appointed has qualified.

This conclusion is based on the language of section 3370, G. C., rather than on any lack of power on the part of the trustees to make an appointment extending beyond the term of office for which they were elected.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1449.

NATURALIZATION FEES—CLERK OF COURTS NOT AUTHORIZED TO RETAIN SUCH FEES—SHOULD BE PAID INTO COUNTY TREASURY.

Since the adoption of the General Code on February 15, 1910, the clerk of courts is not authorized to retain that part of the naturalization fees received by him which is not paid by him to the United States Bureau of Immigration and Naturalization, but the same should be turned into the county treasury.

As to whether or not findings should be made for such amounts heretofore received and not turned into the county treasury, since February 15, 1910, is left to the determination of the bureau of inspection and supervision of public offices.

COLUMBUS, OHIO, April 5, 1916.

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

GENTLEMEN:—Under date of March 16th you wrote me as follows:

> "We are enclosing herewith copy of opinion of Judge Collister in the Cuyahoga court of common pleas in the case of The State of Ohio, ex rel., Cyrus Locher, as prosecuting attorney of Cuyahoga county, Ohio, plaintiff, v. Charles S. Horner and the Bankers Surety Company, Defendants, in which the court held that the clerk of courts is required to account to his fee fund for the portion of naturalization fees received by him. This decision of the court reverses an opinion upon this subject rendered by Hon. Wade H. Ellis, attorney-general; see attorney-general's report 1907-1908, page 224; also the opinion of the court of appeals of the second district in the case of M. R. Talbot, v. State, ex rel., Houston.
>
> "What will be the attitude of this bureau on this question should you hold that the examiners of this department shall make findings against clerks of courts for the return of such fees retained by them, and how far back shall they go in making these findings?"

We have carefully considered the opinion rendered by Judge Collister in the case of State ex rel. Locher, Prosecuting Attorney v. Horner, et al., in the common pleas court of Cuyahoga county. This was an action brought by the prosecuting attorney against Horner for the amount of $6,000.00 retained by him out of the naturalization fees received by him from the United States government during the period the said Horner was clerk of courts, to wit, for the period commencing on the first Monday of August, 1911, and continuing for two years thereafter. The common pleas court held that under the provisions of section 2977, as the same was carried into the General Code (which General Code became operative on February 15, 1910), the said Horner should not have retained the same for his own use but should have turned the same over to the county treasurer.

In the case of M. R. Talbot v. State ex rel. Houston, prosecuting attorney, decided in the court of appeals of Champaign county, the said court had for consideration whether or not M. R. Talbot, who was a former clerk of courts of Champaign county, was required to turn in the sum of $9.50, being one-half of the fees for the naturalization of aliens received by him as clerk during the period of his incumbency of such office, to wit, for a period of three years commencing on the first Monday of August, 1906. The court in this later case considered sections 1 and 18 of the original county salary act, as the same was passed on March 22, 1906, and did not consider the provisions of the General Code as adopted in 1910.

Section 1 of the act of March 22, 1906, provided that all fees, etc., "which by law may *now* be collected by the clerk of courts should be received and collected by him for the sole use of the treasury of the county; and section 18 of the act provided that the salaries fixed should be in lieu of all fees, etc., which any of the officials named in the statute "may *now* collect and receive."

In the act of March 22, 1906, it was provided that said act was not to go into effect until January 1, 1907. However, it is apparent from an examination of the decision in the case of Talbot v. State ex rel Houston that the court of Appeals has determined that the word "now," as used in sections 1 and 18 of the act, referred to the time of the passage of the act and not to the time of the going into effect of the same, for the reason that the act of the United States granting naturalization fees was not passed until June 29, 1906. In said case the court held that Talbot was entitled to retain the fees received by him and was not required to turn the same over to the county.

In the case decided by the court of appeals that court referred to the case decided by Judge Collister, hereinbefore referred to, and stated in reference thereto as follows:

> "It appears from the statement of the case, however, that Horner's term of office did not commence until the first Monday in August, 1911, more than a year after the present provisions of the General Code took effect."

Consequently, the Talbot case cannot be considered in any way as reflecting upon the decision in the Horner case.

Under date of March 13, 1916, Hon. Cyrus Locher, prosecuting attorney of Cuyahoga county, wrote me as follows:

> "Answering your letter of sometime ago enclosing newspaper clipping from the court of appeals of Urbana, regarding the naturalization fees of county clerks, will say that in our suit of myself v. Horner, former county clerk, we secured a judgment of approximately $1,100.00, and the same has been paid into the county treasury."

It therefore appears that so far as the Horner case is concerned no further action will be taken.

In regard to the Talbot case, I am in receipt of a letter from Hon. Harold W. Houston, prosecuting attorney of Champaign county, under date of March 28, 1916, in which he states that it is not his present intention to take the case of M. R. Talbot, plaintiff in error, v. State ex rel Houston, prosecuting attorney, defendant in error, involving naturalization fees received by clerk of courts, to the supreme court.

It appears therefore that neither of the cases is to proceed higher.

In view of the two decisions referred to I would advise you that your examiners should not make any findings against clerks of courts for naturalization fees which they received and retained prior to the adoption of the General Code on February 15, 1910, and did not turn into the county treasury, but that findings may be made for the recovery of that part of the naturalization fees which were received and retained by clerks of courts subsequent to that date and not accounted for to the county treasury.

It is to be noted that the case of State ex rel Locher, prosecuting attorney, v. Horner was an action, as before stated, for the amount of $6,000.00 retained by Horner out of naturalization fees received by him as clerk from the United States Government, and that in the letter of Mr. Locher, under date of March 13, 1916, he advises that a judgment for approximately $1,100.00 was recovered. Mr. Locher advises us that the reason the judgment in the case was for approximately $1,100.00 rather than $6,000.00 was that the defendant proved on the trial of the case that he had expended the larger part of the $6,000.00 sued for in the way of clerk hire and postage in con-

nection with the naturalization department, and that such expenditures were made on the advice of the attorney general pursuant to an opinion rendered by Attorney General Wade H. Ellis, addressed to the prosecuting attorney of Lorain county, and that the prosecuting attorney of Cuyahoga county at that time confirmed said opinion and requested defendant to act on same; that the trial court charged the jury as follows:

> "I charge you that if, acting on the advice of the attorney general, the county prosecutor and the instructions of the state accounting bureau, you find such officers so advised and instructed that the part of the fees authorized by the naturalization act to be retained by the clerk performing naturalization services were to be retained by him and not accounted for as public moneys, and the defendant Horner retained such fees and expended the whole or any part thereof in payment of salaries to clerks for services performed and for expenses in doing said work, the plaintiff cannot recover more than the difference between the amount so expended by defendant Horner and $6,000.00 with interest on such difference from August 4, 1913."

Mr. Locher further advises us, however, that the present clerk of court of Cuyahoga county, ever since he has taken office, has regularly paid *all* naturalization fees into the county treasury, as the law provides.

It seems, therefore, that in the case against Horner the court was of the opinion that if the clerk acted on the advice of the attorney-general and his prosecuting attorney in regard to the naturalization fees, that although he was not entitled to be personally enriched by the receipt of naturalization fees, nevertheless, he was not liable for such amount of the naturalization fees received by him for which he was not required to account to the United States bureau of immigration and naturalization, and which he actually paid out by way of clerk hire in the matter.

It would be well for your department to consider not only the law as established by Judge Collister in the above case, but also the result of the case and the charge to the jury given by Judge Leighley, the trial judge.

In your letter of inquiry you further ask:

> "How far back shall they (the examiners) go in making these findings?"

That is a matter which I desire to leave to the administrative policy of your office, except to say that no findings shall be made for naturalization fees received and retained prior to the adoption of the General Code on February 15, 1910.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1450.

INTERPRETATION OF SECTION 1529, G. C., 103 O. L., 414—WHEN JUDGE SHOULD BE PAID HIS EXPENSES IN EXAMINATION AND DECISION OF CASES HEARD OUTSIDE OF HIS DISTRICT.

Under the provisions of section 1529, *G. C., as amended* 103 *O. L.*, 414, *the time for which a judge may be paid as and for expenses in the examination and decision of cases heard by him must be devoted to such examination and decision outside of the district for which he was elected.*

COLUMBUS, OHIO, April 5, 1916.

HON. REYNOLDS R. KINKADE, *Judge Court of Appeals, Toledo, Ohio.*

DEAR SIR:—I have your letter of March 11, 1916, requesting my opnion as to the interpretation of section 1529 of the General Code, as amended 103 O. L., 414. The facts under which your inquiry arises are stated by you as follows:

> "Where a court of appeals or a judge thereof goes to another district, under assignment provided for in section 1528, and, without remaining in that district to finish and decide all of the cases submitted, brings back to the home district certain of the cases heard, and there considers and decides them, is the time so spent in the home district considering and deciding cases, covered by section 1529 mentioned, so that an allowance of the per diem therein provided for should be made for each day so spent in the home district?"

Section 1529, G. C., as amended aforesaid, provides as follows:

> "A judge so assigned, shall be paid five dollars a day for expenses for each day he shall perform such judicial duties, including the time necessarily devoted to going to and returning from such assignment and to the examination and decision of cases heard by him while he is so engaged outside of the district for which he was elected. * * *"

The first and general clause of the foregoing law expresses its purpose which is to pay the expenses of a judge while performing duties outside of his home district. If this general clause stood alone, no difficulty would be had in giving it a proper interpretation. By two succeeding provisions, however, the legislature has included in the time for which a judge may be paid: (1) the time necessarily devoted to going to and returning from such assignment; (2) and (the time necessarily devoted) to the examination and decision of cases heard by him while he is so engaged outside of the district for which he was elected.

I am of the opinion that the concluding clause of this section "while he is so engaged outside of the district for which he was elected" imposes a condition upon all payments to be made under said section. That is to say, this clause is to be applied, in order to get the intention of the legislature, to each separate provision of the law and not alone to the provision in respect to the examination and decision of cases. So interpreted the statute would read:

> "A judge so assigned, shall be paid five dollars a day, while he is so engaged outside of the district for which he was elected, for expenses for each day he shall perform such judicial duties including the time while he is so engaged outside of the district for which he was elected necessarily devoted to going to and returning from such assignment and the time while he is so

engaged outside of the district for which he was elected necessarily devoted to the examination and decision of cases heard by him."

In this view of the purpose of this law, it is manifest that only time spent outside of his home district may be included in his per diem allowance. I think the purpose of the last two additional provisions of this section was not only to provide full compensation for all expenses but in a measure to protect a judge from any embarrassment which might arise by reason of a comparison of his expense account with the time shown by the court records which he had devoted to the hearing and trial of cases. It certainly is apparent that the primary purpose of the statute is to compensate a judge for expenses and a construction of such statute which allows him expenses while at home is certainly not in harmony with its manifest purpose.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1451.

FORM OF AGREEMENT FOR RESCISSION OF CONTRACT BETWEEN STATE AND THE ENGINEERING SERVICE COMPANY.

COLUMBUS, OHIO, April 5, 1916.

HON. CLINTON COWAN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of March 10, 1916, which reads as follows:

"Under date of October 8th, this department entered into an agreement with The Engineering Service Company of Columbus, Ohio, for the construction of a section of road in Monroe township, Perry county. I am attaching hereto a copy of this agreement.

"Just after the date of the above agreement and before the Engineering Service Company had performed any actual work on the road, but after certain materials were placed by that company on the site of the proposed improvement to be used in its construction, it was ascertained that the proposed improvement had been let upon a line which seems to have been contemplated as a change from the original inter-county highway, but which change had never been actually and legally consummated.

"It now becomes necessary to nullify this agreement and I, therefore, respectfully request an opinion from your office as to the procedure to be followed by me in so doing and if it is necessary that any written agreement or other formality be executed, I respectfully request that you prepare same.

"The Engineering Service Company has advised me informally of its willingness to waive any and all rights under the above mentioned agreement."

The result desired by the parties to the contract referred to by you may be accomplished by the execution of an agreement substantially in the following form:

"AGREEMENT.

"Whereas, On the 8th day of October, A. D., 1915, the State of Ohio and The Engineering Service Company entered into an agreement by the

terms of which agreement said The Engineering Service Company agreed to furnish all materials, appliances, tools and labor and perform all the work required for the construction of section "P" of the New Lexington-Athens road, I. C. H. No. 158, in Monroe township, Perry county, Ohio, petition No. 889, according to the plans and specifications and to the satisfaction and acceptance of the State of Ohio, for an agreed compensation of $41,453.00 to be paid by the State of Ohio to said The Engineering Service Company, and,

"Whereas, It now appears that by reason of mistake the plans and specifications call for this construction of said improvement upon a line which had never been legally designated as an inter-county highway,

"Now, Therefore,

"It is agreed between the State of Ohio and said The Engineering Service Company that said agreement above referred to be and the same is hereby rescinded and in consideration of this agreement each of said parties to said original agreement entered into on the 8th day of October, 1915, does hereby release and discharge the other, its successors and assigns, from all obligations under said original agreement, and from all debts, claims, demands, damages, actions and causes of action whatsoever growing out of said original agreement or out of the rescission thereof.

"In Witness Whereof, the parties have hereunto set their hands this ----------day of----------, 1916.

"THE STATE OF OHIO,

"By---- ----------

"State Highway Commissioner."

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1452.

APPROVAL, RESOLUTIONS FOR ROAD IMPROVEMENTS IN SANDUSKY, WAYNE, GEAUGA AND SUMMIT COUNTIES.

COLUMBUS, OHIO, April 5, 1916.

HON. CLINTON COWAN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of April 1, 1916, submitting to me for examination final resolutions relating to the following roads:

"Sandusky county—Sandusky-Clyde road, Sec. 'P,' Pet. No. 2891, I. C. H. No. 276.

"Wayne county—Massillon-Wooster road, Sec. 'N,' Pet. No. 3068, I. C. H. No. 69.

"Geauga county—Burton-Bloomfield road, Sec. ------, Pet. No. 1667, I. C. H. No. 447.

"Summit county—Akron-Medina road, Sec. 'P,' Pet. No. 2965, I. C. H. No. 95.

"Summit county—Akron-Canton road, Sec. 'Q,' Pet. No. 2966, I. C. H. No. 66."

I find these resolutions to be in regular form and am therefore returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1453.

APPROVAL, RESOLUTIONS FOR TWELVE ROAD IMPROVEMENTS IN SEVERAL COUNTIES.

COLUMBUS, OHIO, April 5, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of March 29, 1916, in which you submit for examination final resolutions relating to the following roads:

"Ashland county—Savannah-Vermillion road, Sec. 'F,' Pet. No. 2040, I. C. H. No. 149.

"Ashland county—Ashland-Loudonville road, Sec. 'A,' Pet. No. 2034, I. C. H. No. 143.

"Guernsey county—National road, Sec. 'K,' Pet. No. 2397, I. C. H. No. 1.

"Harrison county—Dennison-Cadiz road, Sec. 'P,' Pet. No. 2454, I. C. H. No. 370.

"Holmes county—Columbus-Millersburg road, Sec. 'H,' Pet. No. 2507, I. C. H. No. 23.

"Lawrence county (supplemental)—Ohio River road, Sec. 'D,' Pet. No. ----------, I. C. H. No. 7.

"Licking county—Columbus-Millersburg road, Sec. 'Q,' Pet. No. 2580, I. C. H. No. 23.

"Montgomery county—Cincinnati-Dayton road, Sec. 'N,' Pet. No. 2722, I. C. H. No. 19.

"Montgomery county—Dayton-Troy road, Sec. 'O,' Pet. No 2724; I. C. H. No. 61.

"Montgomery county—Dayton-Troy road, Sec. 'M,' Pet. No. 2724, I. C. H. No. 61.

"Muskingum county—Zanesville-Caldwell road, Sec. 'L,' Pet. No. 1379, I. C. H. No. 348.

"Williams county—West Unity-Montpelier road, Sec. 'L,' Pet No. 3091, I. C. H. No. 303."

I find these resolutions to be in regular form and am therefore returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1454.

APPROVAL, SYNOPSIS FOR INITIATIVE PETITION TO AMEND CONSTITUTION OF OHIO BY REPEALING ARTICLE XV, SECTION 10 CIVIL SERVICE.

COLUMBUS, OHIO, April 5, 1916.

HON. TIMOTHY S. HOGAN, *Attorney-at-Law, Columbus, Ohio.*

DEAR SIR:—You have submitted to me for my certificate a petition to initiate an amendment to the constitution of the state of Ohio, the synopsis of which reads as follows:

"That the constitution of the state of Ohio be amended by the repeal of section 10 of article XV thereof, relating to appointments and promotions in the civil service."

I hereby certify that the foregoing synopsis is a true statement regarding the above entitled proposed amendment.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1455.

COUNTY ORPHANS' HOME LOCATED WITHIN MUNICIPAL CORPORATION ENTITLED TO RECEIVE WATER FROM MUNICIPAL PLANT FREE OF CHARGE—SEE SECTION 3963, G. C.

An orphans' home belonging to a county, but located within the corporate limits of a municipality owning its waterworks, is entitled to receive water from the corporation without charge under section 3963, *G. C.*

COLUMBUS, OHIO, April 5, 1916.

HON. THOMAS H. MOORE, *Prosecuting Attorney, Ashland, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your letter of April 1st, asking for an opinion which is as follows:

"Will you please give me your opinion upon the following:

"Ashland county has an orphans' home, which is located inside the corporate limits of the city of Ashland.

"The city owns and operates its own municipal water works system.

"Under section 3963 of the Code, can the city charge the county for water used by said orphans' home, said home being a county institution?

"I contend that under the above section, 3963, no charge can be made by the city."

Section 3963 of the General Code is as follows:

"No charge shall be made by the director of public service in cities, or by the board of trustees of public affairs in villages, for supplying water for extinguishing fires, cleaning fire apparatus, or for furnishing or supplying connections with fire hydrants, and keeping them in repair for fire department purposes, the cleaning of market houses, the use of any public building belonging to the corporation, or any hospital, asylum, or other charitable institutions, devoted to the relief of the poor, aged, infirm, or destitute persons, or orphan or delinquent children, or for the use of public school buildings; but, in any case where the said school building or buildings are situated within a village or cities, and the boundaries of the school district include territory not within the boundaries of the village or cities in which said building or buildings are located, then the directors of such school district shall pay the village or cities for the water furnished for said building or buildings."

The question of furnishing water to the Ohio hospital for epileptics at Gallipolis was involved in the case of the City of Gallipolis v. Trustees of Water Works, Ohio Nisi Prius reports, Vol. II, page 161, and it was determined in that case that the statute

was constitutional, and that under its provisions the corporation owning the water-works was obliged to furnish water to a state institution coming within the class enumerated without charge.

The provisions of the statute are clear, it being expressly provided that no charge shall be made for water furnished to any hospital or asylum devoted to the care of orphan children, and I am, therefore, of the opinion, that the fact that the orphan asylum referred to is a county rather than a municipal institution does not relieve the city of Ashland from supplying it with water, and concur with the opinion expressed by you in reference to the matter.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1456.

FINES COLLECTED FOR VIOLATIONS OF SECTION 1261-63, G. C., ARE REQUIRED TO BE PAID INTO COUNTY TREASURY—WHEN COUNTY COMMISSIONERS MAY ALLOW FEES TO OFFICERS NAMED IN SECTION 3017, G. C., ALTHOUGH FINES ARE PAYABLE INTO MUNICIPAL TREASURY—BALANCE OF FINE AND COSTS PAYABLE TO MAGISTRATE WHEN ACCUSED DESIRES TO BE DISCHARGED FROM JAIL AFTER COMMITMENT FOR NONPAYMENT OF SAME.

All fines collected for violations of section 1261-63, *G. C.*, 103 *O. L.*, 237, *are required to be paid into the county treasury under the provisions of sections* 12378 *and* 4270, *G. C., without regard to whether the court in which the same is enforced is a municipal court or a county court.*

The county commissioners in their discretion may make an allowance to such officers as are named in section 3017, *G. C., in the place of fees legally taxed to them in prosecutions for misdemeanors in which the defendant upon conviction proves insolvent not in excess of one hundred dollars in any one year, although the court in which such cause is tried is required to pay the fine in said cause, if collected, into the municipal treasury.*

Where the accused is committed to the county jail for the nonpayment of fine and costs adjudged against him after a part of the same has been discharged by reason of such commitment, and the accused desires to pay the balance thereof, such balance should be paid to the court by whom the accused was committed.

COLUMBUS, OHIO, April 6, 1916.

HON. E. E. LINDSAY, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—Yours under date of March 27, 1916, in which you request my opinion, is as follows:

> "When convenient, I would like to have your opinion upon the following questions:
>
> "(1.) In the 75th O. S., page 529, the supreme court holds that where a fine is imposed by the court of common pleas in a prosecution instituted in that court for a violation of either the municipal local option law, the law prohibiting the sale of intoxicating liquors on Sunday, or the law requiring the closing of saloons on Sunday, such fine must, when collected, be paid into the county treasury. But where a fine is imposed and collected by a municipal court for a violation of either of said laws, the same must be paid into the treasury of the municipal corporation wherein such fine was imposed.

"Will the same rule apply in prosecutions under section 1261-63 of the General Code as found in Vol. 103 of the Ohio Laws, at page 237?

"(2.) If a person is prosecuted for a violation of either a municipal local option law, the law prohibiting the sale of intoxicating liquors on Sunday, or the law requiring the closing of saloons on Sunday, before a mayor of a municipal corporation, and such person is convicted and proves insolvent, may the commissioners of the county in which the municipality is located pay the costs of such prosecution, or must the municipality in which such conviction is had pay such costs?

"(3) On October 14, 1915, in opinion number 924, you hold in substance that the authority of a justice of the peace, after the execution of a sentence has been begun, terminates, and his jurisdiction ceases.

"If a justice of the peace or mayor in a misdemeanor case wherein he has final jurisdiction, imposes a fine and costs and orders the accused committed to the county jail or workhouse, until such fine and costs are paid, and after being committed to such jail or workhouse the accused decides to pay his fine and costs, to whom should it be paid? Should it be paid to the magistrate imposing the sentence or should it be paid direct to the county treasury?

"I have matters involving all of the above questions under consideration now, and of course I have my opinion in regard to them, but I would like yours also, before my final decision.

"Under the second question propounded, I find that it has been the practice in some places for the commissioners to allow the costs where the accused is convicted before a mayor and proves insolvent, but it does not seem fair to me that the municipality should have the benefit of the fines in such cases where they can be collected from the accused, and if such fine and costs can not be collected from the accused, then for the county or state to have to pay such costs. It seems to me, as a matter of right, that if the municipality is entitled to such fines, when they can be collected from the accused, then the municipality should pay the costs made in the case if they can not be collected from the accused."

Section 1261-63, G. C., 103 O. L., 237, to which you refer, provides as follows:

"Whoever sells intoxicating liquors without having been duly licensed as provided herein shall be guilty of a misdemeanor, and shall be fined not less than two hundred dollars nor more than five hundred dollars for the first offense and for a second or subsequent offense, not less than five hundred dollars nor more than one thousand dollars, or imprisoned in the county jail for a period of not less than one month nor more than three months, or both.

"Sales of intoxicating liquor by other than dealers therein, in quantities of forty gallons or more, where said liquors are taken by way of payment of a debt or by way of collateral security on a loan, or are acquired for investment solely and sold en bloc, and sales under provisions of law requiring an executor, administrator, guardian, receiver or other officer of the court to sell, where such sales are made of a stock of liquors en bloc, or a sale by a person, firm or corporation previously licensed but whose license is not renewed, or is revoked, forfeited, surrendered or otherwise lost, where such sales are made of a stock of liquors en bloc, are not included within the meaning of this section. Nor shall this section include the manufacturer of native wine, cider or other intoxicating liquors from the raw material and the sale thereof by the manufacturer in quantities of one gallon or more

at one time at the factory or the sale thereof in said quantities by the manufacturer from the wagon or other vehicle of said manufacturer to the holder of a liquor license, or in said quantities to individual consumers where said liquors are delivered to the homes of said individual consumers in territory wherein the sale of intoxicating liquors is not prohibited by law. Nor shall this section include the sales made by a registered pharmacist upon a prescription issued in good faith by a reputable physician in active practice, or for exclusively known mechanical, pharmaceutical or sacramental purposes."

Your first question has reference to the disposition of fines collected, as required by law to be made by officers authorized to assess and collect the same. General provision for the disposition of fines collected is found in section 12378 of the General Code as follows:

"Unless otherwise required by law, an officer who collects a fine, shall pay it into the treasury of the county in which such fine was assessed, to the credit of the county general fund within twenty days after the receipt thereof, take the treasurer's duplicate receipts therefor and forthwith deposit one of them with the county auditor."

Except, then, in so far as it will be found to be otherwise specifically provided, all fines are required to be paid into the treasury of the county to the credit of the general county fund.

Specific exception to the foregoing general provision is found in section 13247, G. C., which provides as follows:

"Fines and forfeited bonds collected under this subdivision of this chapter, except as provided in section thirteen thousand two hundred and thirty-one, if enforced in the county court, shall be paid into the county treasury, and, if enforced in municipal courts, shall be paid into the treasury of the municipal corporation in which the cause was tried. Such funds paid into the treasury of the municipal corporation shall be applied as the council thereof may direct."

An examination of the subdivision of Chapter XVII of Title I of part 4, referred to in this section, will disclose that the provisions thereof have application, under the present state of the law, to:

"(1) Offenses in violation of municipal and residence district local option laws as defined in section 13234, G. C.

"(2) Failure to remove intoxicating liquors from a municipal, township or residence district local option territory, within thirty days from the date of the election at which such municipality, residence district or township shall have been "voted dry" as defined in section 13237, G. C.

"(3) Druggists who sell intoxicating liquor for any purpose within a period of two years after a conviction for selling intoxicating liquors as a beverage, contrary to a local option law, under the provision of section 13239 G. C.

"(4) Druggists or pharmacists in a local option township, municipality or residence district who fail to keep the book or register and conform to the provisions of section 13242, G. C."

So that by reason of the special provision of said section 13247, G. C., supra, all fines collected for violations of the provisions of sections 13225 to 13249, G. C., inclu-

sive, except violations of section 13229, G. C., in the county court, are required to be paid into the county treasury and all such fines enforced and collected in municipal courts are required to be paid into the treasury of a municipality in which the cause is tried.

By force of the exception found in section 13247, G. C., and the provisions of section 13231, G. C., therein referred to, all fines collected for violations of section 13229, G. C., in reference to the sale, furnishing or giving away of intoxicating liquors, to be used as a beverage, and keeping a place where such liquors are sold, furnished or given away in a township outside of a municipality, when the sale of intoxicating liquors as a beverage is prohibited in such township, are required to be paid into the county treasury to the credit of the poor fund by whatever court enforced.

As before stated, the foregoing being a special provision, that will control to the exclusion of any general provision otherwise applicable.

It may be here observed that the provisions of sections 13225 to 13249, G. C., in so far as they relate to violations of county local option laws, have been abrogated by the adoption of section 9a of article XV of the constitution, known as the home rule amendment. A further exception to said section 12378, supra, is found in section 4270, G. C., which provides as follows:

> "All fines and forfeitures collected by the mayor, or which in any manner comes into his hands, and all moneys received by him in his official capacity, other than his fees of office, shall be by him paid into the treasury of the corporation weekly. At the first regular meeting of the council in each and every month, he shall submit a full statement of all such money received, from whom and for what purpose received and when paid over. All fines, penalties and forfeitures collected by him in state cases shall be by him paid over to the county treasurer monthly."

The operation of this section, as an exception to the provisions of section 12378, G. C., is limited by force of the last sentence thereof to offenses committed in violation of municipal ordinances and all fines, penalties and forfeitures collected in state cases, are specifically required to be paid into the county treasury monthly, subject, however, to the special provisions of section 13247, G. C., above referred to.

Section 13050, G. C., as it stood prior to the codification of 1910, was enacted as a part of house bill No. 183, 95 O. L., 87, as section 4364-20 R. S. This section makes it a criminal offense for any person to sell intoxicating liquors on Sunday or permit a place other than a regular drug store, where such liquors are sold, to remain open on Sunday. In the same act (95 O. L., 90) there was enacted section 4364-20g, R. S., as follows:

> "Money received from fines and forfeited bonds collected under the provisions of this act shall be paid into the treasury of the municipal corporation wherein said fine was imposed or bond forfeited, and shall be applied to such fund or funds as the council of the said corporation may direct."

Under the provisions of this latter section, the supreme court held, as stated by you, in the case of City v. Mochwart, 75 O. S., 529, that fines collected for violation of section 4364-20, G. C., by a municipal court, must be paid into the municipal treasury, and if enforced by the court of common pleas, such fines must be paid into the county treasury under section 6802, R. S., now section 12378, G. C.

Section 4364-20g, R. S., as construed by the supreme court, was substantially incorporated in section 13247, G. C., supra, in the codification of 1910, but was limited in its application, as above pointed out, to certain offenses defined in section 13225 to 13249, G. C., which, as will be observed, do not include offenses in violation

of the provisions of section 13050, G. C., as above referred to. So that offenses committed in violation of said section 13050, G. C., are now, it would seem, clearly not within the rule laid down in the case of City v. Mochwart, supra.

The offense defined in section 1261-63, G. C., 103 O. L., 237, about which you make inquiry, does not come within any of the foregoing exceptions to the general provisions of section 12378, G. C., as will be readily observed, nor within the rule stated in the case of City v. Mochwart, supra. The offense to which you refer, as defined in section 1261-63, G. C., is not a violation of the provisions of either section 13234, 13237, 13239 or 13242, G. C., or any other provision of that subdivision of chapter XVII of title I, part 4, of the General Code, referred to in section 13247, G. C.

I am therefore of opinion that fines collected for violation of said section 1261-63, G. C., are required to be paid into the county treasury under the provisions of sections 12378 and 4270, G. C., without regard to whether the court in which the same is enforced is a municipal court or a county court.

Your second question relates to violations of municipal local option laws, the law prohibiting the sale of intoxicating liquors on Sunday and the law requiring the closing of saloons on Sunday, and you inquire whether or not county commissioners may pay the cost in prosecutions for offenses committed under said laws had before a mayor of a municipal corporation.

I shall assume that your inquiry has reference to offenses committed in violation of state law prosecuted in the name of the state and does not involve violations of city ordinances passed pursuant to section 6137, G. C., which confers upon municipal corporations full power to regulate the sale, furnishing or giving away of intoxicating liquors and the places where the same are sold, furnished or given away.

The offenses in reference to which you make inquiry are all misdemeanors.

Section 3016, G. C., provides for the payment of the costs of justices of the peace, police judges or justices, mayors, marshals, chief of police, constables and witnesses in felonies upon conviction.

Section 3017, G. C., provides:

> "In no other case whatever shall any cost be paid from the state or county treasury to a justice of the peace, police judge or justice, mayor, marshal, chief of police or constable."

From the above it is conclusive that only in felony cases, upon conviction, may "costs," as such, be paid out of the state or county treasury to a justice of the peace, police judge or justice, mayor, marshal, chief of police or constable. Authority is found, however, for the county commissioners to make an allowance to such officers "in place of fees," in felonies wherein the state fails, or misdemeanors wherein the defendant proves insolvent, as follows:

> "In felonies wherein the state fails and in misdemeanors wherein the defendant proves insolvent, the county commissioners, at any regular session, may make an allowance to any such officers in place of fees, but in any year the aggregate allowance to such officer shall not exceed the fees legally taxed to him in such causes, nor in any year shall the aggregate amount allowed an officer exceed one hundred dollars."

This allowance is left to the discretion of the county commissioners and limited to the fees legally taxed in an amount not in excess of one hundred dollars in state cases to an officer in any year.

The offenses to which you refer, being misdemeanors, it follows that under the provisions of section 3019, G. C., supra, the county commissioners may, in their discretion, make an allowance to a mayor, justice of the peace, police judge or justice,

marshal, chief of police or constable in place of fees legally taxed in misdemeanor cases, and in which the defendant proves insolvent, only in an amount not in excess of one hundred dollars in any one year. The commissioners may make such allowance, where the defendant proves insolvent, whether the offenses come within the class of offenses defined in section 13247, G. C., as to which it is provided that if the fines be enforced in a municipal court, the same shall be paid into the treasury of the municipality, or otherwise.

I am, therefore, of opinion, in answer to your second question, that in prosecutions for violations of municipal local option law, the statute prohibiting the sale of intoxicating liquors on Sunday, or the statute requiring the closing of saloons on Sunday, before the mayor, police judge or justice, or justice of the peace of a municipality, where the defendant proves insolvent, the county commissioners may, in their discretion, make an allowance to such officers as are named in section 3017, G. C., in place of fees legally taxed in such cases, a sum not in excess of one hundred dollars in any year.

As to your third inquiry it may be first observed that opinion No. 924, under date of October 14, 1915, to which you refer, and in which it is held that after the execution of a sentence of a justice of the peace has began, a justice loses all jurisdiction to suspend execution of such sentence, has no application, nor is there occasion for the further exercise of jurisdiction as to such sentence by a justice under the facts stated by you, further than to accept and receipt for payment on such fines and costs. It devolves upon the defendant to discharge and satisfy the judgment and sentence pronounced against him. This he may do by payment of the fine and cost so assessed against him to the court in which the cause was tried, or if committed for nonpayment of the same the defendant is discharged by operation of law when the statutory credit allowed under the provisions of section 13717, G. C., for each day's confinement, aggregates a sum equal to the fine and cost assessed and adjudged against him. If after a portion of the fine and costs so assessed have been satisfied and discharged by reason of confinement of the defendant in default of the payment thereof, he may discharge the balance due thereon by the payment thereof to the court in which the cause was tried and sentence pronounced against him. Whereupon the defendant is entitled to his release. That is to say, after a portion of the fine and cost has been satisfied by reason of the confinement of the defendant, he may secure his release from such confinement by the payment of the balance due on said fine and costs to the court by which the cause was tried and sentence pronounced, and taking from such court a proper receipt therefor showing full payment of such fine and cost. Such receipt from the justice of the peace, mayor, police judge or justice or the duly authorized clerk of either of such courts is sufficient warrant to entitle the defendant to his release from further confinement.

There is no authority for the payment of a fine and costs or any part thereof into the county treasury by the defendant.

I am, therefore, of opinion, in answer to your third inquiry, that the fine and costs therein referred to, or the remainder thereof unpaid, should be paid only to the court in which the cause was tried, that is to say, the justice or mayor's court.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1457.

APPROVAL, RESOLUTION FOR CERTAIN ROAD IMPROVEMENT IN MAHONING COUNTY, OHIO.

COLUMBUS, OHIO, April 6, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of April 5, 1916, transmitting to me for examination final resolution relating to the Youngstown-New Bedford road, section "U," I. C. H. No. 85, petition No. 2642, in Mahoning county.

I find t .is resolution to be in regular form, and am, therefore, returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1458.

COUNTY COMMISSIONERS—MAY ALLOW CONTINGENT EXPENSES OF EMPLOYES OF TAXING DEPARTMENT OF COUNTY AUDITOR'S OFFICE AND COUNTY BOARD OF REVISION—WHAT IS MEANT BY CONTINGENT EXPENSES UNDER PROVISIONS OF SECTION 5585, G. C., 106 O. L., 256—CAR FARE, AUTOMOBILE HIRE, ETC.

Expenses for street car fare of the employes of the taxing department of the county auditor's office in trips made in furtherance of the duties of said office, and for automobile hire, livery or car tickets in necessary trips made by the members of the board of revision in the performance of their official duty are contingent expenses within the meaning of that term as used in section 5585, G. C., 106 O. L., 256, and bills for such expenses may be allowed by the county commissioners and paid as other claims against the county.

COLUMBUS, OHIO, April 6, 1916.

HON. ROBERT P. DUNCAN, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—In your letter of February 17th you request my opinion on the following question:

> "Have the county commissioners the authority to allow the payment of bills for street car fare of the employes of the taxing department of the county auditor's office in trips made in furtherance of the duties of that office, and of bills for automobile hire, livery or car tickets in necessary trips made by the members of the board of revision?"

Your question requires a consideration of that part of section 36 of the Parrett-Whittemore law, so-called (section 5585, G. C.), as found in 106 O. L., 256, which provides that:

> "The contingent expenses of the county auditor and county board of revision, including postage, and express charges, their actual and necessary traveling expenses and those of their deputies, experts, clerks or employes on official business outside of the county, when required by orders issued by the tax commission of Ohio, shall be allowed and paid as other claims against the county."

No other provisions of the statutes now in force authorize the payment of the expenses referred to in your inquiry out of the county treasury and it remains to be determined, therefore, whether the term "contingent expenses," as the same appears in the above provision of section 5585, G. C., includes such expenses as those mentioned in said inquiry. In other words, may bills for such expenses be allowed by the county commissioners and paid as other claims against the county?

I call your attention to an opinion of my predecessor, Hon. Timothy S. Hogan, rendered to the tax commission of Ohio, under date of April 24, 1914, as found in the Report of the Attorney-General for said year at page 514 of said report.

The first and second questions asked by the tax commission were as follows:

> "1. What expenses of district assessors and deputy assessors, members of district boards of complaints, deputies, assistants, experts, clerks and employes are a proper charge against the taxing district?
>
> "2. Does 'contingent expenses' include such expenses as automobile hire, car fare and the like for these various officers while in the exercise of their duties within their respective jurisdictions?"

Consideration was given to that part of section 35 of the Warnes law, so-called (section 5614, G. C.), 103 O. L., 795, which provided as follows:

> "* * * The contingent expenses of the district assessor and district board of complaints, including postage and express charges, their actual and necessary traveling expenses and those of their deputies, assistants, experts, clerks or employes on official business outside of the district when required by orders issued by the tax commission of Ohio shall be allowed and paid as claims against the county; * * *"

It will be observed that the above provision of section 5614, G. C., as in force prior to January 1, 1916, was carried into the provision of section 5585, G. C., as above quoted, and the only material change made was to substitute the county auditor and county board of revision respectively in place of the district assessor and district board of complaints.

As stated in said opinion, the term "contingent expenses" has a well understood technical meaning, viz., those expenses, miscellaneous in character, which the legislative body presumes will be incurred in the natural course of official business, but the exact character of which cannot be so definitely ascertained in advance as to permit specific enumeration of them.

> People v. Yonkers, 35 Barb., 236.
> Dunwoody v. U. S., 22 Ct. Cl., 269.

It was observed that the general assembly supposed that the phrase "contingent expenses" would not necessarily include all expenditures and that this is reasonably apparent from consideration of that part of the statute above quoted which begins with the word "including;" that by specifically enacting that postage, express charges and certain traveling expenses shall be included within the purview of the term "contingent expenses," the general assembly made it plain that such charges and expenses would not, without the provision, have been contemplated within the meaning of the phrase, being expenses, the incurring of which, is a certainty, and which are, therefore, not of the miscellaneous and unascertainable character ordinarily contemplated by the term "contingent expenses."

It was held in answer to the first question that, generally speaking, contingent expenses are such casual and miscellaneous expenditures which may naturally be

incurred in the discharge of the duties of the office for which no special provision is made; save that in the case of the contingent expenses mentioned in section 5614, G. C., the term was to include postage and express charges and the traveling expenses mentioned in said section.

In so far as the second question of the tax commission relating to traveling expenses, it was held that, while in the exercise of their duties within their respective jurisdictions none of the officers referred to in said question might be reimbursed for such expenses incurred by them, and that the only traveling expenses, reimbursement on account of which out of the public treasury shall be afforded any of said officers, were those specifically mentioned in the above provision of the statutes, i. e., the actual and necessary traveling expenses of the district assessor and district board of complaints, their deputies, assistants, experts, clerks or employes, when incurred on official business outside of the district when required by orders issued by the tax commission of Ohio.

I concur in the conclusion reached by my predecessor, that none of the officers mentioned in the above provision of section 5614, G. C. (103 O. L., 795), might be reimbursed for expenses incurred while in the exercise of their duties within their respective jurisdictions. In other words, expenses incurred by the district assessors, or by their deputies acting for them, in going about their respective districts and in appraising property for taxation in the manner provided by law could not be considered "contingent expenses" within the meaning of the term as used in said statute.

The fact must not be overlooked, however, that under the Parrett-Whittemore law, the duty of appraising property in the first instance is placed upon the local assessors selected in the manner provided by section 17 of said law (section 3349, G. C.), and by the assistant assessors selected under the conditions and in the manner provided by section 18 of said act (section 3350, G. C.). Inasmuch as the county auditor, himself, or acting through his deputies or assistants, is not charged by any provision of the act with the duty of appraising real property in the first instance as was required of the district assessor and his deputies under provision of the Warnes law, and inasmuch as the members of the county board of revision in the performance of their ordinary duties as a board of equalization under section 51 of the act (section 5605, G. C.), and as a board of complaints under sections 44, 45 and 52 of the said act (sections 5597, 5598 and 5609 of the General Code), are not required to incur traveling expenses in the sense the term is above used, I think it necessarily follows that if circumstances arise which occasion the expenses referred to in your inquiry such expenses so incurred by the officers and employes named in the above provision of section 5585, G. C., could not in the very nature of things be determined in advance and are therefore "contingent expenses" within the meaning of the term as used in said statute.

I am of the opinion, therefore, in answer to your question that bills for such expenses may be allowed by the county commissioners and paid as other claims against the county under the above provision of said section 5585, G. C.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1459.

APPROVAL, TRANSCRIPT OF BOND ISSUE, BRACEVILLE TOWNSHIP RURAL SCHOOL DISTRICT, TRUMBULL COUNTY, OHIO.

COLUMBUS, OHIO, April 6, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Braceville township rural school district, Trumbull county, Ohio, in the amount of $25,000.00 for the purchase of a site for the erection and equipment of a school building for the proper accomodation of the schools of said district, being fifty bonds of $500.00 each."

I have examined the amended and supplemented transcripts of the proceedings of the board of education and other officers of Braceville township rural school district relative to the issuance of the above bonds, also the bond and coupon form, submitted to me under date of April 3, 1916, and I find the same regular and in conformity with the provisions of the General Code of Ohio.

I am of the opinion that said bonds drawn in accordance with the form submitted, when executed by the proper officers, will, upon delivery,constitute valid and binding obligations of said rural school district.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1460.

ROADS AND HIGHWAYS—COUNTY COMMISSIONERS AUTHORIZED TO ISSUE BONDS FOR ROAD IMPROVEMENT PURPOSES—TEN YEAR LIMITATION—NO AUTHORITY FOR ELECTORS TO VOTE ON PROPOSITION—HOW TO DETERMINE MAXIMUM AMOUNT OF BONDS THAT MAY BE ISSUED FOR SUCH PURPOSES.

County commissioners are authorized to issue bonds for road improvement purposes, which bonds may not be issued for a longer period than ten years. There is no authority or necessity for submitting bond issues of this character to a vote of the electors. In determining the possible amount of bonds that may be issued for this purpose, it is necessary to consider the amount of taxes that may be levied under sections 6926 and 6927, G. C., and the amount of the special assessments proposed to be levied for the projected improvements and no greater amount of bonds may be issued than can be redeemed out of the proceeds of the levies made under the sections in question and the proceeds of the special assessments.

COLUMBUS, OHIO, April 6, 1916.

HON. ELI H. SPEIDEL, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—I have your communication of March 16, 1916, which reads as follows:

"There has been, of late, in this county considerable agitation and discussion about the deplorable condition of the Clermont county highways, and the board of county commissioners are considering the question of sub-

mitting to the electors of the county, at the general primary election in August of this year, the question of issuing bonds for the permanent improvement of these roads, and I am requested by the board of commissioners to ask your opinion as to the greatest amount of bonds that may be issued, provided such issue of bonds is approved by a majority of the qualified electors of the county voting on the question submitted.

"The grand duplicate of Clermont county amounts to the sum of $26,240,-610.00, that is for the year 1915. The total bonded indebtedness of the county or the bonded indebtedness that will exist when the resolution is passed by the board of commissioners, will be $191,957.00.

"To be more specific, we would like to have your opinion as to whether or not the bonds of Clermont county, in the sum of either $250,000.00 or $500,000.00, to be extended over a period of not exceeding twenty-five years, can be issued upon the above statement of the duplicate and total bonded indebtedness, providing the question is submitted to a vote of the electors of said county, at either a general or special election and a majority of the electors voting at said election, vote in favor of such bond issue."

The provision for the issuance of bonds by county commissioners for county road improvement purposes is found in section 6929, G. C., being section 108 of the Cass highway law, which section reads as follows:

"The county commissioners in anticipation of the collection of such taxes and assessments may, whenever in their judgment it is deemed necessary, sell the bonds of said county in the aggregate amount necessary to pay the estimated cost and expenses of such improvement. Such bonds shall state for what purpose they are issued and shall bear interest at a rate not to exceed five per cent. per annum, payable semi-annually and in such amounts and to mature at such times as the commissioners shall determine, subject to the provision however that said bonds shall mature in not more than ten years prior to the issuance of such bonds, the county commissioners shall provide for levying and collecting annually a tax upon all the taxable property of the county to provide a sum sufficient to pay the interest on such bonds and to create a sinking fund for their retirement at maturity. The sale of such bonds shall be advertised once not later than two weeks prior to the date fixed for such sale in a newspaper published and of general circulation within such county, if there be any such paper published in said county, but if there be no such paper published in said county then in a newspaper having general circulation in said county. Such bonds shall be sold to the highest responsible bidder for not less than par and accrued interest. The county commissioners may reject any or all bids. The proceeds of such bonds shall be used exclusively for the payment of the cost and expenses of the improvement for which they are issued."

Under the provisions of the section above quoted, all bonds issued for county road improvement purposes must mature in not more than ten years. There is no authority for submitting to the electors of a county the proposition of issuing bonds for such purposes, and the county commissioners have the full power and authority to issue such bonds without a vote of the electors. Not only is a submission to a vote of the electors of the question of issuing bonds neither required nor authorized, but it is also true that no substantial advantage could be derived by submitting a proposition of this character, in view of the statutory provisions relating to the tax levies, in anticipation of which bonds of this character may be issued. Such bonds, in so far

as they are to be issued in anticipation of the collection of taxes, are to be issued in anticipation of levies made under sections 6926 and 6927, G. C.

In opinion No. 1408 of this department, rendered to the bureau of inspection and supervision of public offices, on March 22, 1916, it was pointed out that the levy under section 6926, G. C., is not subject to the three mill limitation for county purposes provided by section 5649-3a, G. C., and is not subject to the ten mill limitation provided by section 5649-2, G. C. The levy itself cannot exceed two mills and the only other limitation to which it is subject is the fifteen mill limitation provided by section 5649-5b, G. C. It was also pointed out in the same opinion that the levy under section 6927, G. C., is not subject to the two mill limitation for township purposes and is not subject to the ten mill limitation. The levy itself cannot exceed three mills and the only other limitation to which it is subject is the fifteen mill limitation. In view of the fact that the levies under the sections above referred to are not subject to the limitations for county and township purposes, respectively, and are not subject to the ten mill limitation, it will be seen that in the making of such levies the county commissioners have practically all the freedom that exists as to sinking fund and interest levies, where a bond issue is authorized by a vote of the electors.

Answering your specific questions, I advise you that county commissioners are authorized to issue bonds for road improvement purposes, that there is no authority or necessity for submitting bond issues of this character to a vote of the electors and that such bonds may not be issued for a longer period than ten years. In determining the possible amount of bonds that may be issued for this purpose, it is necessary to consider the amount of taxes that may be levied under sections 6926 and 6927, G. C., and the amount of the special assessments proposed to be levied for the projected improvements, and no greater amount of bonds may be issued than can be redeemed out of the proceeds of the levies made under the sections in question and the proceeds of the special assessments. In determining the amount of taxes that may be levied under the sections in question, regard must be had not only to the limitations contained in such sections, but also to the requirements of other political subdivisions and to the requirements of the county for other purposes. Levies made under sections 6926 and 6927, G. C., must be regarded as levies made under the several sections referred to in section 5649-5b, G. C., and together with all other levies made under the several sections referred to in said section 5649-5b, G. C., must not exceed fifteen mills.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1461.

VILLAGE INCORPORATED FROM PART OF TOWNSHIP RURAL SCHOOL DISTRICT—STATUS OF SCHOOL PROPERTY—TITLE TO PROPERTY IS HELD BY BOARD OF RURAL SCHOOL DISTRICT.

Upon the incorporation of a part of the territory of a township rural school district into a village the territory so incorporated automatically becomes a village school district, providing the valuation of the same for taxation is at least five hundred thousand dollars, under provision of section 4687, *G. C.*, 104 *O. L.*, 134, *taken in connection with the provision of section* 4682, *G. C.*, 103 *O. L.*, 545. *In case of such incorporation the title to school property held by the board of education of said rural school district in trust for the use and accomodation of the pupils of said rural district, although located within the corporate limits of said village, will remain in said board of education of said rural school district.*

COLUMBUS, OHIO, April 7, 1916.

HON. GEORGE C. VON BESELER, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—In your letter of March 10th you request my opinion as follows:

"The electors of the township of Willoughby are about to vote upon the question of the creation of a village to be known as the village of Wickliffe, lying within and at the westerly side of said township.

"Just last year the township issued bonds in a considerable amount for the purpose of securing a site and erecting thereon a new and modern community school house. There is now a vast deal of strife and contention among the electors by reason of there being various opinions as to the resulting conditions in reference to the school building.

"Section 4687 is as follows:

" 'Upon the creation of a village, *it shall thereby become a village school district*, as herein provided, and, if the territory of such village previous to its creation was included within the boundaries of a rural school district and such rural school district included more territory than is included within the village, such territory shall thereby be attached to such village school district for school purposes, *provided such territory has an area of less than sixteen square miles.*"

"The area remaining without the village will have an area of more than sixteen miles. Consequently thereafter there will be the two districts, namely the Wickliffe village school district and the Willoughby rural school district.

"Section 4682-1 of the General Code of Ohio is as follows:

" 'A village school district containing a population of *less than fifteen hundred may vote at any general or special election to dissolve and join any contiguous rural district.* After approval by the county board such proposition shall be submitted to the electors by the village board of education on the petition of one-fourth of the electors of such village school district or the village board may submit the proposition on its own motion and the result shall be determined by a majority vote of such electors.'

"The village of Wickliffe will have a population of approximately nine hundred.

"Section 4683 is as follows:

" 'When a village school district is dissolved, the territory formerly constituting such village district shall become a part of the contiguous rural district which it votes to join in accordance with section 4682-1, *and all school*

property shall pass to and become vested in the board of education of such rural school district.'

"Starting with the assumptions that the village will be created, that the vote for a dissolution of the district will be favorable, it then follows that this new school building will certainly revert to and become the property of the rural school district.

"QUERY: What is the status of the ownership and control of this new school property upon the creation of the village? In so far as I have been able to ascertain, there is no provision of the statute disposing of school property under such circumstances. Some are contending that it will remain the property of the rural school district. Others contend that it will become the property of the village, but that the tax duplicate of the village will thereafter be exempt from any tax levy for the purpose of paying the interest and providing a sinking fund to pay the bonds at maturity, heretofore issued for the express purpose of the purchase of a site and the erection of this building.

"My view of it is that as a matter of necessity the building would pass to and become the property of the village with the liability for the payment of the bonds resting as it is at present, namely covering all the property listed for the purpose of taxation in both the township and the village.

"I wish you would give me your opinion in reference to the matter. It may be that section 4696 would be applicable, but it does not impress me as being so, the reference there being only to transferred territory by the county board of education."

In response to my request for additional information I have your letter of March 21st in which you state that the school property in question lies approximately at the center of the proposed incorporated district; that the school was established as an ordinary public school and that the building is used only for grades below the high school. You further state that the tax valuation of the district to be created will be something like two and one-half million dollars, and in your letter of March 24th you state that the school building in question is not confined precisely to the use and accomodation of those pupils residing within the territory which it is proposed to incorporate into a village and that you are informed that some children within the corporation go to schools lying without the corporation, but that no children living without the proposed incorporation come to this new school district lying within the territory proposed to be incorporated into a village.

You have quoted the provisions of section 4687, G. C. (104 O. L., 134). While the first part of said statute by its terms provides that

> "Upon the creation of a village, it shall thereby become a village school district,"

said provision must be read in connection with the provision of section 4682, G. C. (103 O. L., 545), that

> "A village, together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, with a tax valuation of less than five hundred thousand dollars, shall not constitute a village school district. * * *"

The first part of said section 4687, G. C., was not changed by the act of the general assembly amending said section as found in 104 O. L., and in view of the above provision of section 4682, G. C., I am of the opinion that upon the creation of a village,

the territory within its corporate limits will not automatically become a village school district if the tax valuation of such territory at the time of such incorporation is less than five hundred thousand dollars. It appears, however, that that part of Willoughby township, Lake county, which it is proposed to incorporate into the village of Wickliffe, has a valuation of about two and one-half million dollars. It follows, therefore, that upon the incorporation of said village the same will automatically become the Wickliffe village school district under provision of section 4687, G. C.

From your statement of facts it appears that the territory remaining in said Willoughby township rural school district, after the incorporation of the village, will have an area of more than sixteen square miles. Said territory will not, therefore, be attached to said village school district for school purposes under the above provision of section 4687, G. C., but will remain separate and apart from said village school district, and will continue as the territory comprising the Willoughby township rural school district until further change is made in accordance with law.

It further appears, for the purpose of erecting a school building in that part of said Willoughby township rural school district, which it is now proposed to incorporate into a village, the board of education of said rural school district issued the bonds of said district. The school building erected out of the proceeds of said bond issue is owned and controlled by said board of education of said rural school district, and the title to said property is held by said board of education in trust for said rural school district for school purposes.

While you state that no children without the territory proposed to be incorporated into a village attend school in the new school building in question, it must be remembered that the qualified electors residing in the territory within said rural school district that will remain after the incorporation of said village will have no voice in said incorporation proceedings, while in all probability it required a vote of a majority of the electors residing in said rural school district to authorize the board of education of said district to issue the bonds above referred to.

In view of the present tendency to centralize the schools of rural school districts, either by a vote of the electors under section 4726, G. C. (104 O. L., 139), or by the board of education of the rural school district in the exercise of the authority conferred by section 7730, G. C. (106 O. L., 398), it cannot be said that the use of a school building located within a rural school district is necessarily confined to the accommodation of those pupils residing within the immediate vicinity of said building, unless the board of education of said district so determines. On the contrary, I am of the opinion that the school building in question must be considered as available for any and all of the purposes which may be affected under provision of said sections 4726 and 7730, G. C.

I find no provision of the statute to the effect that upon the creation of the village referred to in your inquiry out of a part of the township in question, the title to the school property located within the corporate limits of said village, which upon the facts submitted by you automatically becomes a village school district, passes from the board of education of the township rural school district to the board of education of said village school district, and becomes vested in said latter board. While the above provision of section 4683, G. C., as quoted by you, provides that when a village school district is dissolved the territory formerly constituting said village district shall become a part of the contiguous rural district which it votes to join in accordance with section 4682-1, G. C., and that all school property shall pass to and become vested in the board of education of such rural school district, it will be observed that such transfer of territory and the passing of the title to the school property therein located is effected with the consent and approval of the qualified electors of such territory.

When territory is annexed to a city or village, section 4690, G. C. (104 O. L., 133), provides that such territory thereby becomes a part of the city or village school district, but said section further provides that the legal title to school property in

such territory for school purposes shall remain vested in the board of education of the school district from which such territory was detached, until such time as may be agreed upon by the general boards of education when such property may be transferred by warranty deed.

In the case of Board of Education v. Board of Education, 46 O. S., 595, the court held:

> "Public school property, real or personal, that has been appropriated and set apart by a township board of education for the purpose of a public school of a higher grade than primary, for the benefit of the youth of the whole township, does not pass to or vest in the board of education of a separate school district that may be afterwards organized out of the territory within which the property happens to be situated."

The court in its opinion on page 597 of said report said:

> "The school house in dispute was built by the township board to be used for teaching a school of higher grade than primary, for the benefit of the youth of the whole township. It was, presumably, located at a point most convenient for that purpose, and which happened to fall within the territory afterwards organized into a separate village district, *but was not designed for the benefit of that territory alone;* nor was it ever afterwards set apart by any action of the township board for the use of that territory. * * *
>
> "To hold that grounds, buildings and appliances, designed and intended to secure to the youth of the whole township an opportunity for education in the higher branches of learning could be thus transferred, would defeat a legislative purpose clearly discernible upon the face of the law, for township boards could hardly be expected to provide the necessary means to accomplish it, where the requisite property should be held by so uncertain a tenure."

While it is true that the school referred to in the above case was for high school purposes, nevertheless, I think in view of what has already been said as to the possible use that could be made of the school building referred to in your inquiry, the case of Board of Education v. Board of Education, supra, has some bearing on the question submitted by you.

While authorities may be cited in support of the proposition that when a separate district is created out of a rural school district, by operation of law, or by the creation of a village, under the above provison of the statute, the board of education of said separate district shall take the title to the school property within its limits which was designed for its use, I find no authorities which would warrant me in holding that the title to the school property in question, established by the board of education of the rural school district, under authority of the statutes now in force for the accommodation of pupils residing in said rural school district, and assigned to said school by said board of education, will vest in the board of education of the village school district upon the incorporation of said village and the proper organization of said board of education. On the contrary, the general rule seems to be that, upon the creation of a special or separate district out of a part of a rural district, the title to the school property within the limits of said special or separate district will remain in the board of education of the rural school district, unless said school property was designed solely for the use and accommodation of the pupils residing in the territory comprising the district so created. This rule was recognized by the court in the case of Board of Education v. Board of Education, supra.

I am of the opinion, in answer to your question that, in the absence of a prvision of the statute vesting the title to the school property in question in the board of

education of the village school district upon the creation of said village and upon the proper organization of said board, or of a provision of the statute authorizing the board of education of said rural school district and said village school district to enter into an agreement transferring said title upon a valuable consideration, said title remains in the board of education of said township rural school district.

Inasmuch as it appears from your statement of facts, that upon the creation of the village of Wickliffe, and upon the proper organization of the board of education of the village school district, the necessary steps will be taken by said board, under the above provision of section 4682-1, G. C., to dissolve said school district and join it to the Willoughby township rural school district, it follows that, even if I were to hold that the school property in question vests in the board of education of said village school district upon the creation of said village, upon the dissolution of said village school district the title to said property would pass to,and become vested in the board of education of said rural school district by virtue of the provision of section 4683, G. C., as above quoted.

Section 4696, G. C. (106 O. L. 397), relates to the transfer of a part or all of a school district within a county school district to an adjoining exempted village school district or city school district, or to an adjoining county school district upon the petition of the qualified electors residing in such territory, and in the manner provided in said section. The provision for the distribution of funds and indebtedness as found in the latter part of said section applies only to transfers of territory made under authority of and in compliance with the requirements of said section, and in my opinion said provision of said statute is not applicable to the question submitted by you.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1462.

OFFICES COMPATIBLE—SEXTON OF TOWNSHIP CEMETERY—TOWNSHIP TREASURER.

A person who is employed as a sexton of a township cemetery by the directors thereof is not by reason of such employment disqualified to hold at the same time the office of township treasurer.

COLUMBUS, OHIO, April 7, 1916.

HON. MEEKER TERWILLIGER, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—Yours under date of March 27, 1916, is as follows:

> "I herewith submit a statement of facts and respectfully ask your opinion regarding same. The facts are as follows:
>
> "Walnut township of this county, has a township cemetery, which is, under section 3464 of the General Code, in charge of three directors; said three cemetery directors have charge of said township cemetery, which is known as 'Reber Hill Cemetery,' and employ all laborers, including a cemetery sexton, who lives in the dwelling on the cemetery grounds. Said sexton cares for the cemetery grounds, digs the graves, mows the lawns, and does other work incident to caring for said cemetery; his wages are fixed by the cemetery directors. All bills for the cemetery, including the sexton's wages, and wages of other employes, are first approved by the cemetery directors, then filed with the township trustees for payment, and after being allowed by the township trustees, are paid by orders on the township treasurer, drawn by the township clerk.

"The man, who for several years has been, and is now, employed as said cemetery sexton, was last November elected treasurer of said Walnut township, and qualified and has since January 1, 1916, and is now acting treasurer of said Walnut township, and draws salary as such township treasurer.

"I am writing you, at the request of this person, to inquire if he can be cemetery sexton as above outlined, and township treasurer at the same time, and draw wages as cemetery sexton and salary as township treasurer, both, from the township treasury, during the same period of time."

There is no constitutional or statutory inhibition against a sexton of a township cemetery, who is in the employ of the director thereof, at the same time holding the office of township treasurer. Your inquiry, then, resolves itself into whether the duties, powers and functions of the office of township treasurer and sexton of a township cemetery are such as to render them incompatible.

It has been held that offices are incompatible, and may not be held simultaneously by the same person when one is subordinate to or a check upon the other, or when the duties are such as to render it physically impossible for one person to properly discharge those of both offices at the same time.

A concise, and perhaps as accurate a statement of the rule of incompatibility of offices as will be found, is set forth in section 34 of Throop on Public Offices, as follows:

"The force of the word (incompatibility) in its application to this matter, is that, from the nature and relations to each other of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other.

It remains, therefore, to examine the nature and character of the duties of the two places and their relation to each other, with a view to determining whether a faithful and impartial discharge of the duties and functions of the one would be in any way antagonistic or contrary to a like performance of those of the other.

It is sufficient to say, in regard to the duties of the sexton of the cemetery, as pointed out in your inquiry, that it is not believed that they are of such character or nature as would ordinarily be in any manner antagonistic or contrary to a proper performance of the duties of the township treasurer by such sexton.

The duties and functions of a township treasurer consist principally of his being primarily the custodian of the funds belonging to the township, charged with their safe-keeping and paying the same out in the manner prescribed by law, and at all times keeping an accurate account of the receipts, disbursements and balances thereof. As a part of such duties the township treasurer is required to pay to persons employed as sextons of township cemeteries their lawful salary, wages or compensation.

It is provided, however, with reference to his paying out the funds of the township, by section 3316, G. C., as follows:

"No money belonging to the township shall be paid out by the treasurer, except upon an order signed personally by at least two of the township trustees and countersigned personally by the township clerk."

All bills are first audited and approved by the trustees and the only duty and authority of the treasurer, in respect thereto, is to pay the same upon proper order, out of the township funds and to keep an accurate account thereof. It can hardly be maintained that there is antagonism and contrariety of duties or functions in these two places upon the sole ground that the treasurer would, in such case, of necessity

pay to himself, as sexton, money from the township treasury, as his wages or salary as such sexton. No officer or person, other than the township treasurer, being authorized to pay funds out of the township treasury, it would therefore follow that the adoption of a rule which would prevent a township treasurer from paying township funds to himself, would operate as an inhibition against his receiving the compensation for the discharge of his official duties prescribed by section 3318, G. C. That is to say, the fact that a person holding both places at the same time would, of necessity, have imposed upon him the duty of paying, as township treasurer, to himself the funds of the township for services rendered in another capacity, is not of itself sufficient to render the two places incompatible under the rule above laid down. The township treasurer has no other duty or authority in relation to the sexton of a township cemetery than to pay to such sexton his wages or salary upon the order of the township trustees, countersigned by the township clerk.

I am therefore of opinion, in answer to your inquiry, that a person who is employed as sexton of a township cemetery by the directors thereof is not by reason thereof disqualified to hold, at the same time, the office of township treasurer.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1463.

COMMISSIONERS OF ROAD DISTRICT ORGANIZED UNDER OLD SECTION 7095, G. C.—WHEN AUTHORIZED TO SELL ROAD BUILDING MACHINERY UNDER CASS HIGHWAY LAW.

A road district organized under old section 7095, G. C., et seq., and which is the owner of road building machinery, may sell such machinery provided the indebtedness of such district is greater than its assets, and the proceeds of such sale should be covered into the county treasury to the credit of the road district and applied towards the payment of the interest on the outstanding bonds of the district and towards the redemption of such bond at maturity.

COLUMBUS, OHIO, April 8, 1916.

HON. ARCHER L. PHELPS, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—On March 7, 1916, you addressed to me the following inquiry:

"We have in Trumbull county two road districts organized under sections 7095 et seq., known as good roads district number one, comprising Warren, Howland, Champion and Bazetta townships; good road district number two, comprising Weathersfield and Lordstown townships; also ten or twelve township road districts organized under section 7033, et seq.

"Good roads district numbers one and two, now possess road making machinery of considerable value; some of the township road districts also possess road making machinery. Good road district number one has offered to sell to the county commissioners, its road making machinery for a certain specific consideration; the county commissioners are in need of road making machinery, and desire to purchase this machinery at a price which they consider advantageous.

"Section 303 of the Cass highway law among other matters, provides as follows:

" 'When all obligations existing at the time of the taking effect of this act have been fully met and complied with, such organization or organizations

shall cease to exist, and all property or funds of such organization or organizations shall be and become a part of the road fund of the county in which such organization or organizations exist.'

"Under the language above quoted, the legislature has attempted to transfer the title to all funds and property of these road districts to the county, 'when all obligations existing at the time of the taking effect of this act have been fully met and complied with.' Inasmuch as these road districts have outstanding bonded indebtedness which will run for fifteen or twenty years, it would seem that the road districts are not, at this time, obliged to turn over their machinery and property; however, if this language is to be construed so as to require of the road district, as a present duty, the turning over of this machinery, it would follow that the county commissioners have no right to purchase the same. On the other hand, if the road district is not required to turn over this machinery for fifteen or twenty years to come, I can see no reason why the county commissioners cannot now legally purchase this machinery from the road district.

"Some doubt as to the constitutionality of the provisions of section 303 above quoted would seem to be raised by the reasoning of the supreme court in the case of The State ex rel. Grant v. Sayre, auditor of Franklin county, 89 O. S., page 351, at pages 363 and 364.

"In my opinion, that part of section 303 above quoted, does not take effect until all of the bonded indebtedness of the road district has been paid, which in the present case will take fifteen or twenty years.

"I am further of the opinion that the attempt of the legislature to transfer the property of the road district to the county is unconstitutional, for the reasons stated in the case of State ex rel. Grant v. Sayre. I have therefore concluded that the county commissioners have the right to expend county money in the purchase of this road making machinery."

Under date of April 1, 1916, in response to my request for additional information, you advised me as follows:

"I find that good roads district number one, organized under section 7095, et seq., of the General Code, has outstanding bonds in the aggregate sum of $287,000.00. This road district owns two steam road rollers, two tank wagons and one road machine, all valued at about $1,500.00, and has on hand to the credit of the road repair fund about $18,000.00; the road construction fund is practically exhausted.

"Good roads district number two, organized under section 7095, et seq., of the General Code, has outstanding bonded indebtedness in the aggregate sum of $181,000.00. This road district owns one road roller and one wagon, valued at about $1,500.00. There stands to the credit of the repair fund of this district the sum of about $9,000.00. I understand that the construction fund is practically exhausted."

You refer in your communication of March 7th to township road districts organized under old section 7033, G. C., et seq., but you limit your question to road districts organized under old section 7095, G. C., et seq., and the opinion herein expressed is, therefore, to be taken as applying only to road districts of the latter class.

Under the facts set forth in your communications, the question upon which my opinion is desired may be stated as follows:

"May a road district, organized under old section 7095, G. C., et seq., and which is the owner of road building machinery, sell such machinery to

the county commissioners, provided the bonded indebtedness of such road district is greater than all its assets, including construction and repair funds on hand or levied and in process of collection, and the value of the road building machinery owned by it."

A question bearing upon the one submitted by you was considered by this department in opinion No. 1439, rendered to Hon. Aldrich B. Underwood, prosecuting attorney of Medina county, on the 30th day of March, 1916, in which opinion it was held that a road district, organized under the old section 7095, G. C., et seq., was not authorized, after the going into effect of the Cass highway law, to contract any new obligation or obligations for the construction or repair of additional roads, or the maintenance or repair of roads already improved, but that the provision of section 303 of the Cass highway law referred to by you in your communication of March 7, 1916, to the effect that the funds of an organization of this character shall be and become a part of the road fund of the county in which the road district existed, is not by its terms effective until all obligations existing at the time of the taking effect of the Cass highway law have been fully met and complied with, and that where the outstanding indebtedness exceeds in amount the funds of the district, such funds should be left in the custody of the county treasurer, and applied toward the payment of the interest on the outstanding bonds of a district and toward the redemption of such bonds at maturity. No question can arise as to the right of county commissioners to purchase road building machinery, since this power is expressly conferred upon them by section 7200, G. C., while road commissioners appointed under old section 7095, G. C., et seq., were not expressly authorized by the sections in question to sell equipment belonging to the district, yet in view of the fact that the purchase of road building machinery by such road commissioners was expressly authorized by the former law, and inasmuch as such road commissioners are now stripped of the authority to incur the obligations that would be necessarily incurred in the use of such machinery I am of the opinion that where the debts of a road district of this character exceed the amount of its funds, plus the value of its equipment, such road commissioners are not only authorized to sell any road building machinery belonging to the district, but also that it is the duty of the road commissioners to take such action, and that the proceeds of such sale should be covered into the county treasury to the credit of the road district, and applied toward the payment of the interest on the outstanding bonds of the district and toward the redemption of such bonds at maturity.

I, therefore, concur in the view expressed by you that under the facts stated the commissioners of the road district in question are authorized to sell the road building machinery of the district to the county commissioners of Trumbull county. The facts presented by you, like those presented by Mr. Underwood, do not require any consideration of the validity of the provision to the effect that when all the obligations of a road district of this character, existing at the time of the taking effect of the Cass highway law, have been fully met and complied with, the property and funds of such road district shall be and become a part of the road fund of the county in which such district exists, for the reason that such provision can have no application under the particular facts set forth by you.

I am enclosing for your information a copy of the opinion rendered to Mr. Underwood and referred to herein.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1464.

TOWNSHIP TRUSTEES—DIVISION OF TOWNSHIP INTO CERTAIN NUMBER OF ROAD DISTRICTS—DISTRICTS MAY BE CHANGED BY PRESENT OR SUCCEEDING BOARD—REDISTRICTING SHOULD BE MADE BEFORE SUPERINTENDENTS ENTER INTO ROAD DRAGGING CONTRACTS FOR CURRENT YEAR.

The action of a board of township trustees in dividing a township into a certain number of road districts, and in fixing the boundaries of such districts is not binding upon a succeeding board of trustees, or, indeed, upon the board taking such action, so as to prevent a subsequent redistricting of the township, which redistricting may or may not include a change in the number of districts. A board of township trustees desiring to redistrict a township for road purposes should act before the township highway superintendent or superintendents, as the case may be, have entered into road dragging contracts for the current year, and, failing to act before that time, would not have authority in redistricting the township to divide a road dragging district in which a contract for dragging had been made for the current year but in establishing new road districts would, under such circumstances, be required to fix the lines of the new road districts along the lines of established dragging districts.

COLUMBUS, OHIO, April 11, 1916.

HON. HUGH F. NEUHART, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR SIR:—I have your communication of March 7, 1916, which reads as follows:

> "After the township trustees, prior to January 1, 1916, have made one district of the township, and appointed a highway superintendent therefor under section 75 of the Cass highway law, may the new trustees who took office January 1, 1916, redistrict the township, making two districts, and give one district to the old superintendent, and appoint a superintendent for the other district?
>
> "After the township trustees, prior to January 1, 1916, have made four districts in a township, and appointed a highway superintendent for each district under section 75 of the Cass highway law, may the new trustees who took office January 1, 1916, redistrict said township, making two districts and appoint new superintendents for the new districts?"

Section 75 of the Cass highway law, referred to by you, being section 3370, G. C., provides that for the purpose of the Cass highway law, there shall be in each township, not less than one nor more than four road districts, as the township trustees may determine, which districts must include all the territory in the township. The section in question does not contain any express provision to the effect that the trustees may, at any time, redistrict a township and increase or decrease the number of districts. On the other hand, the section does not contain any language indicating an intent upon the part of the legislature to deny to boards of township trustees the power and authority to redistrict a township or to increase or diminish the number of districts. To my mind, the reasonable and sensible construction, and the one which must be adopted, is that the action of the board of trustees of a township, in dividing the township into a certain number of road districts, and in fixing the boundaries of such districts, is not binding upon a succeeding board of trustees or, indeed, upon the board taking such action so as to prevent a subsequent redistricting of a township, which redistricting may or may not include a change in the number of districts. The above statement is subject to one qualification that will be later explained.

In opinion No. 1448, rendered to you on April 4, 1916, I advised you that a board of township trustees may, at any time, terminate the tenure in office of a township highway superintendent by appointing a successor and that such action will be effective and will terminate the authority of the former appointee as soon as his successor, so appointed, has qualified. The situation presented by your present inquiry s somewhat analogous to that covered by the opinion above referred to, and in conformity with the holding of that opinion I advise you that where a board of township trustees has taken action constituting the entire township a road district and has appointed a township highway superintendent for such district, said board of township trustees, or a succeeding board, may thereafter redistrict the township and divide the same into two road districts, appointing a township highway superintendent for each district. One of the township highway superintendents so appointed may or may not be the former superintendent, as may be determined by the trustees. Where a board of township trustees has divided a township into four districts and appointed a township highway superintendent for each district, such board of trustees, or a succeeding board, may thereafter redistrict the township and reduce the number of road districts thereof from four to two and appoint new township highway superintendents for the districts so created, which action will terminate the tenure in office of the former superintendents. Both of the above statements are subject to a qualification hereinbefore referred to and which grows out of the provisions of section 3375 and 3377, G. C., to the effect that the township highway superintendent shall divide the graveled and unimproved public roads of his district into road dragging districts and shall, on or before the fifteenth day of February in each year, contract with a person to drag the roads of each district for that year. A board of township trustees desiring to redistrict a township for road purposes, should act before the township highway superintendent or superintendents, as the case may be, have entered into road dragging contracts for the current year, and failing to act before that time, would not have authority in redistricting the township to divide a road dragging district in which a contract for dragging had been made for the current year, but in establishing new road districts would, under such circumstances, be required to fix the lines of the new road districts along the lines of established dragging districts. In other words, after road dragging contracts have been made for a year, it would not be permissible for a board of township trustees to interfere with the carrying out of such contracts by dividing a road dragging district and placing part thereof in one road district and part in another.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1465.

PUBLIC LIBRARY—TOWNSHIP TRUSTEES ARE NOT AUTHORIZED TO PURCHASE REAL ESTATE UPON WHICH TO ERECT A BUILDING FOR A LIBRARY—SEE SECTIONS 3403 AND 3404, G. C.

Township trustees are not authorized under the provisions of sections 3403 *and* 3404, *G. C., to purchase real estate upon which to erect a building for a public library.*

COLUMBUS, OHIO, April 11, 1916.

HON. ROGER D. HAY, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—I have your letter of February 23, 1916, submitting the following inquiries:

> "1. Have the township trustees the right to purchase a lot upon which will be built a public library?
>
> "If so, have they the right to levy a tax as provided by sections 3403 and 3404 of the General Code, for the purpose of purchasing this lot?
>
> "2. If the above questions should be answered in the affirmative, have the township trustees the right to issue bonds in anticipation of the collection of the tax as above mentioned?
>
> "At the regular election held on November 2, 1915, a large majority of the electors voted in favor of the establishment of a public library to be located in Hicksville township.
>
> "I have looked into the proposition vary carefully and find only one case which is in any wise applicable to this case. I refer you to the cause found in 14 O. D. (N. P.) 239, William M. Douglass v. Washington T. Porter, et al."

Sections 3403 and 3404 of the General Code, to which you refer in your foregoing inquiry, provide for a submission of the question of establishing a library in any township to the voters thereof. The concluding provisions of section 3404 aforesaid, which are pertinent to your inquiry, are as follows:

> "If a majority of the electors voting at such election vote in favor thereof, the trustees may, annually, levy upon all the taxable property of such township a tax not exceeding one mill on the dollar valuation thereof, to be applied to the establishment and maintenance of a library, and the procuring of a suitable room or rooms therefor."

It is further provided in the succeeding section 3405, G. C., that the township trustees shall appoint three trustees of such library, and confer upon said trustees such authority as may be necessary to render a library so established of public utility. The library shall be conducted and cared for under such rules and regulations as the library trustees prescribe. In the remaining sections of the chapter in which the foregoing sections are found there appears to be no further statutory provisions in any manner controlling or directing either the trustees of the township or the library trustees in the matters specified in your inquiry. The provisions of section 3404 aforesaid clearly authorize the township trustees to levy a tax upon all the taxable property of the township not exceeding one mill on the dollar valuation thereof to be applied in the establishment and maintenance of a library and the procuring of a suitable room or rooms therefor.

It is well settled that township trustees may exercise only those powers expressly

conferred by statute or such as are necessarily to be implied from those granted in order to enable them to perform the duties imposed upon them.

Trustees v. Miner, 26 O. S., 452-456.
Marion Township v. Columbus, 12 O. D., 557.

The power expressly delegated to township trustees under the sections aforesaid is to establish and maintain a library, to provide a suitable room or rooms therefor and to levy a tax of one mill on the dollar valuation of all taxable property in such township. It would seem, therefore, to be the purpose of the legislature as evidenced by said laws to make the establishment of a library a matter of gradual accomplishment and it is clear that their duty in this respect is a continuing one. There is, however, no provision for the creation of any fund with which such trustees may purchase real estate and erect a library building thereon. If such action by the trustees was intended by the legislature it is a necessary conclusion that such provision would have been made. Manifestly the term "room" or "rooms" may not be extended so as to include a lot or real estate. A room is a space or apartment enclosed by walls. While real estate may include a room, a room does not include real estate. There is then no express grant of power in the foregoing section to purchase a lot or real estate upon which a library building may be erected.

If the power to purchase a lot could be said to be implied from the power to procure a room, it would necessarily follow that the grant of a greater power must be implied from the grant of a lesser one. It is a familiar rule of statutory construction that an express grant may not be enlarged by implication and that when the means for the exercise of a granted power are specified, all other means must be excluded. In the statute under consideration the primary purpose to be accomplished is the establishment of a library. This is the main object and purpose of the law under consideration. As a means whereby to accomplish this purpose the trustees are further authorized to procure a room and to levy a tax of a certain amount. In so far as the activities of the trustees may go in respect to the matters covered by these provisions, such provisions must be held to be exclusive.

In view of these considerations I am of the opinion that trustees are not authorized under the sections named in your inquiry to purchase a lot for the purpose of erecting thereon a public library. This necessarily disposes of your second inquiry, but in that connection the fact that no express provision is made for the issuing of bonds whereby to create a fund for the purchase of a lot and the erection of a building must also be considered in connection with the determination of the right to purchase real estate in the first instance.

Inasmuch as you state in your letter that the establishment of said library was approved by the voters of the township in question at the November election in 1915 the foregoing observations and conclusions are made without reference to section 3295 G. C., as amended, 106 O. L., 536, Under the provisions of this section bonds may be issued by township trustees for any of the purposes "authorized by law for the sale of bonds by townships or by municipal corporations for specific purposes and for the purpose of providing funds to pay the township's share of the cost of any improvement made under an agreement with the county commissioners when not less than two of said trustees by an affirmative vote and by resolution deem it necessary, and the provisions of law applicable to municipal corporations with reference to the limitations upon the amount of bonds to be issued and for the submission of the question of their issuance to the voters, shall extend and apply to the trustees of townships. The specific purposes for which municipal corporations may issue bonds, and to which reference is made in said section, are found in section 3939, G. C., as amended, 106 O. L., 537. Among the purposes named in said section 3939 are those of the purchase

of real estate with a building or buildings thereon to be used for public purposes and the establishment of public libraries.

It has been held by this department in several opinions, however, that township trustees do not acquire, under the provisions of section 3295, G. C., the power to issue bonds for all the purposes for which a municipal council may issue bonds under favor of said section 3939, G. C., but that such power exists only as to such purposes which independent of section 3939, G. C., constitute township purposes. In other words, section 3939 of itself does not authorize township trustees to undertake one of the activities for which bonds may be issued as therein provided, but authority must be found in some statute other than section 3939 to pursue and undertake the given purpose, and the intention of section 3939 is merely to confer the power under certain limitations to borrow money for the purposes authorized by other sections. As the legislature has not expressly conferred upon township trustees the authority to purchase real estate for township libraries and has not given the trustees by any general grant of power authority to purchase or condemn real estate for the erection of public buildings, I am of the opinion that said section 3295 does not furnish any authority to the trustees to purchase a lot or real estate for the erection of a township library.

It is my opinion, therefore, that there is no statutory authority in township trustees to purchase a lot upon which to build a public library.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1466.

APPROVAL, RESOLUTION FOR ROAD IMPROVEMENT, WILLIAMS COUNTY.

COLUMBUS, OHIO, April 11, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of April 10, 1916, transmitting to me for examination final resolution relating to the West Unity-Montpelier road, petition No. 3091, I. C. H. No. 303, in Williams County.

I find this resolution to be in regular form and am returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1467.

INSURANCE—ADJUSTMENT OF FOREIGN INSURANCE COMPANY'S TAX—WORD "PREMIUM" DOES NOT INCLUDE ASSESSMENT RECEIPTS—INTERPRETATION OF SECTIONS 5432 AND 5433, G. C.

The word "premiums" as used in sections 5432 and 5433, G. C., does not include assessment receipts.

COLUMBUS, OHIO, April 11, 1916.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Under date of December 21, 1915, you certified to this department The Bankers Life Company, of Des Moines, Iowa, as being delinquent for the tax for the year 1914, under the provisions of section 5433 of the General Code, in the sum of $15,264.16, which amount represents two and one-half per cent. of $610,566.46. Upon receipt of such certification I duly notified The Bankers Life Company of the fact that it was charged as delinquent in the above sum of $15,264.16.

Prior to that time The Bankers Life Company had sent to the treasurer of state a check for $7,852.31, being two and one-half per cent. of $314,092.58, and being the amount for which they claimed they were legally liable, and accompanying said check was a letter to the following effect:

"DES MOINES, IOWA, December 16, 1915.

"RUDOLPH W. ARCHER, *Treasurer of State, Columbus, Ohio.*

"DEAR SIR:—I enclose license tax statement from the insurance department of your state for the license tax of 2½ per cent. on premiums received by this company in such state during the year 1914, under 5433, G. C.

"This company, prior to October 1911, was a Mutual Assessment Life or Mutual Protection Life Insurance Company, operating in your state as such up to that time, and then amended its charter so as to write only level premium insurance thereafter, but clothed by our statute and amendment with the duty of carrying out the original assessment or mutual protection contracts, and each year since such change this company has returned upon the blank furnished for the annual report for your state, after No. 27, on page 7:

" '1st. The amount of level premium insurance received, less the deductions stated.

" '2nd. By interlineation, immediately thereafter, the amount of its assessment receipts for such previous year (as the law of several states require that the amount of assessment receipts be also reported, although not subject to the license tax).'

"In the blanks furnished by the department for the business of the year 1913 and theretofore (on page 7), interrogatory No. 27 appears before and above the heading:

'EXHIBIT OF PREMIUMS FOR TAXATION PURPOSES.'

but in the printed form for the report for 1914 it appears after such heading. The accountant, without noticing this wrote immediately after No. 27 as he had in former years:

" '1st. The amount received as premiums.

" '2nd. The amount received as collections from the assessment contracts' but by reason of the change in the location of the heading with reference to No. 27 both statements now came under that heading, and naturally enough the accountant at the insurance department added the two as the

basis for computing the 2½ per cent. license tax without noticing that a part of the amount consisted of collections on the old assessment contracts, thereby computing a 2½ per cent. license tax on the whole amount of $610,-566.46, being the aggregate receipts from premiums and the collections from assessment contracts, instead of upon the $314,092.58, the amount received as premiums.

"The correct license tax should have been 2½ per cent. upon the pre-premiums, or $7,852.31.

"I enclose you herewith a photograph of that portion of the 1913 and 1914 reports so that you can see readily how the error occurred because of the change of position of the heading with reference to the inquiry No. 27, and from which I admit the inadvertence was mainly on our part by our not noticing the change, and placing the assessment collections under No. 27 under the heading:

'EXHIBIT OF PREMIUMS FOR TAXATION PURPOSES.'

which naturally led the department to certify up the tax on the whole amount without noticing that a portion of it was not taxable.

"We had a conference with the superintendent of insurance and assistant attorney-general as to how to correct the error; their idea was that the statute was new and had not yet received either judicial or departmental construction, but the superintendent read me the opinion of the attorney-general, from which it seemed that in his view, after the tax is certified to your office, that you have no discretion to correct errors, but only to certify the tax over to the attorney-general as certified to you. If, however, after further discussion a different view should obtain, we of course would be very glad to have you make the correction.

"At the suggestion of both the superintendent of insurance and attorney-general we are mailing you herewith our check for the correct amount, that is for 2½ per cent. upon the premiums, being $7,852.31, so as to show our desire to pay the correct amount within the specified time. Of course I do not know that you will feel that you can retain this, but I am anxious to show our good faith and to avoid any penalties or interest.

"I am sending copy of this letter to the superintendent of insurance and one to the attorney-general's office, as I suppose between us at the proper time there will be no difficulty in making this correction.

"We are willing and anxious to do anything we can to correct the error, and will greatly appreciate any aid you can give.

"Yours very truly,

"BANKERS LIFE COMPANY.

"By I. M. EARLE,

"Vice President and General Counsel."

The blank form for the report of the company during the year 1913 and the form for said report during the year 1914 were different, in this, to wit: That item No. 27 included in the blank form of report in 1913 was entirely omitted from the form of said report in 1914, and item No. 28 as set forth in the form for 1913 was numbered "27" in the form of report for 1914.

In the blanks furnished by the department for the report of business during the year 1913 item 27 was as follows:

"27. Premiums collected or secured in cash and notes, or credits without any deduction for losses, dividends, commissions or other expenses.....$200,023.56."

and inserted in ink directly under that item was the following:

"Assessments received.....$330,248.64."

Under the general heading "Exhibit of Premiums for Taxation Purposes" item 28 appeared as follows:

"28. Gross premiums collected or secured in cash and notes, or credits without any deductions for losses, dividends, surrender values, return premiums, commissions or other expenses, or considerations paid or received for reinsurance.....$200,023.56."

and that was the amount upon which the company paid the two and one-half per cent that year.

As before stated, item 27, which was under the general heading "Business in Ohio During 1913," was omitted from the form the following year, and under "Exhibit of Premiums for Taxation Purposes" what was item 28 in the report for the previous year became item 27. In that report appeared the following:

"27. Gross premiums collected or secured in cash and notes, or credits without any deductions for losses, dividends, surrender values, return premiums, commissions or other expenses, or considerations paid or received for reinsurance.....$314,092.58."

and there was inserted in ink the following:

'Assessments received on assessment certificates..... $296,473.88."

and the tax assessed for the year 1914 was computed on the sum of the above two items whereas the year before it was computed solely on the amount received less assesments received on assessment certificates.

I am clearly of the opinion, that it is manifest upon the face of the reports, that the computations for the years 1913 and 1914 are different, and that it was merely a clerical error so far as the company is concerned.

There is, however, the question of whether or not the computation made for the year 1914, or the computation made for the year 1913, is the correct one. In other words, whether under sections 5432 and 5433, G. C., the company should have been assessed not only upon the premiums received from level premium policies, but also on the amounts received by way of assessment from those policies which the company had issued prior to the amendment of its charter changing it from an assessment company to a level premium company.

Section 5432, G. C., provides in part as follows:

"Every insurance company incorporated by the authority of another state or government, in its annual statement to the superintendent of insurance, shall set forth the gross amount of premiums received by it from policies covering risks within this state during the preceding calendar year, without deductions for commissions, return premiums, considerations paid for reinsurance or any deductions whatever. * * *"

Section 5433, G. C. (106 O. L. 502), provides as follows:

"If the superintendent of insurance finds such report to be correct, prior to the month of November, in each year, he shall compute an amount of two and one-half per cent. of the balance of such gross amount after deducting such return premiums and considerations received for reinsurances as shown by the next preceding annual statement and charge them to such company as a tax upon the business done by it in this state for the period shown by such annual statement, which amount shall be paid by each company to the treasurer of state in the month of November next succeeding. All taxes so collected shall be credited to the general revenue fund of the state."

Insofar as the question here involved is concerned, section 5433, G. C., contains practically the same language that it did prior to amendment. The question arises then as to what is meant by the term "gross amount of premiums;" or, in other words, what is meant by the term "premium." Is "premium" to be considered as the amount received not only from level premium policies but by way of assessment as well? An examinaion of the statutes, I believe, will disclose in what manner the term is used.

Sections 5432 and 5433 were, prior to the codification of 1910, included in one section and known as section 2745 of the Revised Statutes. I shall not endeavor to trace the statute from its earliest form, but will begin with the statute as it is found enacted in 86 Ohio Laws, page 274. Said statute reads in part as follows:

"Sec. 2745. Every agency of an insurance company incorporated by the authority of any other state or government shall return to the auditor of each county in which such company does business, or from which it collects *premiums*, on or before the first day of May, annually, the amount of the *gross premium receipts* of such agency for the previous calendar year, in such counties, etc."

This act was passed April 12, 1889.

Said section 2745 was amended on April 19, 1893, and reads as follows (90 Ohio Law, page 201):

"Sec. 2745. Every agency of an insurance company, and every agency of any company or association transacting business in this state, under the provisions of section 3630c, of the Revised Statutes, incorporated by the authority of any other state or government, shall return to the auditor of each county in which such company or association does business, or from which it collects *premiums* or *assessments*, on or before the first day of May, annually, the amount of the *gross premium and assessment receipts* of such agency for the previous calendar year in such counties, etc."

Section 3630c, of the Revised Statutes, referred to above, was the section authorizing foreign insurance companies doing an assessment business to do business in this state.

Said section 2745 was again amended on March 27, 1894, as follows (91 Ohio Laws, page 91):

"Sec. 2745. Every agency of an insurance company incorporated by the authority of any other state or government shall return to the auditor of each county in which such company does business, or from which it collects *premiums*, on or before the first day of May, annually, the amount of the *gross premium receipts* of such agency for the previous calendar year in such counties, etc."

It appears, therefore, that the legislature of this state did not regard the word "premiums" as including amounts received by way of assessment.

In 1898 the supreme court of Ohio had before it the case of State ex rel. National Life Association (of Hartford, Conn.) v. Matthews, superintendent of insurance, 58 O. S., page 1. The said case was a suit in mandamus. The action was brought against the superintendent of insurance to compel him to issue to two companies, respectively a certificate authorzing each of them to transact the business of life insurance within this state under section 3630e, Revised Statutes, said section being the one which prescribed the conditions upon which life insurance companies organized under the laws of other states were permitted to transact the business of life insurance on the assessment plan within this state. The superintendent of insurance declined to issue the certificate, on the ground that the method of insurance pursued by the companies, respectively, was not according to the assessment plan as set down in the statutes.

On page 3 of the opinion, the court, Bradbury, J., states as follows:

> "In respect of the National Life Association of Hartford, Conn., the refusal to grant a certificate rests on the additional ground that it had refused to pay the taxes, which the superintendent of insurance claimed were assessable against it by virtue of section 2745, Revised Statutes."

And on page 4, the court states the following:

> "However, as the taxes claimed to be due from the relator rests on the assumption that it is not engaged in the business of insurance on the assessment plan, the right to revoke its license must stand or fall upon the determination of that question. *If it is transacting business on the assessment plan,* then the taxes in controversy were not legally assessable against it, and its refusal to pay them would not justify a revocation of, or refusal to renew, its license."

It seems, therefore, that the supreme court has likewise given an interpretation to the word "premiums" in accord with what appears to have been the legislative intent as disclosed by the legislative history hereinbefore set forth.

In view of the legislative history of the act, and the interpretation placed upon it by the supreme court, I am of the opinion that The Bankers Life Company is not required to pay the two and one-half per cent. on the amount received by it by way of assessment on policies written by it prior to the time that it changed from an assessment company to a level premium company, and that, therefore, the said company is chargeable only on the sum of $314,092.58, which would amount to $7,852.31, and I would therefore suggest that your duplicate charge against the company should be changed to read in the above amount.

I have written the company requesting it to send me a check for the sum of $7,852.31 to cover the charge against it.

Respectfully,

EDWARD C. TURNER,
Attorney-General.

1468.

THE SUPERIOR BUILDING AND LOAN COMPANY—COMPLAINT OF JAMES A. DEVINE, INSPECTOR OF BUILDING AND LOAN ASSOCIATIONS.

a. The facts stated in the communication of the inspector of building and loan associations fails to show that The Superior Building and Loan Company is in an unsound condition; therefore, suit to secure its dissolution and wind up its business cannot be maintained under section 687 of the General Code.

b. Although the facts stated in the communication of the inspector of building and loan associations and admitted by the president of The Superior Building and Loan Company show said company has conducted its business contrary to law, suit is not authorized under section 686, G. C., because the inspector of building and loan associations failed to give the written notice to the board of directors of said company as provided in said section.

COLUMBUS, OHIO, April 11, 1916.

MR. JAMES A. DEVINE, *Inspector of Building and Loan Associations, Columbus, Ohio*

DEAR SIR:—Referring to your letter of June 28, 1915, relative to the affairs of The Superior Building and Loan Company, of Cleveland, Ohio, and certain practices followed by it in the conduct of its business; also your subsequent letters of November 17, 1915, and January 24, 1916, containing supplemental information gathered from examinations and investigations made by your department on November 5, 1915, and on January 5, 1916, respectively; also the several conferences which you have had with myself and Mr. Jones, of my office, I beg leave to advise you as follows:

The object of your several letters is to induce me as attorney-general of Ohio to bring suit in a proper court under the provisions of sections 686 and 687 of the General Code to secure a revocation of the charter of The Superior Building and Loan Company and its dissolution and the winding up of its business.

The building and loan business, like banking, is founded largely upon credit, and the confidence of the public in the stability and integrity of any building and loan association is an asset without which it cannot successfully operate. Therefore, the mere bringing of a suit, such as you request me to institute against The Superior Building and Loan Company, would in all probability accomplish the destruction of the company even though the judgment of the court might be in its favor.

I have, therefore, considered it my duty, as I informed you in our conference at my office a few weeks ago, to make further investigation of the charges made in your letters, and before bringing suit to give the officers of the company an opportunity to be heard in explanation of the charges, especially in view of statements and assurances made to me and to yourself also, as I am informed, by Honorable Cyrus Locher prosecuting attorney of Cuyahoga county, and one of the directors of said company.

To this end, Mr. Jones, special counsel in my office, on March 30th, visited the offices of the company in Cleveland and carefully questioned its officers relative to the method in which its business was being conducted. The questions asked by him were freely answered and all information requested was fully and immediately furnished.

The material information gained by this investigation, as well as the general attitude of The Superior Building and Loan Company to your department, is clearly set forth in a communication which I yesterday received from Mr. Max Greenhut, its president, which I here quote in full, together with the exhibits attached.

> "We are writing you pursuant to conversation with your Mr. Jones on the 31st ult.

"At the outset we wish to state that the department of building and loan associations has made an examination of the Superior Building and Loan Company at various stated periods. The department at no time suggested any changes or notified either the board of directors or any of its officers regarding any irregularity or indicating, in any manner, that the Superior Building and Loan Company was not operated in the full satisfaction of the department. A short time ago, however, it came to the attention of a few of the officers that the department had been criticizing the Superior Building and Loan Company and that it had referred the matter to the attorney-general's office and requested the attorney-general to institute court proceedings. This information first came to members of our board of directors through members of the board of directors of other loan associations in this city. Immediately, thereupon, we called upon the department of building and loan associations and requested to know concerning the complaints, and offered to comply with any suggestions made or any directions given by the department, but wished to be informed of any irregularity. Upon being informed that the department had sent a report to the attorney-general's office, we immediately called on your Mr. Jones and expressed to him that the Superior Building and Loan Company was willing and ready at all times to follow any suggestions or directions given either by the building and loan department or by the attorney-general's office; that it was the wish of the board of directors to do business strictly according to law and that we had a right to know in what respect the Superior Building and Loan Company was not operated to the satisfaction of either department.

"We further indicated to your Mr. Jones that we felt keenly in the matter that any such information should come to the Superior Building and Loan Company through outside sources; in fact, through the board of directors of the other loan associations.

"We further wish to repeat that at no time have any of the officers of the board of directors of the Superior Building and Loan Company received any notice whatsoever in compliance with section 686 of the General Code.

"Your Mr. Jones has handed to us a letter addressed to yourself by Mr. Devine, dated January 24, 1916. We will answer criticisms in the order in which they are set forth in said letter:

" 'First. The financial statement, "Exhibit A," shows, under liabilities, capital stock subscriptions amounting to $938,900.00, which is expressly forbidden by section 8727 of the General Code, which provides that "no such corporation shall advertise a larger amount of capital stock than has actually been subscribed and paid in.'

"We fully agree with the department as to the correctness of this statement and are glad to have the department call such matters to our attention. This is clearly the function of the department. This circular designated by the department 'Exhibit A' was issued by the president of the company soon after December 15, 1915.

"In December, 1915, the board of directors requested the officers of the Superior Building and Loan Company to engage Nau, Rusk and Sweringen, public accountants, to audit the books of the company. Said books were audited and report made by said public accountants at the close of business December 15, 1915. In the report, said accountants set forth capital stock subscriptions $938,900.00 as liabilities. We do not wish to criticize the public accountants, but merely offer an explanation as to how the president came to issue said statement. The officers of the company assure your department that this mistake will not be made again. We attach herewith exhibit for your inspection.

" 'Second. The item of "surplus" in liabilities amounting to $1,758.67 was the entire earnings of the company up to this date, including $371.52 due and uncollected interest, which under section 8725 should not be included in the earnings. The statement of liabilities showing net surplus of $611.23 would then be in excess of that amount by $371.52, and in addition to this, section 9671, requires that 5% of the net earnings shall be set aside each year to the reserve fund, which would further decrease this socalled surplus.'

"We admit that the item of 'surplus' should not include any amount of due and uncollected interest. Mr. Arighi, an examiner for the building and loan association department, on February 29, 1916, found that a much smaller amount than $371.52 of due and uncollected interest was included in the item of 'surplus' and no doubt has so reported to his department. By mistake, the following items of due and uncollected interest were included in said items of 'surplus' in the liabilities, and said items have since been paid:

"Loan No. 1 ..... $ 7.69, paid March 27, 1916;
"Loan No. 7 ..... 20.00, paid December 27, 1915;
"Loan No. 9 ..... 4.66, paid January 15, 1916;

at any rate, all of the $371.52 has been collected and paid into the treasury. Any part of that that was not paid in at the time the report was made, was an error, and we are glad that the department called our attention to it, and the company assures your department that the same error shall not happen again.

"At the suggestion of Mr. Arighi, examiner, the entire amount of $611.23 was all placed in the reserve fund, and is there now, and all of the $371.52 has been paid into the treasury as noted above. If this does not meet with the approval of the department, please advise at once or have the department advise us with directions, and we will follow directions explicitly.

" 'Third. Under resources, the item "due from borrowers," amounting to $440.42, consists of due and uncollected interest amounting to $371.52 and over paid amounts to borrowers of $69.80. This due and uncollected interest should have no place in the resources or assets.'

"Mr. Arighi, examiner, suggested that the item $371.52, or so much of said item as had not been paid, should be entered as due from borrowers for uncollected interest in the column of 'assets,' and that items like the $69.80 over-paid to borrowers should be entered in the same column. All these items, however, have been paid as above noted, including the $69.80.

"We respectfully request for our information, how due and collected interest and over-paid amounts to borrowers should be entered in the future. We wish to follow the directions explicitly.

" 'Fourth. Under the title "Our growth," is shown the amount of deposits beginning with the February and ending with December 29, to the total amount of $78,451.10, while on the opposite page, under liabilities, their deposits are shown as $2,339.00. The term "deposits," as used by the building and loan associations, means savings accounts, either certificate of deposit or pass-book deposits. In this instance, without any explanation, it would seem that this is intended to convey to the public that they are receiving money upon deposits, and in this way the growth of the association is shown under the title of "deposits." '

"The department is entirely right that the term 'deposits,' as used by the building and loan association, means either certificates of deposits or pass-book deposits; of course, in advertising, a distinction should be made

between money paid on stock and on deposits proper. This was not done for the purpose of deceiving anyone, but because the officers did not make the legal distinction. This matter has been taken care of and will not happen again.

" 'Fifth. The letter, "Exhibit B" has a note under the signature of "The Superior Building & Loan Company," which reads: "Superior Building & Loan Company stock shall be 105. Your directors passed on this December 5th. Only a limited number of shares are left at 103." '

"A resolution passed by the board of directors, December 6, 1915, reads: 'Moved by Mr. Lingenfelter, seconded by Mr. Devay, that the premium on the stock in the Superior Building & Loan Company be raised from $3.00 to $5.00 per share when $1,500,000 in stock has been subscribed. Carried.'

"We had understood that the law provides, and your predecessor, Mr. Hogan, in various opinions had approved, that building and loan associations had the legal right to provide for a premium or membership fees. To our personal knowledge, every loan association in this city sells its stock at a premium.

"If any change is to be made in this respect, please send instructions and directions and the board of directors will gladly comply with the same.

" 'Sixth. Exhibit C, advertisement in the Cleveland Plain Dealer of December 30, 1915, advertises an earning greater than has been earned and is for the purpose of making the sale of stock.'

"The expenses of the company during the year 1915, while the company was in its promotion period, were largely paid from the fund which is in the hands of a trustee, and the expenses of transacting the business of the company itself, exclusive of the promotion charges, of course, were very light. We assure your department that this was not done for the purpose of deceiving the public, but we know of no way in which a building and loan company can start unless it has a fund to pay the initial expense. The salary of the president, the secretary and the stenographer, and other expenses, were paid out of said fund because the larger part of its time and services were devoted to selling stock and in advertising the company. The president of the company, for instance, is drawing a salary of $4,800.00 per year, but receives no extra compensation such as commissions for selling stock. To our personal knowledge, one of the building and loan associations of this city provides for a premium of two, and later on, of three dollars, per share, and paid the sales agency selling the stock $1.25 per share commission on the part that was sold at $2.00 premium and $1.75 on the part that was sold at a premium of $3.00 per share. This sales agency, as the department knows, drew upwards of $20,000.00 in a single year. The board of directors of the Superior Building and Loan Company considered it better business to pay the president of the company a salary rather than commission, and had the president of the Superior Building and Loan Company been paid at the same rate as the parties mentioned above, instead of having drawn at the rate of $4,800.00 per year, he would have made upwards of $10,000.00. We had understood that the operations of this company that we refer to above, has been approved by the department, but we wish to assure that we are ready and willing to comply with the directions of the department, but, of course, do not expect to be discriminated against.

"The board of directors of the building and loan company think that the company is on such a basis that we can well afford to pay all the operating expenses out of the earnings. The board of directors did not take any definite action, but we are willing to do so as soon as we secure the approval

of your department; in fact, the board is anxious to strictly comply with your directions.

"At the directors' meeting of the Superior Building and Loan Company, on January 10, 1916, Mr. Greenhut was re-elected president for the ensuing year; Sam Bernsteen was elected treasurer for the ensuing year and L. E. Weitz was elected secretary for the ensuing year. At the same meeting it was moved and seconded that the salary of the officers be continued the same as before. We attach exhibit 'No. 2,' which has the approval of the board of directors, if satisfactory to your department. The board of directors, after going over the matter very carefully, concluded that the fair amounts to be paid out of the earnings for operating expenses of the Superior Building & Loan Company are as follows:

"Salary of the president	$75.00 per month;
"Rent	51.50 per month;
"Telephone bill	3.00 per month;
"Incidentals	15.00 per month;
"Stenographers-bookkeeper	30.00 per month;
"Treasurer	4.17 per month;

making a total of $178.67 per month to be paid out of the earnings of the company. We are of the opinion that the balance of the expenses in connection with the said company should be paid out of the other funds available, because the work is in the nature of building up and promoting the company. We should be very glad to have you indicate whether such an arrangement is satisfactory to your department, and if it is, the board of directors will immediately pass the said resolution herewith attached.

"Because of the criticism of advertising that has been done by this company, resolution marked 'Exhibit 3,' hereto attached, will be passed by the board of directors as per your suggestion.

"Assuring you that this company is ready, willing and anxious to have the co-operation and the help of the state department, and to explicitly comply with all your directions, we remain,"

"EXHIBIT 1.

"STATE OF CONDITION OF

"THE SUPERIOR BUILDING AND LOAN COMPANY,

"CLEVELAND, OHIO.

"At the close of business, December 15, 1915.

"RESOURCES.

"Mortgage loans	$85,121.00
"Due on stock subscriptions	880,905.01
"Dues from borrowers	440.42
"Cash	7,736.67
"Total	$974,203.10

"LIABILITIES.

"Capital stock subscriptions		$938,900.00
"Deposits		2,339.00
"Due to borrowers—building account		27,352.87
"Borrowed money		5,000.00
"Surplus	$1,758.67	
"Less—interest and dividends paid	1,147.44	
		611.23
"Total		$974,203.10

"CERTIFICATE.

"We have examined the books of account and records of THE SUPERIOR BUILDING & LOAN COMPANY from the commencement of business to December 15, 1915, and we hereby certify that the attached statement of condition correctly reflects the financial condition of The Superior Building & Loan Company at December 15, 1915, as shown by the books.

"Respectfully submitted,

"(Signed) NAU, RUSK & SWERINGEN,

"Certified Public Accountants.

"EXHIBIT 2.

"RESOLUTION.

"Moved by Mr. ....., seconded by Mr. ....., that the following items representing the operating expenses of The Superior Building & Loan Company be paid out of the earnings of the company:

"Salary of the president	$ 75.00 per month
"Rent	51.50 per month
"Telephone bill	3.00 per month
"Incidentals	15.00 per month
"Stenographer-bookkeeper	30.00 per month
"Treasurer	4.17 per month
	"$178.67 per month

making a total of $178.67.

"EXHIBIT 3.

"RESOLUTION.

"Moved by Mr. ....., seconded by Mr. ....., that no money shall be expended by The Superior Building & Loan Company for the purpose of advertising until the subject matter of said advertising shall have had the approval of either the board of directors or of a committee of three having been appointed by the said board of directors.

"THE STATE OF OHIO,
CUYAHOGA COUNTY. } ss.

"Max Greenhut, being first duly sworn, upon his oath, deposes and says:

"That he is the duly elected, qualified and acting president of The Superior Buildng and Loan Company, organized and doing business under and by virtue of the laws of the state of Ohio; that he has been the president of said company since April, 1915; that the state department of building and loan associations, from time to time, has had its inspectors examine the affairs of the said company, and that at no time had the said department indicated or suggested that The Superior Building and Loan Company was not conducted in a regular way, and in accordance with the laws of the state; that the first information that came to the president of the company, or to any of its officers or directors that the business of said company was not conducted to the satisfaction of the state department, came through certain directors of other building and loan associations of this city, and that neither its officers nor the board of directors have at any time been notified, and are now so notified, as provided for in section 686 of the General Code of Ohio; that The Superior Building and Loan Company, its officers and directors, have at all times been ready, willing and anxious to strictly comply with the laws of the state providing for the regulation of building and loan associations and with the rules of the department.

"(Signed) MAX GREENHUT.

"Sworn to and subscribed in my presence by the said Max Greenhut, as president of The Superior Building and Loan Company, this 4th day of April, A. D., 1916.

"(Signed) JOHN J. BABKA,
"Notary Public."

The charges which you make in your letters against The Superior Building and Loan Company may be grouped into two classes or heads, viz.:

a. That the affairs of the company are in an unsound condition, and that the interests of the public demand its dissolution and the winding up of its business.

b. That the company is conducting its business contrary to law, or that it is failing to comply with the law.

With reference to the first class of charges, section 687 of the General Code provides as follows:

> "If, upon examination, the inspector of building and loan associations finds that the affairs of a domestic building and loan association are in an unsound condition, and that the interests of the public demand its dissolution and the winding up of its business, he shall so report to the attorney general, who shall institute the proper proceedings for that purpose."

The financial statement of The Superior Building and Loan Company at the close of business on January 5, 1916, secured by your examiners, and set forth in your letter of January 24, 1916, does not disclose that the company is insolvent, or that it is in an unsound condition. The funds received from the sale of its stock (at par value) are unimpaired, and a small surplus is reported. It cannot, therefore, be maintained that the affairs of the company are in an unsound condition, which is essential to justify the bringing of suit under section 687 of the General Code.

Your charge that the company is in an unsound condition, as I understand it is based upon the fact that it has advertised and paid dividends not warranted by the amount of its earnings. This payment of dividend was made possible by the practice followed by the company of paying all its operating expenses from a fund created by the sale of its stock at a premium of $3.00 per share, which $3.00 premium was specifically authorized by all the stockholders in the subscription contract to be used in

"the payment of any and all obligations incurred in the furtherance of organization and operation of said company, and the sale of said stock, etc."

Although the use of this $3,00 premium to pay promotion and stock-selling expenses is probably permissible and lawful, because such expenses are clearly distinct and separable from the usual and proper operating expenses of a building and loan company, yet the practice of paying all operating expenses from such premium fund thereby enabling the company to pay what might be termed a false dividend, is unlawful and should not be tolerated, especially in view of sections 9672, 8724, 8726 and 8727 of the General Code, which are as follows:

"Section 9672. All expenses of such association shall be paid out of the earnings only, and so much of the earnings as may be necessary must be set aside each year for such purpose. But charges incident to a loan, if paid by the borrower, shall not be deemed a part of the current expenses.

"Section 8724. Directors of a corporation organized under the laws of this state shall not make dividends except from surplus profits arising from its business.

"Section 8726. In order to ascertain the surplus profits from which a dividend may be made, in the account of profit and loss there shall be charged and deducted from the actual profits—

"1. All ordinary and extraordinary expenses, paid or incurred, in managing the affairs and transacting the business of the corporation.

"2. Interest paid, or then due or accrued, on debts it owes.

"3. All losses of the corporation. In computing its losses, debts owing to it which have been due without prosecution, or interest paid thereon, for more than one year, or upon which judgment was recovered, but has been more than two years unsatisfied, and on which also for that period, no interest was paid, shall be included.

"Section 8727. No such corporation shall advertise a larger amount of capital stock than actually has been subscribed and paid in, nor advertise a greater dividend than actually has been earned and credited or paid to its stockholders or members."

This practice is designed and operates to work a fraud on the public in inducing the public to purchase stock. Although I am clearly of the opinion that it is gross violation of the law, it does not necessarily follow that it produces an unsound financial condition in The Superior Building and Loan Company within the meaning of said section 687.

I therefore advise you that a suit under section 687 of the General Code, above quoted, could not successfully be maintained upon the facts furnished by you or which I have since secured from my own investigations.

As to the second class of charges, viz.:

"That the company is conducting its business contrary to law, or that it is failing to comply with the law."

Section 686 of the General Code, provides as follows:

> "If, upon examination, the inspector of building and loan associations finds any domestic association conducting its business in whole or part contrary to law, or failing to comply therewith, he shall notify the board of directors of such association of such fact in writing. If, after thirty days, such illegal practices or failure continues, he shall communicate the facts to the attorney-general, who shall cause proceedings to be instituted in the proper court to revoke the charter of such association."

It is freely admitted by the written communication from Mr. Greenhut, president of The Superior Building and Loan Company, herein quoted, that the company has followed certain of the practices charged in your letters, especially that of paying its operating expenses from the premium described above, thereby enabling it to declare a dividend when no lawful dividend had in fact been earned.

It is further stated, under oath, however, that although examinations have been made from time to time during the past year by your department, of the affairs of The Superior Building and Loan Company, that no notice was given, or even suggestion made to the company or to any of its officers, by your department, that "it was not conducted in a regular way and in accordance with the laws of the state." This statement is not controverted in the several letters which I have received from you and I have since been orally advised by you that it is correct.

Under section 686 of the General Code, above quoted, you are required to give written notice to the board of directors of a building and loan company found engaging in "such illegal practices or failure" and a period of thirty days of grace is given such company within which to discontinue its unlawful act before you are authorized to communicate the fact to the attorney-general.

The fact that such written notice has been given, and the thirty days' time has expired, and that the illegal practices or failure continue, are jurisdictional to the bringing of a suit under said section and must be alleged in a petition filed by me under its provisions. It would therefore be useless for me to bring such a suit until you have fully conformed to the requirements of the section.

I therefore advise you that under said section 686 of the General Code, no cause of action exists against The Superior Building and Loan Company, and that I cannot comply with your request to bring suit.

I suggest that you indicate to The Superior Building and Loan Company, whether or not the corrections proposed by it in the communication from its president, herein quoted, will be satisfactory to your department. If they are not satisfactory, or in event that you hereafter find the company violating the law you should comply with the provisions of section 686 of the General Code, relating to giving written notice, and then at the expiration of thirty days, if the practices complained of are not discontinued, you should communicate the fact to the attorney-general, as provided in said section.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1469.

APPROVAL, TRANSCRIPT OF REFUNDING BOND ISSUE, HENRY COUNTY, OHIO.

COLUMBUS, OHIO, April 12, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Refunding bonds of Henry county, Ohio, in the amount of $20,000.00, viz.:

"1. $10,000.00 to refund bonds issued for road improvement Nos. 78 and 79, in Flat Rock township, being ten bonds of $1,000.00 each.

"2. $10,000.00 to refund bonds of road improvement Nos. 72 and 77 of Harrison township, being ten bonds of $1,000.00 each.

I have examined the transcript of the proceedings of the county commissioners and other officers of Henry county, relative to the issuance of the above refunding bonds, also the bond and coupon form attached, and I find the proceedings and forms regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted, when executed by the proper officers, will, upon delivery, constitute valid and binding obligations of Henry county and of said townships.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1470.

APPROVAL, TRANSCRIPT OF BOND ISSUE FOR VILLAGE OF LINDEN HEIGHTS, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, April 12, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the village of Linden Heights, Franklin county, Ohio, in the amount of $10,000.00, being twenty bonds of $500.00 each, issued for the purpose of paying the village's portion of the cost of improving certain streets."

I have examined the transcript of the proceedings of the council and other officers of the village of Linden Heights, relative to the issuance of the above bonds, also the bond and coupon form attached, and I find that the same are regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of the village of Linden Heights.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1471.

COUNTY COMMISSIONERS—EXPENSES INCURRED IN ARREST AND RETURN OF PERSON CHARGED WITH FELONY WHO HAS FLED FROM STATE—STATE LIABLE FOR EXPENSES ONLY WHEN REQUISITION HAS BEEN PROPERLY MADE FOR SUCH PRISONER.

The amount allowed by the county commissioners for expenses incurred in the arrest and return of a person charged with felony who has fled from the state, can only be included in the cost bill and paid by the state when such arrest and return is made on the requisition of the governor or on the request of the governor to the president of the United States. Sections 2491, 13722 *and* 13726, *G. C., construed.*

COLUMBUS, OHIO, April 13, 1916.

HON. C. H. CURTISS, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR:—Your letter of April 6, 1916, requesting my opinion, received and is as follows:

> "Last term in our court of common pleas Colonel Smith of this county was indicted for burglary and larceny. He was afterwards located by the writer in the army at Toronto, Canada. Arrangement was made through the army officials and constable at that place that he should be returned to this country by the warrant which was in the hands of our sheriff. Accordingly the deputy sheriff of this county went to Toronto and carried out the arrangement returning with the prisoner without extradition papers. Mr. Smith entered a plea of guilty and is now confined in the penitentiary at Columbus.
>
> "As usual in these cases the clerk certified the entire cost for payment by the state. However, Mr. Donahey, auditor of state, has refused to pay the mileage of the sheriff to and from Toronto, for the reason as he states in a letter to our sheriff under date of March 16th, 'Owing to the fact that this prisoner was arrested outside of the state without first obtaining the requisition papers as required in such cases.' "

Section 13722, G. C., provides as follows:

> "Upon sentence of a person for a felony, the officers, claiming costs made in the prosecution, shall deliver to the clerk itemized bills thereof, who shall make and certify, under his hand and the seal of the court, a complete bill of the costs made in such prosecution, including the sum paid by the county commissioners for the arrest and return of the convict on the requisition of the governor, or on the request of the governor to the president of the United States. Such bill of costs shall be presented by such clerk to the prosecuting attorney, who shall examine each item therein charged, and certify to it if correct and legal."

Section 13723, G. C., provides for execution against the property of the defendant for the costs of prosecution and section 13724, G. C., provides that if the defendant is sentenced to imprisonment in the penitentiary or to death and no property has been levied upon the sheriff shall deliver "such certified cost bill" with the convict to the warden of the penitentiary. These sections undoubtedly refer back to the cost bill made up and provided in section 13722, G. C., supra.

Section 13726, G. C., provides as follows:

> "When the clerk certifies on the cost bill that execution was issued according to the provisions of this chapter, and returned by the sheriff 'no goods, chattels, lands or tenements, found whereon to levy,' the warden of the penitentiary shall allow so much of the cost bill and charges for transportation as is correct, and certify such allowance, which shall be paid by the state."

The cost bill here referred to is likewise undoubtedly the cost bill made up under the provisions of section 13722, G. C., and it is to that section that we must look to determine what costs are to be paid from the state treasury. An examination of said section 13722, G. C., shows that it is only "the sum paid by the county commissioners for the arrest and return of the convict on the requisition of the governor or on the request of the governor to the president of the United States," which may be included in the cost bill, and it necessarily follows that the cost of the arrest and return of the convict from another state or county without such requisition or request cannot be included in the cost bill which is presented to the warden of the penitentiary and allowed by him for payment out of the state treasury.

That this is the proper interpretation of said section 13722, G. C., is shown by an examination of the history of this legislation. This particular provision originated in an act of the general assembly passed April 26, 1871 (68 O. L., 75), which provides as follows:

> "An act to authorize county commissioners to pay expenses to persons authorized to pursue after fugitives from justice charged with crime, upon the requisition of the governor.
>
> "Section 1. Be it enacted by the general assembly of Ohio, that the county commissioners of any county in this state are hereby authorized, when any person or persons charged with a felony, and shall have fled to any other state, and the governor shall have issued his requisition for such person or persons so charged with such offense, to pay to the officer or other person designated in such requisition by the governor to execute the same, all necessary expenses in the pursuit and returning of said person or persons so charged with crime as aforesaid, out of the county treasury, as to them may seem just.
>
> "Section 2. That in case of the arrest, return and conviction of such fugitive or fugitives, the expenses incurred in the pursuit and return of such fugitive or fugitives, shall be charged by the clerk of the court in the cost bill, and paid out of the state treasury as in other criminal cases."

Section 1 of this act became section 920 of the Revised Statutes of 1880 and appears therein substantially the same form.

Section 2 of said act became a part of section 7332 of the Revised Statutes of 1880, making said section read as follows:

> "Upon the sentence of any person for felony, the officers claiming costs made in the prosecution shall deliver to the clerk itemized bills thereof, who shall make and certify, under his hand and the seal of the court, a complete bill of the costs made in the prosecution, including any sum paid by the county commissioners for the arrest and return of the convict on the requisition of the governor, which, if correct, the judge of the court shall allow and certify."

By an act passed April 17, 1882 (79 O. L., 100), the general assembly amended

said two sections by an act entitled "an act to amend sections 920 and 7332 of the Revised Statutes of Ohio," and by this act said sections assumed substantially the form in which they now appear as sections 2491 and 13722, G. C.

So that it is clear that the "sum paid by the county commissioners for the arrest and return of the convict on the requisition of the governor, or on the request of the governor to the president of the United States," as set out in section 13722, G. C., is the allowance provided for in section 2491, G. C., which section provides as follows:

> "When any person charged with a felony has fled to any other state, territory or country, and the governor has issued a requisition for such person, or has requested the president of the United States to issue extradition papers, the commissioners may pay from the county treasury to the agent designated in such requisition or request to execute them, all necessary expenses of pursuing and returning such person so charged or so much thereof as to them seems just."

I am therefore of the opinion that there is no authority to include in the cost bill prepared under section 13722, G. C., and presented to the warden with the prisoner and allowed by him under section 13726, G. C., any sum paid by the county commissioners for the arrest and return of a person charged with felony where said arrest and return is not made "on the requisition of the governor or on the request of the governor to the president of the United States."

Respectfully,
EDWARD C. TURNER.
Attorney-General.

1472.

HEALTH OFFICER IN VILLAGES—HOLDS OFFICE UNTIL SUCCESSOR IS APPOINTED AND QUALIFIED.

A health officer appointed by council under section 4404, G. C., holds his office until his successor is appointed and qualified, in the absence of affirmative action by council.

COLUMBUS, OHIO, April 13, 1916.

State Board of Health, Columbus, Ohio.

GENTLEMEN:—Your letter of February 24, 1916, asking my opinion, received and is as follows:

> "We have in times past, many inquiries in regard to whether or not a health officer, appointed to serve in place of a board of health in a village, shall serve until his successor has been legally appointed and qualified. Our opinion has been that the office of health officer is of such nature that it is continuing in character, and that the law does not contemplate that the office shall become vacant in the event that an appointment or reappointment is not made on or before the expiration of the term of office of the original appointee. I shall be glad to have an opinion from you that will answer this question for us."

The appointment of health officers in villages is provided for by secti n 4404 G. C., as follows:

"The council of each municipality shall establish a board of health, composed of five members, to be appointed by the mayor and confirmed by council, who shall serve without compensation, and a majority of whom shall be a quorum. The mayor shall be president by virtue of his office. But in villages, the council, if it deems advisable, may appoint a health officer, to be approved by the state board of health, who shall act instead of a board of health, and fix his salary and term of office. Such appointee shall have the powers and perform the duties granted to or imposed upon boards of health, except that rules, regulations or orders of a general character, and required to be published, made by such health officer, shall be approved by the state board of health."

The duty imposed upon council to provide for a board of health or a health officer was held to be mandatory in the case of State ex rel. Miller v. Council of Massillon, 2 O. C. C. (N. S.), 167. That the legislature intended that there should be a board of health or a health officer in every municipality in the state is indicated not only by the wording of section 4404, G. C., supra, that "the council of each municipali y shall establish" the same, but by the further provisions of section 4405, G. C., which provides as follows:

"If a municipality fails or refuses to establish a board of health or appoint a health officer, the state board of health may appoint a health officer therefor and fix his salary and term of office. Such health officer shall have the same powers and duties as health officers appointed in villages in place of a board of health, and his salary as fixed by the state board of health, and all necessary expenses incurred by him in performing the duties of a board of health shall be paid by and be a valid claim against such municipality."

That a health officer appointed under the provisions of section 4404, G. C., supra is an *officer,* is established by many authorities. Mechem, in his work on Public Offices and Officers, section 1, defines a public office as:

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

The above definition has been quoted with approval by the courts of Ohio in a number of cases. In the case of State ex rel. v. Wilson, 29 O. S., 347, in holding that the position of medical superintendent of a hospital for the insane was an office within the meaning of section 4 of article XV of the constitution, the court, after observing that it is impossible to give a definition of an office that will be applicable to all offices, indicated that a public officer is one who has a duty concerning the public, and that he is not the less a public officer because his authority is confined within limits.

See also State ex rel. v. Anderson, 45 O. S., 196.

In the case of State ex rel. v. Brennan, 49 O. S., 33, the court made the following observation:

"It is not important to define with exactness all the characteristics of a public office, but it is safely within bounds to say that where by virtue of law a person is clothed, not as an incidental or transient authority but for such time as denotes duration and continuance with independent power to control the property of the public, or with public functions to be exercised in

the supposed interest of the people, the service to be compensated by a stated yearly salary and the occupant having a designation or title, the position so created is a public office."

See also,

State ex rel. v. Jennings, 57 O. S., 415;
State ex rel. v. Hunt, 84 O. S., 143, 23 Am. & Eng. Encyc. of Law, 2nd Edition, 322.

Section 4413, G. C., provides:

"The board of health of a municipality may make such orders and regulations as it deems necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement or suppression of nuisances. Orders and regulations not for the government of the board, but intended for the general public, shall be adopted, advertised, recorded and certified as are ordinances of municipalities, and the record thereof shall be given, in all courts of the state, the same force and effect as is given such ordinances,"

all of which powers are conferred upon health officers appointed thereunder by section 4404, G. C., supra.

Council having acted under section 4404, G. C., and determined to have a health officer rather than a board of health, the office of health officer is a continuing office and could only be discontinued by some action of council either by the appointment of a board of health or an affirmative declaration of their intention to discontinue the office, and a person appointed to said office is within the terms of section 8 G. C., which provides as follows:

"A person holding an office of public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws."

I am therefore of the opinion that the office of health officer, having once been created by council, under authority of section 4404, G. C., and filled by appointment, does not become vacant in the event that an appointment or reappointment is not made on or before the expiration of the term of office of the original appointee, but that such an appointee holds his office until his successor is appointed and qualified or until some affirmative action is taken by council as above outlined.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1473.

BOARD OF EDUCATION—THE WORD "TAXATION" AS USED IN SECTION 4759, G. C., DOES NOT INCLUDE THE TERM "ASSESSMENT"—STREET IMPROVED ON WHICH SCHOOL PROPERTY ABUTS—NOT ASSESSABLE—BOARD WITHOUT AUTHORITY TO PAY FOR SUCH IMPROVEMENT OUT OF ITS CONTINGENT FUND OR LEVY TAX FOR SUCH PURPOSE.

The term "taxation" as used in the first part of section 4759, G. C., does not include the term "assessment," the latter term being confined to local impositions upon property for the payment of the cost of public improvements in its immediate vicinity, and levied with reference to special benefits to the property assessed. Lima v. Cemetery Association, 42 *O. S.*, 128.

No part of the cost of the improvement of a street on which school property, used exclusively for public school purposes, abuts can be assessed against such property, and the board of education of the school district in which such property is located is neither required nor authorized to pay any part of the cost of said improvement out of its contingent fund, or to levy a tax for said purpose.

COLUMBUS, OHIO, April 13, 1916.

HON. CHARLES T. STAHL, *Prosecuting Attorney, Wauseon, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your letter in which you state that property in the village of Wauseon, owned by the board of education of the village school district, and used exclusively for public school purposes, has been assessed for the improvement of a street on which said property abuts. The question having been raised as to the authority of the village to assess said property the same as other property abutting on said street, for its proportionate part of the cost of said improvement, you ask to be advised as to whether the word "taxation," as used in section 4759, G. C., includes the word "assessment." Section 4759, G. C., provides as follows:

> "Real or personal property vested in any board of education shall be exempt from taxation and from sale on execution or other writ or order in the nature of an execution."

Section 2 of article XII of the constitution provides:

> "Laws shall be passed taxing by uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, and also all real and personal property according to its true value in money, * * *. But burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, public property used exclusively for any public purpose, * * *, may, by general laws, be exempted from taxation * * *."

The legislature in the exercise of the authority conferred upon it by the foregoing provision of the constitution enacted the above provision of section 4759, G. C., exempting school property from taxation. In pursuance of this same authority the provisions of sections 5347 to 5365-1, both inclusive, of the General Code, were enacted.

By provision of section 5349, G. C., public school houses and the grounds attached to such buildings necessary for the proper occupancy, use and enjoyment thereof and not leased or otherwise used with a view to profit, are exempted from taxation. By provision of section 5350, G. C., lands used exclusively as graveyards, or grounds for burying the dead, except such as are held by a person, company or corporation

with a view to profit, or for the purpose of speculating in the sale thereof, are exempt from taxation.

In the case of Lima v. Cemetery Association, 42 O. S., 128, which was an action to enforce an assessment against certain property owned by said cemetery association, and used exclusively as a graveyard and ground for burying the dead, said assessment being for a proportionate part of improving an alley on which said real estate abuts, the statement of facts showed that said Lima cemetery association was a corporation not for profit. Under the provision of section 5350, G. C., the above described property was clearly exempt from taxation, yet the court held that said property was not exempt from the special assessment above referred to, the first and third branches of the syllabus reading as follows:

> "1. In a general sense, a tax is an assessment, and an assessment is a tax; but there is a well recognized distinction between them, as assessment being confined to local impositions upon property for the payment of the cost of public improvements in its immediate vicinity, and levied with reference to special benefits to the property assessed.
>
> "3. An incorporated cemetery association is not relieved from an assessment for a street improvement by a statutory provision exempting its lands from taxation, *such exemption being regarded as confined to taxes as distinguished from local assessments.*"

Other cases might be cited in which the courts have made this same distinction between the term "taxation" as used in the above provisions of the constitution and statutes, and the term "assessment" as applied to a local imposition upon property for the payment of the cost of a public improvement in the immediate vicinity of said property, and levied with reference to the special benefits to said property.

I am of the opinion, therefore, in answer to your question, that the term "taxation" as used in the above provision of section 4759, G. C., does not include the term "assessment" as above defined and as applied in the case of the improvement referred to in your inquiry.

In view of this conclusion the question still remains as to whether the aforesaid property, owned by the board of education of Wauseon village school district, and used exclusively for public school purposes, may be subject to an assessment for the aforesaid improvement, or whether the board of education of said village school district can be required to pay any part of the cost of said improvement out of its contingent fund, or to levy a tax for said purpose.

You will observe that under provision of said section 4759, G. C., real or personal property vested in any board of education is exempt from sale on execution or other writ or order in the nature of an execution. In this connection I again call your attention to the case of Lima v. Cemetery Association, supra. Under provision of section 3571, R. S., as in force at the time said case was before the court, a company or association, incorporated for cemetery purposes, had the right to purchase, appropriate or take by gift, or devise and hold not exceeding one hundred acres of land, which, by the further provision of said statute, was exempted "from execution, from taxation, and from being appropriated to any other public purpose if used exclusively for burial purposes, and in no wise with a view to profit." The court, recognizing said provision of said statute, held in the fourth branch of the syllabus that:

> "While the lands of an incorporated cemetery association, so far as exempted, cannot be sold to pay an assessment for the improvement of a street, the municipal corporation may enforce the assessment by such remedies as the statute and courts of equity afford."

In the case of City of Toledo v. Board of Education, 48 O. S., 83, the court evidently had in mind its interpretation of the above provision of section 3571, R. S., in the case of Lima v. Cemetery Association, supra, and, in holding that school property is not liable to assessment for a street improvement, it is manifest that the court based its decision on the above provision of section 4759, G. C., that "real or personal property vested in any board of education shall be exempt * * * from sale on execution or other writ or order in the nature of an execution," applying said provision of said statute the same as it applied the similar provision of section 3571, R. S.

It was further held by the court, however, that a judgment could not be rendered against the board of education for the payment of said assessment out of its contingent fund to be raised under provision of section 3598 of the Revised Statutes as then in force, and that the amount of said assessment should be paid out of the general fund of the city.

The authority of the council of a municipal corporation to levy a tax for this purpose is found in section 3837, G. C., which provides:

> "When the whole or any portion of an improvement authorized by this title passes by or through a public wharf, market space, park, cemetery, structure for the fire department, water works, *school building*, * * * the council may authorize the proper proportion of the estimated costs and expenses of the improvement to be certified by the auditor or clerk of the corporation to the county auditor, and entered upon the tax list of all taxable real and personal property in the corporation, and they shall be collected as other taxes."

In the case of Board of Education v. Bowland, 15 O. D., 334, decided January 4, 1905, the court held that school property was not subject to assessment for street assessments prior to the passage of what was then known as the new school code being the act of the general assembly as found in 97 O. L., 334. The court did not pass on the question as to whether the division of the contingent fund into separate funds by said act of the general assembly will render valid such assessments levied since the passage of said act.

In the case of Board v. Volk, 72 O. S., 469, decided by the supreme court May 23, 1905, the court in commenting on the authority of a board of education to levy taxes, in its opinion at page 479 quoted the above provision of section 4759, G. C. (3973 R. S.), and said:

> "Legislative control and limitation is further shown in section 3958, Revised Statutes, which provides that 'each board of education shall annually, at a regular or special meeting to be held between the third Monday in April and the first day of June, determine by estimate, as nearly as practicable, the entire amount of money necessary to be levied as a contingent fund for the continuance of the school or schools of the district, after the state funds are exhausted, to purchase sites for school houses, to erect, purchase, lease, repair and furnish school houses, and build additions thereto, *and for other school expenses.*' "

Section 3958, R. S., was amended in 98 O. L., 9, and as now found in section 7586 G. C., provides as follows.

> "Each board of education, annually, at a regular or special meeting held between the third Monday in April and the first Monday in June, shall fix the rate of taxation necessary to be levied *for all school purposes*, after the state funds are exhausted."

I do not think that the levy of a tax by the board of education of the village district referred to in your inquiry for the payment of a proportionate part of the cost of the improvement in question can be said to be a levy "for school purposes" within the meaning of the above provision of section 7586, G. C., and I find no provision in the statute charging said board of education with the duty of paying said part of the cost of said improvement out of its contingent fund or authorizing said board to make a tax levy for said purpose.

In view of the foregoing provisions of the statutes and the authorities cited I am of the opinion that no part of the cost of the improvement in question can be assessed against the school property referred to in your inquiry and that the board of education of Wauseon village school district is neither required nor authorized to pay any part of the cost of said improvement out of its contingent fund or to levy a tax for said purpose.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1474.

BANKS AND BANKING—DEPOSITS IN FORM OF CHECKS—WHEN MADE BY COUNTY TREASURER IN COUNTY DEPOSITORY—HOW INTEREST IS TO BE COMPUTED—"DAILY BALANCES."

When deposits in the form of checks are made by the county treasurer in a depository duly designated by the county commissioners under authority of section 2715 et seq., G. C., and in compliance with the requirements of said sections, and the account of said county treasurer is credited by said depository with such deposits, the same go to make up daily balances on the respective days on which said deposits are made and the average of such daily balances, as shown by the statement which the depository bank is required to furnish the county treasurer on the first day of each month, by provision of section 2737, G. C., determines the basis for the computation of interest provided for in said section.

COLUMBUS, OHIO, April 13, 1916.

HON. WILLIAM H. VODREY, *Prosecuting Attorney, Lisbon, Ohio.*

DEAR SIR:—I have your letter of March 24th which is as follows:

"The county treasurer of this county has requested an opinion with reference to the construction of section 2737, General Code, providing for the computation of depository interest and we therefore request an opinion from your department.

"The treasurer has had some dispute with the county depository in regard to the manner of computing interest on the county deposits. We maintain that this should be figured on the daily average balance as shown by the statement which the bank furnishes the treasurer on the first day of each month.

"The depository insists that the county should be credited with interest on checks only after the checks deposited have been collected. The depository allows no interest on checks deposited until two days after said checks are deposited with the bank, they making this arbitrary rule which if they saw fit could be extended to five or even ten days. If their point is well taken the county treasurer would have no accurate check upon depository interest.

"The difference in the manner of figuring between the county treasurer and the depository causes a discrepancy in the depository interest account of about $25.00 per month.

"The writer believes that this question is of sufficient general interest to have your opinion in the matter."

I am in receipt of a letter under date of March 21st, from R. W. Firestone, president of the Firestone bank, located at Lisbon, which has been designated by your county commissioners as the active depository for the funds of said county. Mr. Firestone's letter is as follows:

"Our bank is the depository of the active funds of Columbiana county, Ohio, and our relations with the county treasurer are very amicable. There is a difference of opinion however regarding the computation of interest upon these funds which has led us both to seek your official opinion, and I have been asked to put the matter before you.

"The difference hinges upon the meaning of the words 'daily balances' as contained in the statute. The treasurer maintains that the deposits made by him each day are a part of the balance of that day; the bank, on the other hand, claims that all items other than cash are received for collection and are not to be regarded as a part of the treasurer's balance until collection is made (two days later). It is an undeniable fact that it takes two days to collect a check drawn upon a bank in another town whether this be done by direct mailing or through the clearing house functions of a city correspondent bank. Wherefore, it is the custom of all such banks to postpone credit for two days in figuring the interest upon the accounts of other banks. Some banks charge all customers a fee for collecting checks in compensation for the expense involved and the use of the money; and the practice is just. A more equitable plan, however, with no profit or loss to either, is to withhold the payment of interest until the checks are collected and can be made to earn interest.

"The rule the treasurer would follow leads to collection of double interest, as seen in the transfer of funds by check from an inactive to the active depository. The check can not be collected through the usual banking channels until the second day after it is deposited; wherefore for two days the proceeds would be earning interest in both depositories. This is manifestly inequitable and shows the absurdity of the rule.

The following is a summary of our bank's position:

"(1) The phrase 'daily balances' in the statute (2737) signifies cash balances rather than items received by the bank for collection;

"(2) The Firestone bank receives the county treasurer's checks on other banks for collection;

"(3) These checks become a part of the treasurer's cash balance the second day after their deposit;

"(4) To withhold interest upon checks until they are collected and can earn interest is equitable to both parties.

"Will you kindly let us have your opinion in the above matter?"

Section 2737, G. C., one of the statutes governing the deposit of county funds relates to interest on daily balances in depositories of said funds and the apportionment of such interest, and provides as follows:

"All money deposited with any depository shall bear interest at the rate specified in the proposal on which the award thereof was made, *com-*

puted on daily balances, and on the first day of each calendar month or at any time such account is closed, such interest shall be placed to the credit of the county, and the depository shall notify the auditor and treasurer, each separately, in writing, of the amount thereof before noon of the next business day. All such interest realized on the money belonging to the undivided tax funds shall be apportioned by the county auditor to the state, cities, city school district and county taxing or assessing districts in the proportion that the amounts collected for the respective political divisions or districts bear to the entire amount collected by the county treasurer for such undivided tax funds and deposited as herein provided, due allowance being made for sums transferred in advance of settlements. All interest apportioned as the county's share, together with all interest arising from the deposit of funds belonging specifically to the county shall be credited to the general fund of the county by the county treasurer. The county auditor shall inform the treasurer in writing of the amount apportioned by him to each fund, district or account."

Under the above provision of the statute it will be observed that all money deposited with any depository, active or inactive, shall bear interest at the rate specified in the proposal on which the award was made, and that such interest must be computed on daily balances.

It seems clear to my mind that when the county treasurer, acting in pursuance of the authority conferred upon him by statute, and in conformity with the terms of the contract between the county commissioners and the duly designated depository of county funds, makes a deposit with such depository, either of cash or of checks, payable to his order as treasurer of such county, and said depository bank credits his account with the amount of such deposit, the same goes to make up the balance for the day on which said deposit is made, and the average of such daily balances for the month is the basis for the computation of interest.

I appreciate the force of Mr. Firestone's argument in so far as the collection of money on checks deposited by the county treasurer is affected by the operation of the foregoing provisions of section 2737, G. C., but I am unable to agree with him to the extent of holding that the phrase "daily balances," as used in said statute, means cash balances rather than credits in the form of checks which the bank undertakes to collect.

It must be conceded, however, that a lawfully designated depository of county funds is not charged by any provision of the statute with the duty of making such collections, and could not be required to accept checks from the county treasurer and credit his account with a sum equal to their aggregate amount in the absence of a provision to that effect in the contract between the county commissioners and the depository. In other words, in the absence of such a provision in the contract, the depository might insist on the county treasurer making cash deposits rather than deposits in the form of checks, and this would place the burden of collecting the same on the county treasurer, and would deprive the county of the interest on the sum represented by said checks during the time the same are being collected.

It has been the practice, however, in so far as county depositories are concerned, for the depository bank to make such collections and credit the county treasurer with the amount represented by checks deposited, on the day on which such deposits are made. It seems to me, in view of this practice, that the bank in question should have taken this situation into consideration at the time of bidding for the county funds and should have governed its bid accordingly. In this way any embarrassment on account of loss to the bank in the respect above mentioned would be avoided.

The plan suggested by Mr. Firestone, i. e., to withhold crediting the county treas-

urer with a deposit of checks until the same are collected, is unauthorized, and the danger of the abuse of such an arrangement can readily be seen.

I am of the opinion, therefore, in answer to your question, that when deposits in the form of checks are made by the county treasurer with a depository duly designated by the county commissioners, under authority of section 2715, et seq., of the General Code, and in compliance with the requirements of said sections, and the account of said county treasurer is credited by said depository with such deposits, the same go to make up daily balances on the respective days on which said deposits are made, and the average of such daily balances, as shown by the statement which the depository bank is required to furnish the county treasurer on the first day of each month, by the above provision of section 2737, G. C., determines the basis for the computation of interest.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1475.

DAYTON STATE HOSPITAL—APPROVAL OF CERTAIN QUIT CLAIM DEEDS AUTHORIZED BY SENATE BILL No. 292, 106 O. L., 427.

Approval of quit claim deeds from Lizzie M. Davis et al., to State, and from State to Lizzie M. Davis et al., under Senate Bill No. 292, 106 O. L., 427.

COLUMBUS, OHIO, April 13, 1916.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—You have submitted to me two deeds, one a quit claim deed from Lizzie M. Davis (unmarried), Jennie F. Davis (unmarried), Annie D. Davis (unmarried), William B. Davis and Ida E. Davis, his wife, George A. Davis and Hattie M. Davis, his wife, and Robert H. Davis and Mary Kay Davis, his wife, to the state of Ohio for the premises therein described, duly executed; and the other a quit claim deed from the state of Ohio to Lizzie M. Davis, Jennie F. Davis, Annie D. Davis, William B. Davis, George A. Davis and Robert H. Davis, for the premises therein described, which deed has not been executed, and you request me to inform you whether or not such last named deed should be executed by you in its present form.

The act under which the state of Ohio is to receive the quit claim deed from the aforesaid persons, and in return is to give a quit claim deed to such persons, is found in 106 O. L., 427. In said act the governor is authorized and directed to execute and deliver to said persons, being the devisees of John S. Wead, deceased, and their assigns, a proper deed in the name of the state for the release of all right, title and interest of the state in and to certain lands therein described, being lands formerly owned by the said John S. Wead, but before the delivery of such deed the said named persons shall deliver to the state of Ohio a good and sufficient quit claim deed conveying to the state all their right, title and interest in and to certain property owned by the state and specifically described in the act.

I have examined the deed from Lizzie M. Davis, et al., to the state of Ohio, and find the same to be in proper form, and likewise the deed from the state of Ohio to said Lizzie M. Davis, et al., and find said latter deed to be in proper form.

It is proper, therefore, for you to accept the first deed and to execute the second deed, and deliver the same to the said Lizzie M. Davis, et al.

Section 8523 of the General Code provides as follows:

"All conveyances of real estate, or any interest therein, sold on behalf of the state in pursuance of law, shall be drafted by the auditor of state, executed in the name of the state, signed by the governor, countersigned by the secretary of state, and sealed with the great seal of the state. The auditor thereupon must record such conveyances in books to be kept by him for that purpose, deliver them to the persons entitled thereto, and keep a record of such delivery, showing to whom delivered, and the date thereof."

The quit claim deed from the state of Ohio to Lizzie M. Davis, et al., relinquishes certain interests which the state of Ohio has in property of the said Lizzie M. Davis, et al., and I, therefore, suggest that, in pursuance of the provisions of section 8523 supra, after the deed has been executed by you and the secretary of state, it should be delivered, together with the deed to the state of Ohio, to the auditor of state, in order that he may perform the duties required of him under said section before delivery of the deed to the persons entitled thereto.

I am returning herewith the deeds submitted.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1476.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, CITY OF PORTSMOUTH, OHIO.

COLUMBUS, OHIO, April 15, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the city of Portsmouth, Ohio, in the sum of $40,000.00, being eighty bonds of $500.00 each, issued to secure funds for the purpose of constructing and extending the waterworks system of said city."

I have examined the transcript of proceedings of the council and other officers of the city of Portsmouth, Ohio, relative to the above bonds, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted, and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of the city of Portsmouth.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1477.

COUNTY COMMISSIONERS—DUTY TO PROVIDE TEMPORARY OFFICES FOR COUNTY OFFICIALS DURING ERECTION OF NEW COURT HOUSE —LIABILITY IN CASE RECORDS ARE STOLEN OR DESTROYED.

When temporary offices must be used by county officials during the erection of a new court house it is the duty of the county commissioners to provide the same and to furnish them with reasonable equipment for the protection of records to be kept therein during said occupancy. A probate judge under such circumstances may not control the action of said commissioners in selecting an office but must occupy the one provided by them. If during his occupancy of said office his records are stolen or destroyed by fire by reason of the inadequate equipment of said office for the protection of said records, no liabilty thereby attaches to said judge if he used reasonable care to safely keep such records with the means and equipment furnished him.

COLUMBUS, OHIO, April 17, 1916.

HON. ARTHUR D. DAVIS, *Probate Judge, Eaton, Ohio.*

DEAR SIR:—I have your letter of April 4, 1916, in which you state that the commissioners of your county are about to erect a new court house upon the site of the present one and that in consequence thereof it will be necessary for all of the officers to move out of the old court house into new quarters. You further state that the commissioners have rented for the purpose of temporary offices a certain building which has no fire protection whatever. You complain that in your case the office to be furnished is without a fire-proof vault or safe and without any fire protection of any kind. After calling attention to the necessity of this protection you further state that there is a certain building, once used for a bank, in which there is a steel vault and which building you claim is almost fire proof, and for that reason and the further reason that said building will furnish offices on the ground floor which would be easily accessible to old people, you desire to move there. You then submit the following inquiries:

> "1. Can the commissioners compel me to move the people's records into an old fire trap without any protection in the way of a safe or vault?
>
> "2. Can I compel them to let me move into this other building above mentioned?
>
> "3. Years ago the commissioners of this county saw fit to expend enough of the public money to build steel vaults for the protection of the records in the recorder's office and the probate court, and now, just because we are going to erect a new building, can the commissioners place these same records in jeopardy for two years, with no protection whatever, or can I demand that they furnish me with a vault as we now have and have had for years and years?"

There are no specific provisions of statutory law covering such situations as now obtain in your county. It may be said, however, in a general way, that the duty rests upon your board of county commissioners to provide offices for the various county officials during the erection of your new court house and that such duty requires said commissioners to use ordinary care to provide offices reasonably convenient and comfortable and adequate for the transaction of public business and reasonably safe for the protection of public records and documents to be kept therein during such occupancy. The only statutory law reflecting upon the matter under consideration is found in section 2419, G. C., as amended 106 O. L., 423, as follows:

> "A court house, jail, public comfort station, offices for county officers, and an infirmary, shall be provided by the commissioners when, in their judgment, they, or any of them, are needed. Such buildings and offices shall be of such style, dimensions, and expense, as the commissioners determine. They shall provide all rooms, fire and burglar proof vaults and safes, and other means of security in the office of the county treasury, necessary for the protection of public moneys and property therein."

The foregoing section before the codification in 1910 was section 859, R. S., and then provided as follows:

> "Section 859. A court house, jail, offices for the county officers and an infirmary shall be provided by the commissioners when in their judgment the same or any of them are needed, and they shall be of such style, dimensions and expense as the commissioners determine; and they are required to provide all such rooms and fire and burglar-proof vaults and safes and other means of security in the office of the county treasury as are necessary for the perfect protection of the public moneys and property therein."

In the codification of this section the conjunctive "and" between the words "rooms" and "fire" was omitted. In the amendment of said statute aforesaid the abbreviated form was again adopted. When we consider this statute in its present form in connection with its original form and expression it does not in my opinion warrant such interpretation and construction as by its terms it should be held to make it the mandatory duty of county commissioners to furnish any office, other than the county treasurer's office, with fire and burglar proof vaults and safes.

This conclusion is further strengthened by the amendment made to section 2436, G. C., as found in 101 O. L., 135, which amendment provides:

> "And hereafter the county commissioners in the construction of all court houses and offices for county officials shall provide fire-proof vaults therein in which shall be kept all the valuable records and documents belonging to the county."

If section 2419 aforesaid imposed the duty upon county commissioners to so furnish their offices in the first instance, the enactment of the foregoing amendment was wholly unnecessary. This said amendment, however, applies to the construction of court houses and offices, and is to be considered under the facts here only as evidence of the intention and purpose of the legislature to have county records properly protected.

I am therefore of the opinion that your county commissioners must use reasonable care in selecting offices and in furnishing them with reasonably safe equipment to protect all records kept therein during their occupancy by your various county officials. This must not be taken to mean that they must provide fire and burglar proof vaults and safes, neither does it mean that they are not to provide any fire protection whatever. They must exercise their discretion in this respect in a reasonably prudent manner and if fire and burglar proof vaults are available it would certainly be the part of wisdom to procure them. If, however, they are not available, then other fire proof devices should be provided and furnished by your commissioners, such as fire proof steel filing cases or cabinets.

With these general observations and in answer to your inquiries aforesaid I must advise that you cannot control the action of the commissioners in these matters and that you will be required to occupy the offices furnished by them and to use such means for the protection of your records as they see fit to procure and furnish for your offices.

In a subsequent communication just received you direct attention to the provisions of sections 1583 and 1584, G. C., and inquire if you may not be held liable upon your official bond if you move your records by order of the county commissioners into offices provided by them which are not sufficiently equipped against fire and said records should be stolen or destroyed.

Said section 1583, to which you refer, provides as follows:

> "Section 1583. A probate court is established in each county, which shall be held at the county seat. Such court shall be held in an office furnished by the county commissioners, in which the books, records and papers pertaining to the court shall be deposited and safely kept by the judge thereof. The commissioners shall provide suitable cases for the safe keeping and preservation of the books and papers of the court, and furnish such blank books, blanks and stationery as the probate judge requires in the discharge of official duties."

and that part of section 1584 pertinent to your inquiry provides:

> "Each probate judge shall have the care and custody of the files, papers, books and records belonging to the probate office."

I am of the opinion that the provisions aforesaid of said sections only undertake to fix the degree of care which a probate judge shall use in protecting records in his office, and they do not involve him in any responsibility whatever for any loss due to the defective equipment of said office for the protection of said records. He must use the means provided by the county commissioners for the safe keeping and protection of his records. If by reason of inadequate equipment and furnishings the records are stolen or destroyed, such result is by no fault of the probate judge, and he cannot be held liable. If, however, said records should be stolen or destroyed by reason of his negligence in not using reasonable care with the means and equipment provided for their protection, in that event he would be responsible.

Permit me to suggest that a conference between you and your county commissioners might result in some arrangement satisfactory to you.

Respectfully,

EDWARD C. TURNER,
Attorney-General.

1478.

TAXES AND TAXATION—ASSIGNEES, RECEIVERS. SHERIFFS AND MASTER COMMISSIONERS REQUIRED TO LIST FOR TAXATION MONEYS, CREDITS, INVESTMENTS IN SECURITIES OR OTHER PERSONAL PROPERTY IN THEIR POSSESSION—PROPERTY SHALL BE ENTERED ON TAX LIST ON ACCOUNT OF PERSON, FIRM OR COMPANY FOR WHOM IT IS HELD.

Under provision of section 5372-1, *G. C.*, 106 *O. L.*, 247, *assignees, receivers, sheriffs and master commissioners are required to list for taxation all personal property, including moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, in their possession or control on the day preceding the second Monday of April in any year, on account of any person or persons, company, firm, partnership, association or corporation and such property shall be entered on the tax lists and duplicate in the manner provided in said section.*

If on or after said listing day in any year any such property becomes subject to the possession or control of an assignee, receiver, sheriff or master commissioner on account of any other person who was the owner thereof on said listing day, and such property has not been listed for taxation, then under provision of section 5372-2, *G. C.*, 106 *O. L.*, 248 *said property must be listed by such assignee, receiver, sheriff or master commissioner in the manner provided in said section* 5372-1, *G. C.*

COLUMBUS, OHIO, April 17, 1916.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—In your letter of March 28th you request my opinion as follows:

> "In the case of McNeill v. Hagerty, 51st O. S., 255, the court held that assignees were not required to list for taxation the moneys and other property in their possession to be distributed to the creditors of the assignors. One of the reasons given by the court was that the statute did not require assignees to list the property for taxation. Since the enactment of section 6 of the Parrett-Whittemore law, designated section 5372-1, General Code, are assignees, receivers, sheriffs and master commissioners required to list the property in their hands as trustees for the benefit of creditors or litigants.
>
> "The case of French v. Bobe, 64th O. S., 323, also has a bearing upon this question."

Section 6 of the Parrett-Whittemore law (section 5372-1, G. C., 106 O. L., 247) provides:

> "Personal property, moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, in the possession or control of a person as parent, guardian, trustee, executor, administrator, *assignee, receiver, official custodian,* factor, agent, attorney, or otherwise, on the day preceding the second Monday of April in any year, on account of any person or persons, company, firm, partnership, association or corporation, shall be listed by the person having the possession or control thereof, and be entered upon the tax lists and duplicate in the name of such parent, guardian, trustee, executor, administrator, *assignee, receiver, official custodian,* factor, agent, attorney or other person, adding to such name words briefly indicating the capacity in which such person has possession of or otherwise controls said property, and the name of the person, estate, firm, company, partnership, association

or corporation to whom it belongs; but the failure to indicate the capacity of the person in whose name such property is listed, or the name of the person, estate, firm, company, partnership, association or corporation to whom it belongs, shall not affect the validity of any assessment thereof."

Section 7 of said law (section 5372-2, G. C., 106 O. L., 248 provides:

"If, on or after the day preceding the second Monday of April in any year, any personal property, moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, become subject to the possession or control of a person as parent, guardian, trustee, executor, administrator, *assignee, receiver, official custodian*, factor, agent, attorney or otherwise, on account of any other person who was the owner thereof on said date, and such personal property has not been listed for taxation, such property shall be listed by such parent, guardian, trustee, executor, administrator, *assignee, receiver, official custodian*, factor, agent, attorney, or other representative as provided in the next preceding section."

Under the plain terms of section 5372-1, G. C., as above quoted, all personal property, including moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, in the possession or control of a person as assignee, receiver or official custodian on the day preceding the second Monday of April in any year, on account of any person or persons, company, firm, partnership, association or corporation, shall be listed by, and shall be entered upon the tax lists and duplicate in the name of such person as such assignee, receiver or official custodian, and under provision of section 5372-2, G. C., if on or after the day above referred to any such property becomes subject to the possession and control of such person as assignee, receiver or official custodian on account of any other person who was the owner on said listing day, and such personal property has not been listed for taxation, the same shall be listed by such assignee, receiver or official custodian in the manner provided in said section 5372-1, G. C.

It was clearly the intention of the legislature in enacting the foregoing provisions of the statutes to provide for the return for taxation of all personal property held at any time in any year in trust capacity or fiduciary relationship.

It will be observed that said provisions of said statutes are general in their terms in so far as the particular purpose for which the property therein referred to is held so that I do not think it can be said, that where property is held by an assignee, the same distinction may now be made as was made by the supreme court, between the case of McNeill, assignee, v. Hagerty, auditor, 51 O. S. 255, in which it was held that

"Personal property, whether in the form of moneys, bills receivable, bonds, certificates of stock, or otherwise, held by an assignee of an insolvent debtor, whose estate is being settled in the probate court, is not subject to taxation, and it is not the duty of such assignee to make return of the assets to make return of the assets of such estate to the county auditor for taxation,"

and the case of French, treasurer, v. Bobe, assignee, 64 O. S., 323, in which it was held that:

"Personal property in the possession of an assignee for the benefit of creditors of a manufacturing corporation, which is not being reduced to money for distribution among the creditors of the corporation, but is being held and operated, under the orders of the insolvency court, and at the joint request of the creditors of the assignee, in the conduct of a going business,

such business being conducted as it had been theretofore by the corporation itself, is subject to taxation, and it is the duty of the assignee to list such property for taxation."

One of the principal grounds upon which the court based its decision in the case of McNeill, assignee, v. Hagerty, auditor, supra, was that at the time said decision was rendered, neither by the constitution nor by the statute, when consideration was given to all the sections as then in force and bearing on the subject, was it made the duty of an assignee of an insolvent debtor, whose estate was being settled in the probate court, to list the property so held by him, for taxation. The court, in its opinion said:

"Nowhere is it in terms provided that the assignee shall list the property for taxation, nor is provision made for the payment of any taxes save those existing against the assignor. This omission seems to us significant when contrasted with the duty enjoined by other sections of the statute upon other trustees. By section 2734, returns must be made of the property of every ward by his guardian, 'of every estate of a deceased person, by his executor or administrator; of corporations whose assets are in the hands of receivers, by such receivers.' It is made the duty of every executor or administrator 'to apply the assets to the payment of debts in the following order: * * * Fourth, public rates and taxes, and sums due the state for duties on sales at auction.' For such payments of taxes the administrator or executor is allowed in the settlement of his accounts. The provision relating to the payment of taxes by assignees is that 'all taxes of every description assessed against the assignor upon any personal property held by him before his assignment, shall be paid by the assignee,' etc., and if we apply the familiar rule *expressio unius exclusio alterius*, it would seem that those are the only taxes, payment of which may properly be included in his accounts. * * *

"To hold that property in possession of an assignee, as in these cases, must be listed and taxes paid on it is, in effect, to hold that the creditors must be taxed twice on the same value. While the legal title to the property is in the assignee, it is so only for the purpose of facilitating the settlement of the trust. Equitably, the property is vested in the creditors. * * * It is not necessary to hold that the legislature might not include assignees in the class of trustees who are required to list property in their hands, even though duplicate taxation results; it is enough, for the disposition of the present cases, if the purpose to do so has not been expressed.

"The assignee is, in every essential particular, an officer of the court. The fund is in his hands as such, and he is bound to do with it just what the court directs. The fund, therefore, is really in the custody of the court, and, as before stated, the beneficial interest is in the creditors."

In the case of French, treasurer, v. Bobe, assignee, supra, the court, in its opinion, said:

"From a consideration of section 2, of article XII, of the constitution, respecting taxation, and of sections 2731, 2732 and 2734, Revised Statutes, relating to the same subjects, it is manifest that property thus in possession of the assignee is subject to taxation, and that it is his duty to list it for taxation, unless the same is exempt by direct provisions of law or by fair inference, from all the legislation bearing on the subject. It was the opinion of the insolvency court and of the circuit court, and is urged in argument by counsel for defendant in error, that it should be held to be ex-

empt, and that the case is ruled in favor of the assignee by the case of McNeill, assignee, v. Hagerty, auditor, 51 O. S., 255. We are of opinion that the property is not exempt, and that the case at bar is so clearly distinguishable from the case cited, that its decision is not controlled by that case. That action was an application for an injunction to prevent the auditor from enforcing against the assignee a claim for taxes, based upon a return made by the assignee, under threat to take legal steps against him for failing to make return, and looking to an attempt at distraint in case the taxes were not paid. It appeared that the entire assets in the hands of the assignee were collectible notes for property sold by him, and cash on hand, amounting in all to $25,910.90; that the debts of the assignor aggregated $65,000.00; that there could be paid creditors a dividend of between thirty and thirty-five per cent. only, and that the assets awaited an order of distribution to creditors. The assignee's claim was that the assets were in his hands as an officer of the probate court, subject to an order of distribution so soon as the same could be made, and that the beneficial interest in the property thus held was in the creditors, and that to the extent of the value of the claims of the creditors against the assignor such claims were, under the law, required to be returned for taxation by the creditors, and not by the assignee, and hence an injunction should be allowed against the auditor. This claim was sustained by the trial court and by this court. That the condition in the present case is an essentially different one, recurrence to the facts heretofore recited will abundantly show. There the indebtedness largely exceeded the value of assets, and the assignee was proceeding strictly under section 6346, Revised Statutes, and following, to reduce the assigned property to money and close out the state by a distribution of the proceeds among the creditors. He had sold all the property and held only its avails; he was neither holding the property of the assignor, or any of it, nor operating the business. Here the appraised value of the property exceeds the indebtedness. The assignee is not selling, and has not attempted to sell, any of the assigned property, but is proceeding under section 6350h, to operate the plant. That section gives authority to the court, upon the written application of three-fourths in number and amount of the creditors and upon being satisfied that it will be for the advantage of the creditors, to order the assignee to continue to carry on the business of the assignor, and, with the approval of all concerned, he has been, under the court's order, thus conducting a beer manufacturing plant for six years and over. It has been a sort of partnership affair. The corporation having ceased to do business because insolvent, and the property thus being held in trust for the benefit of creditors, they—the *cestius que trustent*—have, in effect, invested the property in a scheme to continue the business, and the assignee has advanced his own personal funds in the venture. * * *

"In substance, and in all essential particulars, the proposition of the assignee in this case is much like that of a receiver. He is clothed with the legal title to the property of which he has possession (which cannot be said as to a receiver), but in no other particular is there any real difference. He has held, and is holding, the property, not for the purpose of sale and distribution, but for the purpose of operating the same for profit. Indeed the very order which directs him to operate in effect forbids him to sell. It may be conceded that in form, and from the strict legal standpoint, the estate is in the court of insolvency for settlement, but in reality it is not being settled, but, on the other hand, the arrangement amounts to an investment of the creditors' money in the management of a going concern."

In contrast with the provisions of the statutes as in force at the time the foregoing decisions were rendered and governing the return of personal property for taxation, which statutes by their terms did not require an assignee as such to return personal property in his possession or control on the day preceding the second Monday of April in any year, for taxation, the above provision of section 5372-1, G. C., (106 O. L., 247), expressly requires the return for taxation of all personal property, referred to in said section, in the possession or control of a person as an assignee on the day preceding the second Monday of April in any year.

A custodian is defined in 12 Cyc. 1024 as "an officer of the court."

In view of the various capacities or relationships enumerated in the provisions of said sections 5372-1 and 5372-2 of the General Code as above set forth it is evident that the only trust capacity or fiduciary relationship to which the term "official custodian" can refer is that of clerk of the courts, sheriff or master commissioner.

As stated in 37 Cyc., 797:

> "At common law property in the custody of the law or of a court or judicial officer is not subject to taxation. But in some states statutes have been passed authorizing the taxation of clerks of court, masters in chancery, municipal treasurers and other such officers for money paid into court and deposited with them by the court's order, or held by them under similar orders pending litigation as to its ownership; and similar provisions have been made in some states as to real estate held by the courts and mortgages made to judicial officers in their official capacity."

As has already been stated the provisions of the statutes formerly in force and governing the return of personal property for taxation, did not by their terms require assignees, clerks of court, sheriffs and master commissioners to return for taxation personal property in their possession or control on the day preceding the second Monday of April in any year. The result was that in most cases such property was not entered on the tax lists and duplicate for such year and thus escaped taxation. The manifest purpose of the legislature in enacting the above provisions of sections 5372-1 and 5372-2 of the General Code was to secure the return of such property in just such cases.

I am therefore compelled to conclude in answer to your question that, under said provisions of said statutes, assignees, receivers, sheriffs and master commissioners are required to list for taxation all personal property, including moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, in their possession or control on the day preceding the second Monday of April in any year, on account of any person or persons, company, firm, partnership, association or corporation, and that such property shall be entered on the tax lists and duplicate in the manner provided in said section. If on or after said listing day in any year any such property becomes subject to the possession or control of an assignee, receiver, sheriff or master commissioner on account of any other person who was the owner thereof on said listing day and such property has not been listed for taxation, then I am of the opinion that under provision of said section 5372-2, G. C., as above quoted, said property must be listed by such assignee, receiver, sheriff or master commissioner, in the manner provided in said section 5372-1, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1479.

DISAPPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, CLINTON TOWNSHIP, SENECA COUNTY, OHIO.

COLUMBUS, OHIO, April 17, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Clinton township, Seneca county, to the amount of $25,000.00 for road improvement purposes."

I have examined the transcript of the township trustees and other officers submitted to me relative to the above bonds, and I am unable to approve the same for the following reasons:

1. The transcript discloses that a township road district was created which composed all that part of Clinton township lying outside of the municipal corporation of Tiffin. All subsequent proceedings therefore under the provisions of the General Code were applicable to and affected only that portion of the township composing said road district.

2. The notice of election, at which was submitted the question of issuing the bonds of said road district to the amount of $100,000.00, was defective in that:

a. It recited that the bonds of the township were to be issued instead of bonds of the road district.

b. Because it failed to designate the boundaries of said road district as required in section 7040 of the General Code, which was in effect at that date.

c. The resolution to issue bonds is defective in that the bonds are designated as the "Bonds of Clinton Township" whereas they should have been designated as "Bonds of Clinton Township *Road District.*"

d. There is a further reason why I deem it inadvisable to approve the bonds. The transcript and correspondence disclose that the prosecuting attorney of Seneca county, Ohio, who is the legal adviser of the township trustees of Clinton township and of the officers of said road district, has refused to certify to the validity of the bonds. Although I am unable to agree with the reasons assigned by the prosecuting attorney for his refusal to certify to the validity of the bonds, yet the mere fact that there is a disagreement between the road district officials and the legal adviser relative to their authority now to issue the bonds in question is to my mind sufficient reason for your commission to decline to accept them.

The transcript is not complete in other particulars than those above mentioned, but as these imperfections are probably due to omissions which can be corrected I deem it unnecessary to specifically refer to them now.

For the foregoing reasons I advise the commission to reject the bonds. I herewith return the transcript and letter of Hon. Russell M. Knepper, prosecuting attorney of Seneca county.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1480.

HEALTH OFFICER—WOMAN NOT ELIGIBLE TO HOLD SUCH POSITION.

The office of health officer may not be filled by a woman, section 4 of article XV of the constitution, as amended, November 4, 1913, applies only to the appointment of women to membership on boards or to positions in those departments and institutions established by the state or any political subdivision thereof peculiarly involving the interests or care of women or children or both.

COLUMBUS, OHIO, April 17, 1916.

State Board of Health, E. F. McCampbell, Secretary, Columbus, Ohio.

DEAR SIR:—Your request for an opinion as to whether a woman is eligible to hold the office of health officer in a township is as follows:

> "In Brown township, Delaware county, Ohio, the trustees of the township, in their capacity as a board of health, duly organized under the provisions of section 3391 of the General Code, have appointed a woman as health officer for the township. Please inform me if a woman may be legally appointed, under the provisions of section 3391 of the General Code, to serve as a health officer for a township, or appointed, under the provisions of section 4408 of the General Code, to serve as a health officer in a municipality."

Section 3391 of the General Code, under which it is stated a woman was appointed health officer in Brown township, Delaware county, is as follows:

> "In each township the trustees thereof shall constitute a board of health, which shall be for the township outside the limits of any municipality. Each year they shall elect one of their number president and the township clerk shall be clerk of the board of health. They shall appoint a health officer and may appoint as many sanitary officers as they deem necessary to carry out the provisions of this chapter and they shall define the duties and fix the compensation of such appointees who shall meet annually and at such other times as it deems necessary."

Section 4408 of the General Code, which relates to the appointment of a health officer in a municipality, is as follows:

> "The board of health shall appoint a health officer, who shall be the executive officer. He shall furnish his name, address and other information required by the state board of health. The board may appoint a clerk, and, with the consent of council, as many ward or district physicians, or one ward physician for each ward in the city, as it deems necessary."

Under the provisions of the amendment to the constitution adopted November 4, 1913, women were made eligible to serve as members of certain boards, or positions in departments and institutions of the state when there existed special reasons for such service. The amendment referred to, which is section 4 of article 15 of the constitution, is as follows:

> "No person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector; provided that women who are citizens may be appointed as members of boards of, or to positions in,

those departments and institutions established by the state, or any political subdivision thereof, involving the interests or care of women or children, or both."

The amendment just quoted was adopted in answer to a demand which was made for the appointment of women to certain positions in the state, the nature of which particularly requires or makes fitting the supervision of women rather than men.

Under date of January 15, 1914, my predecessor rendered opinion No. 683 to Hon. James Nye, member of the house of representatives, which opinion is to be found on page 22, Vol. I of the Attorney-General's Reports for 1914, in which he construed the constitutional amendment referred to above in connection with house bill No. 105, which was a bill to provide for the examination and registration of trained nurses in Ohio, the particular question before him being whether or not that board was such as would involve the interest and care of women or children or both.

There can be no question but that the duty of a health officer would necessarily involve the interest and care of women and children, but as held in the opinion referred to the interest was only incidental and not special, and for that reason it was held in the opinion that it was not such as to make women eligible for a position on the board.

I concur in that opinion, and for another and more important reason must conclude that a woman is not eligible to hold the position of health officer, as under the provisions of the constitution above referred to "no person shall be elected or appointed to any *office* in the state unless possessed of the qualifications of an elector."

The amendment to the constitution in question was proposed specifically to meet conditions at the girl's industrial school, which required, or seemed to require, that the supervisory authority over that home should be exclusively in the hands of a woman. The enabling clause which permits women to be appointed applies only to membership on boards or to positions in departments and institutions established by the state, or any political subdivision thereof, peculiarly involving only the interests or care of women or children or both, and the position of health officer is not such as would come within the latter class.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1481.

INDUSTRIAL COMMISSION—HAS NO DISCRETION IN PAYMENT OF ATTORNEYS' FEES FOR CLAIMANT WHEN SUCH FEE IS FIXED BY TRIAL JUDGE.

The Industrial Commission of Ohio has no discretion in the payment of attorneys' fees for a claimant's attorneys when the fee is fixed by the trial judge, section 43 of the workmen's compensation law, or section 1465-90, G. C., 103 O. L., 72, so long as the order of the court fixing said fee has not been modified.

COLUMBUS, OHIO, April 17, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letters under date of April 7th and April 10th, which are, respectively, as follows:

"Herewith find enclosed copy of a letter and journal entry received by this commission from Mr. Charles W. Toland, attorney-at-law, Cleveland, and copy of my reply thereto.

"Kindly advise us as to whether we have any discretion in the matter of paying or rejecting the claim for attorneys' fees in this case."

April 10th:

"Following my letter of the 7th inst., relative to the attorneys' fees allowed by Judge Powell in the case of Sam Police v. The Industrial Commission of Ohio, I am enclosing herewith a further letter from Attorney Charles W. Toland."

To your letters are attached copies of letters from Mr. Toland, and copies of letters addressed to Mr. Toland are also attached. There is also attached a journal entry in the case of Sam Police v. The Industrial Commission of Ohio. The entry of the judge of the common pleas court of Cuyahoga county shows that at the January term, 1916, a fee was fixed in the sum of $1,000.00 as payment for the services rendered by attorneys for Sam Police on the trial of this case.

This case was first tried in the court of common pleas of Cuyahoga county, and the court on its own motion dismissed the plaintiff's petition upon the theory that the court of common pleas had no jurisdiction of the subject of the action. Error was prosecuted to the court of appeals, and the court of appeals reversed the judgment of the court of common pleas. The case was retried in the common pleas court, verdict returned and judgment for the plaintiff. Error was prosecuted by the defendant to the court of appeals and that court affirmed the judgment of the court of common pleas. A motion was made in the supreme court of this state to require the court of appeals to certify up its record. This motion was overruled.

The above are facts which relate to the conduct of this case through the various courts. The question submitted in your communication is as to whether or not your commission has any discretion in the matter of paying or rejecting the amount as fixed by the judge of the court of common pleas for attorney fees in the trial of this case.

I call your attention to the latter part of section 43 of the workmen's compensation law, section 1465-90 of the General Code (103 O. L., 72), which is as follows:

"Any final judgment so obtained shall be paid by the state liability board of awards out of the state insurance fund in the same manner as such awards are paid by such board. The cost of such proceedings, including a reasonable attorney fee to claimant's attorney, to be fixed by the trial judge, shall be taxed against the unsuccessful party. Either party shall have the right to prosecute error as in ordinary civil cases."

It appears from this provision of section 43 that the duty of fixing the attorney fees rests with the trial judge. The judge in this case has fixed the amount of attorney fees at $1,000.00, which is taxed under the provisions of the statute against your commission. The amount of this fee is fixed by the order of the court, and in my opinion your commission has no discretion as to whether or not you shall pay the amount. So long as the order fixing the amount of compensation remains unchanged it would be the duty of your commission to pay the same, and the only way whereby this amount might be changed would be to take exceptions and prosecute the proceedings in the court of appeals for a modification of the order of the court of common pleas in fixing the amount.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1482.

APPROVAL, LEASE OF PORTION OF OHIO CANAL IN MUSKINGUM COUNTY TO THE COLUMBUS OIL AND FUEL COMPANY.

COLUMBUS, OHIO, April 18, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of yours under date of April 13, 1916, with which you transmit to me for my approval a lease executed in triplicate to The Columbus Oil and Fuel Company, of Columbus, Ohio, for a certain portion of the abandoned Ohio canal in Muskingum county therein described, for the production of gas and oil.

I have examined said lease and find the same to be regular in form and am returning the same herewith with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1483.

BOARD OF EDUCATION—DEPOSITORY BANK FOR SCHOOL FUNDS—WHEN CLOSED AND RECEIVER APPOINTED—WHETHER OR NOT BOARD CAN BORROW MONEY TO PAY OBLIGATIONS PREVIOUSLY INCURRED UNTIL THEY REALIZE ON DEPOSITORY BOND.

Where the board of education of a school district, at the time of letting a contract for the construction and equipment of a school building for the use and accommodation of the pupils residing in said district, has sufficient funds available for such purpose as evidenced by the certificate filed with said board by its clerk in compliance with the requirement of section 5660, G. C., but subsequent to the time said obligations are incurred the bank, located in said district duly designated by said board of education as the depository for the school funds, is closed and a receiver appointed, so that said board of education is unable to draw on the funds deposited in said bank to pay said obligations as the same become due, said board of education, by complying with the requirement of section 5658, G. C., i. e., by first determining by formal resolution that the amounts due according to the terms of the aforesaid contract are existing, valid and binding obligations of said school district, may borrow money for said purpose under authority of section 5656, G. C.

COLUMBUS, OHIO, April 18, 1916.

HON. ELI H. SPEIDEL, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—In your letter under date of April 1st you request my opinion as follows:

> "About two years ago, the electors of the New Richmond village school district, this county, voted on the question of issuing fifty thousand dollars in bonds for the purchasing of a site and the erection of a new school building and fixtures in said school district, which proposition was carried and the bonds duly issued and sold.
>
> "At that time and up until about four months ago, the First National Bank of New Richmond, Ohio, was the legally selected depository for the funds of said school district, but about four months ago said First National Bank of

New Richmond, Ohio, was closed for business and a receiver appointed by the comptroller of currency, and at the time the said board of education had on deposit with said bank in the bond and interest fund, approximately fifty-four hundred ($5,400.00) dollars, and in the general fund approximately twelve hundred ($1,200.00) dollars.

"The board of education has a personal bond given by the bank as such depository, but as the bond was given by some of the officers and stockholders in the bank, it is uncertain at this time, whether or not the sureties on said bond are responsible, and it is also entirely uncertain as to what per cent. will be paid to the depositors in said bank, when its affairs are finally liquidated by the federal authorities.

"The board of education, by a proper contract, in the erection and completion of said building, incurred certain obligations prior to the failure of said bank and one suit has already been filed against said board of education in the common pleas court of this county. The board of education is very anxious to take care of these obligations and they can borrow the money from the New Richmond National Bank, another bank in said town, providing they have the legal authority to do so, and issue their notes until such time as it can be ascertained what per cent. will be paid by said First National Bank to the said board of education on its deposits, and until it is ascertained if the balance of said deposit can be collected by judgment from the sureties on said depository bond.

"I would appreciate very much having an early opinion from your office on the question as to whether or not, under the circumstances, the board of education can borrow the money until these questions are determined and issue its notes therefor."

From your statement of facts it appears that at the time the board of education of the village school district referred to in your inquiry entered into a contract for the erection and completion of the school building mentioned in said inquiry, and thus incurred the obligations in question, said board had in its depository funds available for this purpose and I assume that the clerk of said board of education certified that said funds were in said depository and available for said purpose in compliance with the requirement of section 5660, G. C.

However, subsequent to the time of the incurring of said obligations it appears that the bank, which had been duly designated as the depository of the funds of said village school district and in which the funds in question were deposited, was closed and a receiver was appointed for said bank by the comptroller of the currency.

It further appears that according to the terms of the aforesaid contract certain sums are past due and that because of its inability at this time to draw on its funds in said depository bank said board of education is unable to pay said sums which, under the facts stated by you, are existing, valid and binding obligations of said village school district.

It is unnecessary, for the purpose of answering your question, to consider the question as to when the funds in said depository bank will be available, or whether the personal bond, given by said depository bank to said board of education for the security, safe-keeping and payment over of said funds, will secure said board of education against any loss. It is only necessary to observe that said funds are not available at this time and if, after availing itself of all the remedies afforded to it, said board of education in the future finds that a part or all of said funds now held by said depository bank, is in the treasury of said board of education to the credit of the fund arising from the sale of bonds referred to in your inquiry, and that the balance to the credit of said fund cannot be used or is no longer needed for the purpose for which said bonds

were issued, it will be the duty of said board of education, upon such finding being made, to immediately transfer such balance to the sinking fund of said village school district to be used for the payment of the interest and the retirement of said bonds at their maturity in compliance with the requirement of section 5654, G. C. (103 O. L., 521.)

Inasmuch as said funds are not available at this time with which to pay the aforesaid valid and binding obligations of said village school district, it seems clear to my mind that the provisions of section 5656, G. C., are applicable to the situation presented by you, and that said board of education may, for the purpose of extending the time of payment of said indebtedness, borrow money under authority of said section and within the limits therein provided.

Section 5656, G. C., provides:

> "The trustees of a township, the board of education of a school district, and the commissioners of a county, for the purpose of extending the time of payment of any indebtedness, which from its limits of taxation, such township, district or county is unable to pay at maturity, may borrow money or issue the bonds thereof, so as to change, but not increase the indebtedness in the amounts, for the length of time and at the rate of interest that said trustees, board or commissioners deem proper, not to exceed the rate of six per cent. per annum, payable annually or semi-annually."

Section 5658, G. C., provides in part:

> "No indebtedness of a * * * school district * * * shall be funded, refunded or extended unless such indebtedness is first determined to be an existing, valid and binding obligation of such * * * school district * * * by a formal resolution of the * * * board of education * * * thereof. * * *"

The proceeds of a tax levy made by the board of education of said village school district at this time would of course not be available for the immediate payment of the obligations in question.

I am of the opinion, therefore, in answer to your question, that said board of education may, by complying with the requirements of the provision of section 5658, G. C., as above set forth, borrow money for said purpose under authority of section 5656, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1484.

APPROVAL, TWENTY-ONE LEASES OF CANAL LANDS.

COLUMBUS, OHIO, April 18, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—Under date of April 4, 1916, you transmitted to me for my approval, leases of canal lands as follows:

"The Williams Foundry & Machine Co., Akron, Ohio..... $1,666.66⅔
"Fred Reinstettle, Logan, Ohio..... 133.33⅓

"Millard Nethers, Frazeysburg, Ohio	500.00
"Max Maggied, Hunter street, Logan, Ohio	400.00
"Frank L. Rowles, Akron, Ohio	1,000.00
"Charles Saar, St. Marys, Ohio	600.00
"Andrew A. Quilling, Troy, Ohio	800.00
"W. J. Frasch, Logan, Ohio	250.00
"Katharine Jackson, Logan, Ohio	100.00
"Mrs. Culver Smith, Logan, Ohio	145.00
"H. L. Schuler, Cleveland, Ohio	4,500.00
"John Walters, Napoleon, Ohio	200.00
"Peter Rudolph, St. Marys, Ohio	1,200.00
"Lon Fisher, Buckeye Lake, Ohio	1,333.33⅓
"J. W. Weakley, Newark, Ohio	1,000.00
"The Village of Baltimore, Baltimore, Ohio	200.00
"Mary C. Thompson, Logan, Ohio	100.00
"Margaret Hamilton, Frazeysburg, Ohio	200.00
"Dr. C. S. Matthews, Upper Sandusky, Ohio	1,000.00
"R. G. Oldham, Newark, Ohio	1,666.66⅔
"Homer Stiers, Haydenville, Ohio	175.00"

I have examined each of the above leases and find them to be regular in form, and am returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1485.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, TIPPECANOE VILLAGE SCHOOL DISTRICT.

COLUMBUS, OHIO, April 18, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"Re:—Bonds of Tippecanoe village school district, in the sum of $80,000.00, being twenty bonds of $500.00 each; forty bonds of $1,000.00 each; twenty bonds of $1,500.00 each."

I have examined the transcript of the proceedings of the board of education and other officers of Tippecanoe village school district; also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted, and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of Tippecanoe village school district of Miami county, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1486.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, CITY OF LAKEWOOD, CUYAHOGA COUNTY, OHIO.

COLUMBUS, OHIO, April 18, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the city of Lakewood, Cuyahoga county, Ohio, in the sum of $10,095.00 issued in anticipation of the collection of special assessments to pay the cost and expense of improving Emerson avenue between Donald avenue and Johnson avenue by paving, grading, draining and curbing same, being one bond of $1,095.00 and nine bonds of $1,000.00 each.

I have examined the transcript of the proceedings of the council and other officers of the city of Lakewood relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of the said city of Lakewood, Cuyahoga county, Ohio.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1487.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, CITY OF LAKEWOOD, CUYAHOGA COUNTY, OHIO.

COLUMBUS, OHIO, April 18, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the city of Lakewood, Cuyahoga county, Ohio, in the amount of $10,400.00 issued in anticipation of the collection of special assessments for the improvement of Brown road between Madison avenue and Fisher road, by constructing sewer therein, being five bonds of $2,080.00 each."

I have examined the transcript of the proceedings of council and other officers of the city of Lakewood relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of the said city of Lakewood, Cuyahoga county, Ohio.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1488.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, CITY OF LAKEWOOD, CUYAHOGA COUNTY, OHIO.

COLUMBUS, OHIO, April 18, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the city of Lakewood, Cuyahoga county, Ohio, in the amount of $2,280.00, issued in anticipation of the collection of special assessments for the improvement of Detroit street, between Belle avenue and Cook avenue, by constructing sewer therein, being five bonds of $456.00 each."

I have examined the transcript of the proceedings of council and other officers of the city of Lakewood relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of said city of Lakewood, Cuyahoga county, Ohio.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1489.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, CITY OF LAKEWOOD, CUYAHOGA COUNTY, OHIO.

COLUMBUS, OHIO, April 18, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the city of Lakewood, Cuyahoga county, Ohio, in the sum of $9,730.00, issued in anticipation of the collection of special assessments for the improvement of McKinley avenue from West Madison avenue to Hilliard road, by paving, grading, draining and curbing, being ten bonds of $973.00 each."

I have examined the transcript of the proceedings of council and other officers of the city of Lakewood relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of said city of Lakewood, Cuyahoga county, Ohio.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1490.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, CITY OF LAKEWOOD, CUYAHOGA COUNTY, OHIO.

COLUMBUS, OHIO, April 18, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:

"RE:—Bonds of the city of Lakewood, Cuyahoga county, Ohio, in the sum of $3,500.00, issued in anticipation of the collection of special assessments for the improvement of Brown road between West Madison avenue and Fisher road, by constructing water main, being five bonds of $700.00 each."

I have examined the transcript of the proceedings of council and other officers of the city of Lakewood relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted, and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of said city of Lakewood, Cuyahoga county, Ohio.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1491.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, CITY OF LAKEWOOD, CUYAHOGA COUNTY, OHIO.

COLUMBUS, OHIO, April 18, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the city of Lakewood, Cuyahoga county, Ohio, in the sum of $21,400.00, in anticipation of the collection of special assessments for the improvement of Lakewood avenue from Detroit street to Clifton boulevard by paving, draining and curbing same, being ten bonds of $2,140.00 each."

I have examined the transcript of the proceedings of council and other officers of the city of Lakewood relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted, and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of said city of Lakewood, Cuyahoga county, Ohio.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1492.

APPROVAL OF RESOLUTION FOR IMPROVEMENT OF CERTAIN ROADS IN GREENE AND PORTAGE COUNTIES, OHIO.

COLUMBUS, OHIO, April 19, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of April 12, 1916, submitting to me for examination final resolutions relating to the following roads:

"Greene County—Sec. 'S,' Dayton-Chillicothe road, Pet. No. 2389, I. C. H. No. 29.

"Portage County—Sec. 'U,' Cleveland-East Liverpool road, Pet. No. 2823, I. C. H. No. 12 (also duplicate).

"Portage County—Sec. 'U,' Cleveland-East Liverpool road, Pet. No. 2833, I. C. H. No. 12 (also duplicate)."

I find these resolutions to be in regular form, and am, therefore, returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1493.

DISAPPROVAL, LEASES OF CANAL LANDS TO COMMISSIONERS OF LUCAS COUNTY AND MRS. LOUISE C. HARTMAN, LOGAN, OHIO.

COLUMBUS, OHIO, April 19, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—Under date of April 4th you transmitted to me for my approval the following leases of canal lands:

"Commissioners of Lucas county, Toledo, Ohio.....$250.00
"Mrs. Louisa C. Hartman, Logan, Ohio..... 400.00"

I am returning the lease to the commissioners of Lucas county without my approval, for the reason that there does not accompany the same a certificate of the county auditor that the money required for the payment of the rental of the lands therein described is in the treasury to the credit of the fund from which it is to be drawn, or has been levied or placed on the duplicate and in process of collection and not appropriated for any other purpose, as required by the provisions of section 5660 of the General Code.

I am also returning the lease to Mrs. Louisa C. Hartman, Logan, Ohio, without my approval, for the reason following:

This lease purports to be executed by the lessee in the form following:

Her
"Mrs. Louisa (X) C. Hartman,
Mark
"By Emma C. Hartman."

This form of signature renders it uncertain whether the lessee made her mark in the usual way of signing by mark. It at least gives rise to the inference that the entire signature, including the mark, may have been written by Emma C. Hartman even in the absence of the lessee. If that be the fact, there appears no authority in said Emma C. Hartman to so sign the name of the lessee.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1494.

ROADS AND HIGHWAYS—TELEPHONE AND TELEGRAPH COMPANIES —AUTHORITY TO REQUIRE SUCH COMPANIES TO LOCATE OR RELOCATE THEIR POLES PLACED UPON INTER-COUNTY HIGHWAYS AND MAIN MARKET ROADS.

Where a telephone or telegraph company proposes to erect a pole line upon an inter-county highway or main market road, it is the duty of the company to request the state highway department to establish the location of such pole line, and upon receipt of such request the chief highway engineer at the direction of the state highway commissioner, is required to establish such location within thirty days. The same rule also applies where a company desires to change the location of an existing pole line.

Where the state highway department is proposing to improve an inter-county highway or main market road, and a pole line thereon situated constitutes an obstruction to the public highway or interferes with the proposed improvement of the same, the state highway commissioner may require the company owning such pole line to relocate the same on some other line within the limits of the highway in question.

COLUMBUS, OHIO, April 19, 1916.

HON. CLINTON COWAN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of March 13, 1916, which communi cation reads as follows:

"Requests have been made upon this office from time to time by telephone and telegraph companies through their agents, for permission to erect poles within a specified distance from the paving on state roads and also on inter-county highways and main market roads.

"The question has also arisen frequently as to the authority of this department to require these companies to move their poles when already placed upon inter-county highways and main market roads which the state has agreed to improve.

"A comprehensive opinion from your office, therefore, is respectfully requested upon the following:

"What is the authority of the state highway department in the matter of regulating the erection of poles by telephone and telegraph companies in the following instances:

"1st. When the right of way has been acquired by the county commissioners upon an inter-county highway or main market road and there is either no improvement within the right of way or an improvement has been made and maintained by the county authorities?

"2nd. When the right of way has been acquired by the county commissioners and the road is properly termed a 'state' road?

"3rd. When the right of way has been acquired by the county commissioners and the state is improving, either by construction or repair, a strip of road within that right of way?

"4th. When the right of way has been acquired by the state highway department and the state is improving or has improved a strip of road within that right of way?"

I note that while you refer in your communication to the question of the authority of your department to require telephone and telegraph companies to move their poles when already placed upon inter-county highways and main market roads, which the state has agreed to improve, yet you inquire only as to your authority in the matter of regulating the erection of poles by telephone and telegraph companies. I will, however, refer to both the questions suggested by you.

Considering first the question upon which you submit a specific inquiry, I note that the four situations described by you all relate to inter-county highways or main market roads. In this connection permit me to call your attention to section 220 of the Cass highway law, section 1227, G. C., which section reads as follows:

"If a franchise is or has been granted on an inter-county highway or main market road, no construction thereon or obstruction thereof shall be permitted, nor any alteration or change made therein, until the location and grade of such construction has been established by the chief highway engineer. Such location and grade shall be established within thirty days after he is notified to do so by the state highway commissioner."

This section refers to the establishing of a location and grade, and the reference to a grade might be taken as indicating that the section was intended to apply to electric and interurban railways and other similar works requiring the construction of a grade. I am of the opinion, however, that a broader interpretation is to be placed upon this section and that its force and effect are such that where a telephone or telegraph company proposes to erect a pole line upon an inter-county highway or main market road, it is the duty of the company to request the state highway department to establish the location of such pole line and that upon receipt of such request it is the duty of the state highway commissioner to notify the chief highway engineer to establish such location, and the chief highway engineer must act in the premises within thirty days after the receipt of such notice. Since the provision above quoted is applicable to all inter-county highways or main market roads, the answer above given is applicable under all the circumstances set forth in your inquiry, and without reference to how the right of way for the road was acquired or the nature of the proposed improvement, or the authority planning to carry out the same. This is also true where a pole line has been constructed by a telephone or telegraph company upon an inter-county highway or main market road, and the company is desirous of changing the location of such pole line. Under such circumstances the company should submit the new location of its pole line to the state highway department and the same should be approved by the chief highway engineer before the change is made.

Referring now to the matter alluded to in your inquiry and which relates to the authority of your department to require telephone and telegraph companies to move their poles when already placed upon inter-county highways and main market roads, I desire to call your attention to section 161 of the Cass highway law, being section 7204, G. C., which section reads as follows:

"It shall be the duty of the owners or occupants of lands situated along the highways to remove all obstructions within the bounds of the highways which have been placed there either by themselves or their agents, or with

their consent. It shall be the duty of all telephone, telegraph, steam or electric railway, or other electrical companies, oil, gas, water or public service companies of any kind, to remove their poles and wires, connected therewith, or any tracks, switches, spurs, or oil, gas or water pipes, mains, conduits or other object when the same, in the opinion of the county highway superintendent, constitute obstructions in the highway or interfere with the construction, improvement, maintenance or repair of the highway or use thereof, by the traveling public, subject, however, to the rights of any such company to be or remain in such highway, by virtue of any grant or franchise to said company. If, in the opinion of the county highway superintendent, such companies have obstructed said highway, said highway superintendent shall forthwith notify the county commissioners, who shall cause notice to be served on said owner, occupant or company, directing the removal of said obstructions, and if said owner, occupant or company shall not within five days proceed to remove said obstruction and complete the same within a reasonable time, the county highway superintendent, upon order of the county commissioners, may remove said obstructions. The expense thereby incurred shall be paid in the first instance out of money levied and collected and available for highway purposes, and the amount thereof shall be certified to the proper officials, to be placed upon the tax duplicate against the property of such owner, occupant or company, as provided by law, to be collected as other taxes, and the proper fund shall be reimbursed out of the money so collected, or the cost of removing such obstructions may be collected from the owner, occupant or company by civil action by the county commissioners or township trustees.

"All such persons, firms or corporations shall be required to reconstruct or relocate their properties or any part thereof upon such public highway, upon the order of the proper authorities if in the opinion of such authorities the same constitute an obstruction in such public highway."

This section was discussed at some length in opinion No. 855 of this department, rendered to you on the 22nd day of September, 1915, to which opinion you are referred. The opinion in question related to the tracks of an interurban railway company, but the same rule is clearly applicable in the case of pole lines belonging to telephone and telegraph companies.

In accordance with the conclusion expressed in that opinion, I advise you that where your department is proposing to improve an inter-county highway or main market road, either with or without the co-operation of local authorities and in your opinion a pole line thereon situated constitutes an obstruction to the public highway or interferes with the proposed improvement of the same, you may, by virtue of the provisions of the above quoted section, require the company owning such pole line to relocate the same on some other line within the limits of the highway in question. Where the improvement in question is being carried forward by county commissioners or township trustees, without the co-operation of your department, other than the approval of the plans, then. of course, any action designed to secure the relocation of poll lines is to be taken by the local authorities.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1495.

BOARDS OF DEPUTY STATE SUPERVISORS OF ELECTIONS—COMPENSATION OF MEMBERS AND CLERKS OF SUCH BOARDS FOR PRIMARY ELECTIONS.

Section 4990, *G. C., provides an annual compensation for members of boards of deputy state supervisors and deputy state supervisors and inspectors of elections, and the clerks of such boards, which is required to be paid quarterly under the provisions of section* 4822, *G. C., in the same manner as the compensation for services in conducting other elections is paid.*

The compensation authorized for services in conducting primary elections is not dependent upon or affected by the number of primary elections held within the official year.

COLUMBUS, OHIO, April 19, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Yours under date of March 16, 1916, is as follows:

"1. Under section 4990 of the General Code of Ohio are members and clerks of boards of deputy state supervisors of elections and deputy state supervisors and inspectors of elections entitled to compensation for each primary election or are they only entitled to one compensation during the official year for holding primary elections during said official year?

"2. Are members and clerks of boards of deputy state supervisors of elections and deputy state supervisors and inspectors of elections entitled to draw the compensation as a whole after the completion of their work of holding a primary, or shall they draw the compensation quarterly as provided in section 4822 of the General Code of Ohio?"

Your second inquiry is answered by opinion No. 694 of this department, under date of August 5, 1915, to be found at page 1430 of the report of the attorney-general for the year 1915, a copy of which opinion is herewith enclosed. In the opinion referred to it is held that the compensation of deputy state supervisors of elections for conducting primary elections is payable quarterly in the same manner as the payment of the compensation for holding general elections under the provisions of section 4822, G. C.

Your first inquiry involves a consideration of the following statutory provisions:

"*Section* 4990, *G. C.* For their services in conducting primary elections, members of boards of deputy state supervisors shall each receive for his services the sum of two dollars for each election precinct in his respective county, and the clerk shall receive for his services the sum of three dollars for each election precinct in his county, and judges and clerks of election shall receive the same compensation as is provided by law for such officers at general elections.

"*Section* 4991, *G. C.* (103 O. L., 510). All expenses of primary elections, including cost of supplies for election precinct and compensation of the members and clerks of boards of deputy state supervisors, and judges and clerks of election, shall be paid in the manner provided by law for the payment of similar expenses for general elections * * *."

"*Section* 4822, *G. C.* Each deputy state supervisor shall receive for his services the sum of three dollars for each election precinct in his respective county, and the clerk shall receive for his services the sum of four dollars

for each election precinct in his respective county. The compensation so allowed such officers during any year shall be determined by the number of precincts in such county at the November election of the next preceding year. The compensation paid to each of such deputy state supervisors under this section shall in no case be less than one hundred dollars each year and the compensation paid to the clerk shall in no case be less than one hundred and twenty-five dollars each year. Such compensation shall be paid quarterly from the general revenue fund of the county upon vouchers of the board, made and certified by the chief deputy and the clerk thereof. Upon presentation of any such vouchers, the county auditor shall issue his warrant upon the county treasurer for the amount thereof, and the treasurer shall pay it."

If the provisions of section 4990, G. C., might be taken as standing alone, it could be argued with some force that it provides the method of computing the fee of deputy state supervisors for conducting primary elections, the basis of which fee is the particular service performed in each case. That is to say, it provides the means or machinery for determining the compensation of the officers for the performance of a particular separate and distinct service, and upon this theory the conclusion might be reached that these officers are entitled to the compensation so determined for all and every primary election required by law to be conducted by them.

An examination of the statutes above quoted will readily lead to the conclusion, as stated at the outset, that they must, of necessity, be read together. By the provisions of section 4991, G. C., supra, it is required that all expenses of primary elections, including compensation of the members and clerks of boards of deputy state supervisors of elections, shall be paid in the manner provided by law for the payment of similar expenses for general elections, provision for which is found in section 4822, G. C., supra.

Section 4822, G. C., requires that such compensation for general elections shall be paid quarterly from the general revenue fund of the county upon voucher of the board, made and certified by the chief deputy and clerk thereof.

If it had been the legislative intent that the compensation determined by the method prescribed by section 4990, G. C., should be paid to the members of the board of deputy state supervisors of elections and the clerks thereof, for their services in conducting each primary election authorized and required to be held, it would be difficult to assign a substantial reason for the requirement that such compensation shall be paid quarterly under the provisions of section 4822, G. C., supra.

At the time of the enactment of section 4990, G. C., one primary was authorized to be held in each year. In view of this fact, and the requirement that the compensation must be paid quarterly, I am inclined to the view that the purpose of section 4990, G. C., supra, was to prescribe an annual compensation for the services of members and clerks of the boards of deputy state supervisors of elections, rendered in conducting all primary elections authorized to be held within the year. That is to say, the effect of the provision of section 4991, G. C., supra, that the compensation here under consideration shall be paid in the same manner as similar expenses for general elections, is that all the compensation for conducting primary elections for the entire official year shall be paid in four equal quarterly installments. The payment of such compensation in this manner would be impracticable if the total amount thereof was subject to contingent variations during the official year. In addition to the quadrennial primary election provided for in sections 4954 and 4955, G. C., 106 O. L., 545, there is now further provision for special primary elections to be held in anticipation of special elections made under section 4964, G. C., 106 O. L., 544.

The primaries authorized to be held under the provisions of the statutes last above referred to can not be anticipated for the purpose of determining the annual

compensation of deputy state supervisors of elections if it were contemplated in the enactment of section 4990, G. C., to provide an annual compensation for such officers for conducting all the primary elections authorized to be held in one year, to be paid in equal quarterly installments pursuant to section 4822, G. C.

It is well established that additional duties may be imposed upon public officers without providing additional salary or compensation for the performance of the same. If then section 4990, G. C.,in its original enactment, contemplated an annual salary to be paid for the only primary then authorized to be held, the requirement to conduct additional primaries would not have the effect to change the construction to be given the provisions of said section.

While it is held in the case of State ex rel. v. Hogg, 19, C. C. (n. s.) 55, that the compensation provided in section 4990, G. C., is required to be computed from the whole number of precincts in the county, the question here under consideration could not then have been before the court, as I am informed by the clerk of the board of elections of Mahoning county that but one primary election was held in that county within the official year 1913-1914.

I am, therefore, of opinion, in answer to your first inquiry, that deputy state supervisors of elections and deputy state supervisors and inspectors of elections are entitled to receive as compensation for their services in conducting all primary elections held within the year, only the sum of two dollars for each precinct in their respective counties, which shall be paid quarterly from the general revenue fund.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1496.

COUNTY BOARD OF EDUCATION—HOW MEMBERS ARE TO BE ELECTED—WHAT CONSTITUTES "A VOTE OF MAJORITY MEMBERS PRESENT"—MEMBER SERVES UNTIL SUCCESSOR ELECTED AND QUALIFIED—WHEN COUNTY SUPERINTENDENT REFUSES TO CALL MEETING, MAJORITY OF SEVERAL PRESIDENTS OF VARIOUS VILLAGE AND RURAL SCHOOL DISTRICTS MAY CALL MEETING.

Where a majority of the presidents of the various village and rural school districts of a county school district were present at a meeting called by the county superintendent under authority of section 4730, *G. C.*, 104 *O. L.*, 136, *and held on the* 14*th day of January*, 1916, *for the purpose of electing a successor to the member of the county board of education, whose term, by provision of section* 4729, *G. C.*, 104 *O. L.*, 136, *expired on said date, and there was a failure to elect such successor, owing to the fact that no candidate received the vote of a majority of the members present, which under provision of said section* 4730 *G. C., is necessary to elect said successor, said presidents may be called together at any time subsequent to said date for the purpose of electing such successor to the member of the county board of education whose term of office expired on said date.*

If the county superintendent refuses to issue the call for said meeting, the same may be held by a majority of the several presidents issuing a call for such meeting, providing the notice in writing, served upon each of the presidents of the various village and rural school districts above referred to, sets forth the time when, the place where, and the purpose for which said meeting is to be held.

COLUMBUS, OHIO, April 19, 1916.

HON. JOHN M. MARKLEY, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:—In your letter of April 13th you enclose the following statement of facts:

"On the 14th day of January, 1916, in response to a call issued by the county superintendent of schools, the several presidents of the various boards of education of the county met for the purpose of electing a member of the county board of education, as authorized by sections 4729 and 4730, General Code.

"The number of presidents in attendance were more than half of the number in the county, hence a quorum was present.

"The body organized by electing a chairman and secretary, and roll call was had which showed *s;xteen* presidents in attendance.

"Two persons were duly and legally nominated for the office of member of the county board, and a vote was had by ballot (written ballot), and the votes or ballots were collected by the two tellers, who had been appointed by the chairman, and were read and announced by the secretary of the meeting, and were tallied by the two tellers. The result showed *eight* votes for one candidate and *seven* votes for the other. Thereupon the candidate receiving the eight votes was declared elected by the chairman, a certificate of his election was made out and signed by the chairman and secretary, and he was administered the oath of office. A short time after all this had been done, it was observed by some one that the supposed newly elected member of the county board had not received a majority of *all the votes present*, and hence he was not elected. At that time the meeting had dispersed, and no attempt was made to call them together and take another ballot. The chairman of the meeting refused to certify the election of the candidate to the county auditor, and the old member of the county board, whose term expired, is holding over."

Referring to the statement of facts, as above set forth, you request my opinion on the following grounds:

"1st. Inasmuch as no election was had as required by the statutes, can this board, composed of the several presidents, be called together again and an election held at this time?

"2nd. If this can be done, and the county superintendent of schools refuses to call such meeting, can a majority of the several presidents issue a call for such meeting, notifying the remainder of such meeting in writing?"

The provisions of the statutes material to your inquiry are found in sections 4729 4730 and 4731, of the General Code (104 O. L., 136, 137), and are as follows:

"Sec. 4729. On the second Saturday in June, 1914, the presidents of the boards of education of the various village and rural school districts in each county school district shall meet and elect the five members of the county board of education, one for one year, one for two years, one for three years, one for four years and one for five years, and until their successors are elected and qualified. The terms of office of such members shall begin on the fifteenth of July, 1914, and each year thereafter on the third Saturday of January. Each year thereafter, one member of the county board of education shall be elected in the same manner for a term of five years. The presidents of the various boards of education, within the county school district, shall be paid their necessary and actual expenses incurred while meeting for the purpose of electing members of the county board of education. Such expenses shall be allowed by the county auditor and paid out of the county treasury upon the order of the chairman and clerk of the meeting.

"Sec. 4730. The county auditor of each county shall issue the call for

the first meeting, giving at least ten days' notice of the place where such meeting will be held. The call for all future meetings shall be issued by the county superintendent. The meeting shall organize by electing a chairman and a clerk. The vote of a majority of the members present shall be necessary to elect each member of the county board. The members of the county board so elected, may or may not be members or officers of any village or rural board of education. The result of the election of members of the county board of education shall be certified to the county auditor by the chairman and clerk of the meeting.

"Sec. 4731. Each member of the county board of education shall within ten days after receiving notice of his election, take an oath that he will perform faithfully the duties of his office. Such oath may be taken before any one authorized by law to administer oaths. If any person so elected shall fail to take such oath within the time prescribed, the office to which he was elected shall be considered vacant. Any vacancy on the board shall be filled in the same manner as is provided in section 4748 of the General Code."

The facts submitted by you are the same as those submitted by Hon. E. A. Scott, prosecuting attorney of Adams county, and in connection with said statement of facts, certain questions were asked which were answered in opinion No. 1266, of this department, rendered to Mr. Scott, under date of February 14, 1916.

In that opinion, it was held, that under provision of section 4729, G. C. (104 O. L., 136), the member of the board of education elected on the second Saturday in June, 1914, for the one year term, should hold over until the third Saturday in January, 1916, and until his successor is elected and qualified; that the meeting of the presidents of the various village and rural school districts of the county school district, on January 14, 1916, for the purpose of electing a successor to said member was properly called by the county superintendent, under the above provision of section 4730, G. C., and that if said presidents of said boards of education had elected said successor in compliance with the provisions of said statute, the person so elected, upon qualifying for the office of member of the county board of education, would have held said office for the term of five years, commencing on January 15, 1916.

It having appeared that only sixteen of said presidents were present at said meeting, and that eight votes were cast for one candidate and seven for another, in view of the provision of section 4730, G. C. (104 O. L., 137), that:

"The vote of a majority of the members present shall be necessary to elect each member of the county board of education,"

it was held that there was a failure to elect. It was further held, however, that inasmuch as the member of the county board of education elected on the second Saturday in June, 1914, for a term of one year, holds over until his successor is elected and qualified, no vacancy existed in said county board within the meaning of the latter part of section 4731, G. C. (104 O. L. 137), which provides that:

"Any vacancy on the board shall be filled in the same manner as provided in section 4748 of the General Code."

The facts submitted by you being identical with those submitted by Mr. Scott, and considered in the aforesaid opinion, I have deemed it necessary to briefly set forth the holding of said opinion preliminary to the consideration of the questions submitted by you.

You first inquire whether the presidents of the boards of education of the various village and rural school districts of your county school district may meet at

this time for the purpose of electing a member of the county board of education to succeed the member whose term expired January 14, 1916, but who is holding over because of the failure of said presidents to elect a successor at their meeting on said date.

While section 4729, G. C., as above quoted, required that the first meeting of the presidents of the boards of education above referred to should be held on the second Saturday in June, 1914, for the purpose of electing the members of the county board of education as therein provided, section 4730, G. C., required the county auditor to issue the call for said meeting, as in said section provided, it will be observed that as to all subsequent meetings of said presidents for the purpose of electing a successor to the member whose term, by the above provision of section 4729, G. C., expires on the third Saturday in January, of any year, no time is fixed for said meeting, and the only provision of the statute relating thereto is the provision of section 4730, G. C., that:

> "The call for all future meetings shall be issued by the county superintendent."

Section 4745, G. C. (103 O. L., 275), provided that:

> "The term of office of members of each board of education shall begin on the first Monday in January after their election, and each such officer shall hold his office for four years, except as may be specifically provided in chapter 2 of this title (relating to city school districts), and until his successor is elected and qualified."

Where, under the provision of the latter part of section 4745, G. C., as above quoted, a member of the board of education of a school district holds over because of the failure of the qualified electors of said district, at the regular election for said purpose, to elect a successor to said member, no vacancy exists within the meaning of section 4748, G. C., and said member holds over until the electors of said district at a subsequent regular election for said purpose, elect a successor to said member and until said successor qualifies in the manner provided by law. If said successor should fail to qualify within the time prescribed in section 4748, G. C., then a vacancy would be created which could be filled in the manner provided in said section.

As has already been stated, it was held in the opinion heretofore referred to that the member of the county board of education whose term expired on January 14, 1916, holds over because of the failure of the presidents of the boards of education of the village and rural school districts, above referred to, to elect a successor, and no vacancy exists within the meaning of the provision of the latter part of section 4731, G. C., which could be filled in the manner provided in said section 4748, G. C.

In view of what has been said as to the holding over of the member of the board of education by virtue of the provision of the latter part of section 4745, G. C., as above quoted, until the election of his successor at a subsequent regular election for that purpose and until said successor is duly qualified, it may be argued that a meeting of the presidents of the boards of education above referred to may not be called at this time for the purpose of electing a successor to the member of the county board of education in question, and that said member is entitled to hold over for another year, in view of the fact that said presidents are required to meet at the call of the county superintendent for the purpose of electing a successor to the member of your county board whose term will expire on the day preceding the third Saturday in January, 1917, or it may even be argued that in view of the fact that if a successor to the member in question had been elected at the meeting held on January 14, 1916, and had qualified in the manner provided by law, said successor would have held

office for a term of five years from January 15, 1916, and until the election and qualification of his successor, said member is entitled to hold over for the full term of five years and until his successor is elected and qualified. It seems clear to my mind, however, that inasmuch as no time is fixed for holding said meeting in any year, there is no practical difference in the operation of the statute between the calling of a meeting of said officials for the purpose of electing a successor to said member, and the calling of a meeting of the members of the county board of education under authority of the latter part of section 4731, G. C., as above quoted to fill a vacancy in said board in the manner provided in section 4748, G. C. In fact, there is nothing in the statutes above set forth to prevent said presidents from holding a meeting at this time for the purpose of electing such successor and for the further purpose of electing a successor to the member whose term will expire on the day preceding the third Saturday in January, 1917. I am of the opinion, therefore, that your first question must be answered in the affirmative.

While, as before noted, the county superintendent is charged with the duty of issuing the call for said meeting by the above provision of section 4730, G. C., I do not think it can be said that this authority vested in said official is exclusive and that upon his refusal to perform this duty said meeting may not be held at this or any other time during the year, with any more reason than it could be said that upon the refusal of said county superintendent to issue a call for a meeting of said presidents for the purpose of electing a successor to the member whose term will expire on the day preceding the third Saturday in January, 1917, said meeting could not be held for said purpose. Such a holding would defeat the manifest purpose of section 4729, G. C., which provides the opportunity to effect a gradual change in the personnel of the county board of education in the manner therein prescribed.

I am of the opinion therefore, in answer to your second question, that if the county superintendent refuses to call said meeting, the same may be called in the manner suggested in your inquiry, provided the written notice served upon each of the several presidents above referred to sets forth the time when, the place where, and the purpose for which said meeting is to be held.

Permit me to add further that I have just been informed that the questions presented by the prosecuting attorney of Adams county, in answer to which the aforesaid opinion was rendered, were presented to the court of common pleas of said county and the holding in said opinion was sustained by that court. A copy of said opinion is enclosed.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1497.

STATE AND MUNICIPAL CIVIL SERVICE COMMISSIONS—AUTHORITY TO PROCURE ATTENDANCE OF WITNESSES IS CONFERRED ON COMMISSIONS—HOW SUCH WITNESSES ARE TO BE PAID—FEES NOT PAYABLE IN ADVANCE.

1. *The authority to procure the attendance of witnesses and to issue processes therefor, as provided in section* 486-7, *G. C., as amended,* 106 *O. L.,* 403, *is conferred only upon the state and municipal civil service commission.*

2. *Witnesses summoned by the state civil service commission may be paid from the state treasury, and witnesses summoned by the municipal civil service commission may be paid from the county treasury upon the certificate of said commission when duly audited and allowance of said claims by the county commissioners is not required. Witnesses summoned by said commissions may not demand their fees in advance and no costs including witness fees in any hearing before said commissions may be adjudged against any party involved in any of the matters submitted.*

COLUMBUS, OHIO, April 19, 1916.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—I have your letter of April 7, 1916, as follows:

"Paragraph five, section 486-7, provides for fees to be paid persons who are summoned as witnesses in hearings and investigations before the civil service commission. The provision reads:

" 'Fees shall be allowed to witnesses, and on their certificate, duly audited, shall be paid by the state treasurer, or in the case of municipal commissions by the county treasurer, for attendance and traveling, as is provided in section 3012, of the General Code, for witnesses in courts of record.

"Section 3012, referred to provides:

" 'Each witness in civil causes shall receive the following fees: For each day's attendance at a court of record, to be paid on demand by the party at whose instance he is summoned, and taxed in the bill of costs, one dollar, and five cents for each mile from his place of residence to the place of holding such court, and return; for testifying before an officer authorized to take depositions, under a subpoena, seventy-five cents, and five cents for each mile from his place of residence to the place of taking depositions, to be paid on demand by the party at whose instance he is summoned; * * *. No mileage shall be allowed if the distance from the place of residence of the witness to the place where called to testify is less than one mile.'

"The question that arises is this:

"In case of hearings before a municipal civil service commission does section 3012 mean that fees paid to witnesses shall be paid on demand by the party at whose instance such witnesses are summoned? Does the person who makes an appeal to the civil service commission have to pay for his own witnesses, or do fees paid witnesses come from the party losing the action?"

Your foregoing inquiries involve not only a consideration of that part of section 486-7, G. C., as amended 106 O. L., 403, which you quote in your letter, but also other provisions of said section, which for convenient reference I will quote as follows:

"Fourth: Make investigations, either sitting in banc or through a single commissioner or the chief examiner, concerning all matters touching the enforcement and effect of the provisions of this act and the administrative rules of the commission prescribed thereunder. In the course of such investigations each commissioner and the chief examiner shall have the power to administer oaths and affirmations, and to take testimony relative to any matter which the commission has authority to investigate.

"Fifth: Have the power to subpoena and require the attendance and testimony of witnesses and the production thereby of books, papers, public records and other documentary evidence pertinent to the investigations, inquiries, or hearings on appeal from the actions or decision of an appointing officer as is herein authorized, and to examine them as it may require in relation to any matter which it has authority to investigate, inquire into or hear. Fees shall be allowed to witnesses, and on their certificate, duly audited, shall be paid by the state treasurer, or in the case of municipal commissions by the county treasurer, for attendance and traveling, as is provided in section 3012 of the General Code for witnesses in courts of record. All officers in the civil service of the state, or any of the political subdivisions thereof, and their deputies, clerks, subordinates and employes, shall attend and testify when summoned so to do by the commission. Depositions of witnesses may be taken by the commission in the manner prescribed by law for like depositions in civil actions in the courts of common pleas."

When all of the foregoing provisions of this section are considered together I think it is manifest that its provisions refer to and apply only to witnesses who are summoned by the state or municipal civil service commission, and that a discretion is vested in said commissions as to what witnesses and the number thereof who shall be summoned to testify in any matter before them. In other words, while a party to any hearing may suggest to the commission the persons whom he desires for witnesses, no mandatory duty rests upon such commission to summon said witnesses, as would be the case in a civil action in a court of justice. It follows, therefore, that the processes for summoning witnesses as provided in this section are subject wholly to the control of the commission, and are not available to any party to a hearing at his instance and upon his motion. This does not mean that a party to a hearing is precluded from offering any evidence or the testimony of witnesses, but it does mean that the purpose of this law is to furnish the commission and not the parties to a hearing the means, at the expense of the public, to procure the testimony of witnesses and other evidence to enable them to hear and determine justly the matters in controversy.

This being so, when the commission with due regard for the rights of all parties determines what witnesses are necessary, it is empowered to procure their testimony, either in person or by deposition. Should any party feel aggrieved by the action of the commission in this respect, he may, as before observed, at his own expense, procure other witnesses, and the commission may hear their testimony. This, however, would be entirely voluntary on the part of the party submitting such testimony, and would involve no expense to the commission or to the public. When witnesses are summoned by the commission as aforesaid, they shall be paid as provided in that part of said section quoted by you, which slightly elaborated, so as to express fully its complete meaning, may be said to provide as follows:

"Fees shall be allowed to witnesses, and on their certificate, duly audited, shall be paid by the state treasurer, or in the case of municipal commissions (on their certificate, duly audited, shall be paid) by the county treasurer, for attendance and traveling, as is provided in section 3012 of the General Cod e for witnesses in courts of record."

The effect of the foregoing provision is to make the fees of witnesses summoned by a municipal commission, as hereinbefore explained, payable from the county treasury upon the certificate of such commission when duly audited. It is not provided in said section, nor is it contemplated, that the fees of such witnesses before payment shall require the action of any other authority or of the county commissioners. The provisions of section 3012, G. C., fixing the compensation of witnesses, are adopted and made a part of this law. Under the rule of compensation as fixed by said section 3012, G. C., nothing remains to be done except to determine and certify the amount due each witness, which is done by the commission. In other words, this law authorizes the amounts to be paid witnesses to be fixed by the commission, and, therefore, constitutes one of the exceptions coming within the provisions of section 2460, G. C. When witnesses are summoned by any municipal commission under the foregoing provisions of the law, the county stands responsible for the payment of their fees, and the further provisions of section 3012, G. C., in respect to the right of a witness to demand his fees when summoned, or before he is sworn, can have no application in the case of a witness summoned by the commission to appear before it.

In view of these considerations no witness summoned as aforesaid may demand his fees in advance, nor may any party to any hearing before the commission be held responsible for the fees of any witnesses summoned by said commission.

In answer to your inquiries, therefore, I must advise:

(1.) That as no witnesses are summoned at the instance of any party other than the commission no witness fees may be demanded in advance, and;

(2.) That all witnesses summoned by the commission must be paid as aforesaid, and that no costs including witness fees may be adjudged against any party to a hearing before the commission.

It must be observed in conclusion that the fees of witnesses certified by the state civil service commission may be paid only from a fund in the state treasury appropriated for that specific purpose. This question was considered fully in an opinion to you under date of October 29, 1915, and reported in Vol. III, page 2139, of the Attorney-General's Opinions for the year 1915. Respectfully,

EDWARD C. TURNER,
Attorney-General.

1498.

HOME RULE COMMISSION—ADOPTION OF CHARTER SUBMITTED BY SUCH COMMISSION—HOW EXPENSES OF ELECTIONS FOR ABOVE PURPOSES ARE TO BE PAID—FROM COUNTY TREASURY.

Expenses of a special election by a city for the purpose of voting upon the proposition of a home rule charter commission, as well as the expenses of a special election held upon the adoption of a charter submitted by such a commission, are to be paid by the county, and the same are not to be charged back by the county against the municipality to be retained from the funds due said municipality at the next semi-annual distribution of taxes.

COLUMBUS, OHIO, April 19, 1916.

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

GENTLEMEN:—We are in receipt of your letter of March 3d as follows:

"We would respectfully request your opinion upon the following questions:

"(1) Are the expenses of a special election by a city, for the purpose of voting upon the proposition of a home rule charter commission for said

city, under Art. 18 of the constitution of Ohio, legal expenses against the city funds to be paid direct by the warrant of the city auditor, or must such expense be certified by the deputy state supervisors of elections to the county auditor and be paid by the county?

"(2) If it is held that the latter course is the proper procedure, is it the duty of the county auditor to retain from the funds due to said city at the next distribution of taxes, the expenses of such an election?

"(3) Like inquiry is made as to the payment of the expense of a special election held upon adoption of a charter submitted by a commission, selected under the home rule provisions of the constitution."

Section 8 of the municipal home rule amendment to the constitution provides as follows:

"The legislative authority of any city or village may by a two-thirds vote of its members, and upon petition of ten per centum of the electors shall forthwith, provide by ordinance for the submission to the electors, of the question, 'Shall a commission be chosen to frame a charter?' The ordinance providing for the submission of such question shall require that it be submitted to the electors at the next regular municipal election if one shall occur not less than sixty nor more than one hundred and twenty days after its passage; otherwise it shall provide for the submission of the question at a special election to be called and held within the time aforesaid. * * * Any charter so framed shall be submitted to the electors of the municipality at an election to be held at a time fixed by the charter commission and within one year from the date of its election, provision for which shall be made by the legislative authority of the municipality in so far as not prescribed by general law. * * *"

There is no provision in the above constitutional amendment for the payment of the expenses of such elections.

We are therefore relegated to the general statutes in order to ascertain how the expenses of said election shall be paid.

Section 5052 of the General Code provides as follows:

"All expenses of printing and distributing ballots, cards of explanation to officers of the election and voters, blanks, and other proper and necessary expenses of any general or special election, including compensation of precinct election officers, shall be paid from the county treasury, as other county expenses."

There is no doubt that the two elections referred to in your inquiry are "special elections," and unless we can find some authority whereby the expenses thereof shall be charged against the municipality, the county will have to pay the same.

Section 5053, G. C., provides that in November election held in odd numbered years, the compensation and expenses shall be a charge against the township, city or village in which the election was held, and the amount so paid by the county shall be retained by the county auditor at the time of making the semi-annual distribution of taxes. This, however, can in no way refer to the special elections indicated in your letter.

In opinion No. 82, rendered on February 12, 1915, to Hon. John M. Markley, prosecuting attorney, Georgetown, Ohio, I held that the expenses of a special municipal election held in a municipality, to determine whether or not the sale of intoxicating

liquor as a beverage should be prohibited in such municipality, must be paid out of the county treasury and may not be charged back against the municipality.

The same rule would apply to the special elections referred to in your inquiry.

Without undertaking to give a complete history of the statute, which was designated as section 2966-27, of the Revised Statutes, but which has since been codified into sections 5052 and 5053 of the General Code, I will, however, refer to the act as found in 91 O. L., page 243, passed May 15, 1894. This was an act to amend section 14 of the act found in 90 O. L., page 263, and provided in part as follows:

> "Section 14. All expenses arising from printing and distributing ballots, cards of explanation to officers of election and voters, blanks, and all other proper and necessary expenses of any general or special elections, including compensation of precinct election officers, shall be paid out of the county treasury as other county expenses; but, except in the case of November elections, shall be a charge against the township, city, village or political division in which such election was held, and the amount so paid by the county, as above provided, shall be retained by the county auditor from the funds due to such township, city, village or political division, at the time of making the semi-annual distribution of taxes; * * *"

At the time of the passage of the above act municipalities held elections for their officers in April, and not in November.

On October 2, 1902, the Municipal Code was enacted (See 90 O. L., 20). Section 222 of said act provided for the first election under the act to be held on the first Monday in April, 1903, and for an election every year thereafter, on the first Monday in April.

On March 17, 1904, the legislature amended section 222 of the Municipal Code (97 O. L. 39), and provided that, beginning with the year 1904, the regular municipal election should be held on the first Tuesday after the first Monday in November. It was therefore in the year 1904, that the time for the holding of municipal elections was changed from April to November.

In 1905, article XVII of the constitution, was adopted. Section 1 of said article provides that the elections for state and county officers shall be held on the first Tuesday after the first Monday in November, in the even numbered years, and all elections for all other elective officers on the first Tuesday after the first Monday in November in the odd numbered years.

Section 2966-27, R. S., as found in 91 O. L., 243, was not then amended; but on April 9, 1908, the legislature amended section 14, of the act passed May 15, 1894 (99 O. L., 84), so as to contain practically the same language as is now found in sections 5052 and 5053 of the General Code. Therefore, the change made from the provisions of the act found in 91 O. L., 243, was not made by the codifying commission, but was made by the general assembly as indicated. The language of the act passed in 99 O. L., 84, is clear and explicit, and, as I see it, admits of no interpretation other than that which I have heretofore expressed.

Section 5052, G. C., requiring that the county shall pay all the expenses of elections, and there being no statutory authority under section 5053, G. C., to charge the same back to the municipality, the conclusion is inevitable that no such charge can be made.

In passing on this question, I have not considered whether or not said sections 5052 and 5053, as found in the General Code, are constitutional. I have simply passed on the question of the meaning of the provisions of said sections as found in the General Code. Nor have I passed in any way upon such expenses as are to be paid under section 4946, G. C.

Specifically answering your question, therefore, I am of the opinion that the expenses of a special election by a city, for the purpose of voting upon the proposition of a home rule charter commission, are to be paid by the county, and that the same should not be charged back against the municipality to be retained from the funds due said municipality at the next distribution of taxes; and further, that the expenses of a special election, held upon adoption of a charter submitted by a commission, are to be paid by the county and not charged back.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1499.

APPROVAL, RESOLUTIONS FOR IMPROVEMENT OF ROADS IN TEN COUNTIES.

COLUMBUS, OHIO, April 19, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communications of April 17 and April 18, 1916, transmitting to me for examination, resolutions relating to the following roads:

"Champaign county—Sec. 'O' of Urbana-West Jefferson road, Pet. No. 2146, I. C. H. No. 188.

"Clark county—Sec. 'I,' Springfield-Urbana road, Pet. No. 2158, I. C. H. No. 187.

Clark county—Sec. 'I,' Springfield-Urbana road, Pet. No. 2158, I. C. H. No. 187.

"Erie county—Sec. 'O,' Sandusky-Norwalk road, Pet. No. 1480, I. C. H. No. 294.

"Mercer county—Celina-Greenville road, Pet. No. 2681, I. C. H. No. 211, Sec. 'E.'

"Monroe county—Sec. 'J,' Woodsfield-Marietta road, Pet. No. 2718, I. C. H. No. 389.

"Ross county—Sec. 'M,' Chillicothe-Lancaster road, Pet. No. 2880, I. C. H. No. 361.

"Tuscarawas county—Sec. 'O,' New Philadelphia-Uhrichsville road, Pet. No. 3000, I. C. H. No. 412.

"Jefferson county—Steubenville-Cambridge road, Sec. 'H,' I. C. H. No. 26, Pet. No. 2538.

"Knox county—Sec. 'J' of the Mt. Vernon-Coshocton road, Pet. No. 2552, I. C. H. No. 339. (Also copy.)

"Knox county—Sec. 'I' of the Columbus-Millersburg road, Pet. No. 2553, I. C. H. No. 23.

"Knox county—Sec. 'I' of the Columbus-Millersburg road, Pet. No. 2553, I. C. H. No. 23.

"Union county—Sec. 'F' of the Urbana-Marysville road, Pet. No. 3013, I. C. H. No. 191."

I find these resolutions to be in regular form, and am therefore returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1500.

TOWNSHIP TRUSTEES—WITHOUT AUTHORITY AT PRESENT TIME TO SUBMIT TO ELECTORS OF TOWNSHIP BOND ISSUE FOR ROAD PURPOSES—WHEN SUCH QUESTION MAY BE SUBMITTED UNDER PROVISIONS OF CASS HIGHWAY LAW—PURPOSE DEFINED—COUNTY COMMISSIONERS MAY ISSUE BONDS FOR ROAD REPAIR PURPOSES.

Township trustees are without authority at the present time to submit to the electors of a township a bond issue for road purposes. Such question may not be submitted until the budget commission has made its report and it is known how much will be realized from the levy already made, and how much of the cost of the projected work will have to be met by a bond issue. Such bonds can only be issued for construction or reconstruction work. County commissioners, may, however, issue bonds at the present time for road repair purposes and the proceeds of such bonds may be used by the county commissioners in the repair of township roads.

COLUMBUS, OHIO, April 20, 1916.

HON. OTHO W. KENNEDY, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—I have your inquiry under date of March 20, 1916, which reads as follows:

> "In Crawford county there are a number of townships that have improved roads that are in great need of repair. These townships have practically no money with which to make such repairs. That is, the sum in the treasury that might be used for that purpose is wholly inadequate to meet the expenses that will be necessarily incurred in making needed repairs. Some of these roads are in very bad condition, and if not repaired during the present year, I am informed that they will be almost, if not altogether, ruined.
>
> "The question is: How can these townships get the money with which to make these needed repairs during the present year? There is no question but that arrangements can be made by way of a levy for future years, but it is a question of the present. In your opinion, can they borrow money, either with or without a vote of the people for this purpose?"

The right of township trustees to borrow money for road purposes has been discussed and passed upon in several opinions of this department heretofore rendered. The matter was first under consideration in opinion No. 849, rendered to the bureau of inspection and supervision of public offices on September 21, 1915. In that opinion it was pointed out that as the Cass highway law did not go into effect until September 6, 1915, and that as no levy might be made in 1915 under section 60 of that act, section 3298-1, G. C., no election to determine the question of issuing bonds might be held until after the time in the year 1916, when the township had made its levy under section 3298-1, G. C., and it had been determined that said levy did not furnish sufficient funds for the construction and repair of the designated roads.

It was also pointed out in the opinion in question that, under authority of the several sections of chapter III of the Cass highway law, township trustees might issue bonds only for the construction or reconstruction of roads and not for the repair thereof. In opinion No. 1264, rendered to Hon. Hugh F. Neuhart, prosecuting attorney of Noble county, on February 14, 1916, it was held that township trustees must make the levy provided for in section 60 of the Cass highway law, section 3298-1, G. C., and it must be determined that said levy does not furnish sufficient funds before the trustees may even submit the question of a bond issue to the qualified electors of the

township, and that this is true, even if the township trustees are aware that a levy which may be hereafter made, will be sufficient for the purpose of improving the roads designated by them.

In opinion No. 1407, rendered to Dean E. Stanley, prosecuting attorney of Warren county, on March 22, 1916, it was further pointed out that the amount produced by a levy, under section 3298-1, G. C., cannot be known until the budget commission has completed its work, which must be not later than the third Monday in August, unless the time be extended by the state tax commission. The further conclusion was expressed that the question of a bond issue may not be submitted by the township trustees until the budget commission has made its report and it is known how much will be realized from the levy and how much of the cost of the projected work will have to be met by a bond issue.

I am enclosing for your information, copies of opinions Nos. 1264 and 1407, referred to above, and am mailing you under separate cover a copy of a pamphlet containing opinion No. 849. The conclusions expressed in the opinions in question, render apparent the answer to your inquiry, which is that township trustees are not at the present time authorized to even submit to the voters the question of issuing bonds for road purposes, and even when the proper time has arrived for submitting such question, can only submit the question of issuing bonds for the construction or reconstruction of certain designated roads, and will not be authorized to submit the question of issuing bonds for repair purposes.

Complete relief for the situation referred to in your letter may be had, however, through the action of the county commissioners. I am enclosing for your information, a copy of opinion No. 1095 of this department, rendered to Hon. Donald F. Melhorn, prosecuting attorney, Hardin county, on December 13, 1915, in which the procedure of county commissioners, in the issuing of bonds for road repair purposes, is fully outlined. Such bonds may be issued by county commissioners at the present time, and in view of the provisions of paragraph (c) of section 241 of the Cass highway law, section 7464, G. C., to the effect that the county commissioners shall have full power and authority to assist the township trustees in maintaining township roads, the proceeds of such bond issue may be used by the county commissioners in the repair of either county or township roads. It will be noted that bonds issued under authority of section 108 of the Cass highway law, section 6929, G. C., in so far as they are to be issued in anticipation of taxes, are to be issued in anticipation, not only of taxes levied on the entire county, but also of taxes levied upon all township or townships in which the road or roads to be improved or repaired may be in whole or in part situated.

The provisions of section 98 of the Cass highway law, section 6919, G. C., as to the methods of division of the cost and expense, and the provision of section 100 of the Cass highway law, section 6921, G. C., relating to a division by agreement of the cost and expense of road work between the county commissioners and the trustees of the interested township or townships, are sufficiently broad to permit of any desired arrangement between the county commissioners and the township trustees of any particular township relating to the share of the cost and expense to be borne by the county and township or townships, respectively.

The language of section 6921, G. C., to the effect that the county commissioners may enter into an agreement with the trustees of the interested township or townships, whereby said county and township, or one or more of them, may pay such proportion of the cost and expenses as may be agreed upon between them, is sufficiently broad to warrant any division that may be mutually agreed upon, even should such division involve the payment of the entire cost and expense by the interested township or townships.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1501.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, CITY OF CLEVELAND, OHIO.

COLUMBUS, OHIO, April 21, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the city of Cleveland, Ohio, in the amount of $153,000.00, issued in anticipation of the collection of special assessments for the improvement of various streets of the city under ordinance No. 39226, being 153 bonds of one thousand dollars each."

I have examined the transcript of the proceedings of the council and other officers of the city of Cleveland, Ohio, relative to the issuance of the above bonds, also the bonds now in the hands of the treasurer of state, and I find the same regular and in conformity with the provisions of the General Code of Ohio and of the provisions of the charter of said city.

I am of the opinion that said bonds are valid and binding obligations of the city of Cleveland.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1502.

DISAPPROVAL, LEASE TO GLEN BROWN OF CERTAIN CANAL LANDS IN CITY OF AKRON, OHIO.

COLUMBUS, OHIO, April 22, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of March 11, 1916, transmitting to me for examination a lease to Glen Brown of certain canal lands in the city of Akron, Ohio. I have examined the lease in question and find that it covers certain portions of the towing path embankment of the canal, and does not provide for the construction of any new towing path by the lessee, either upon the opposite or berme embankment, or in any other location. I am of the opinion from an examination of the statutes that you are unauthorized to lease the towing path embankment of a canal for railway purposes, even where the lease covers less than two miles, as I am informed in the case of this particular instance, unless, indeed, provision is made in the lease for the construction of a new towing path, which construction should be required of the lessee at his expense. It has been suggested informally that the lessee in the proposed lease might be willing to enter into a lease containing a stipulation covering the above matter, and if that be true I am of the opinion that a lease might properly be made covering the canal lands in question. If it should be desired to enter into such a lease, and submit the same for approval, I suggest the use of the following language:

"The party of the second part, for himself, his heirs, executors, administrators and assigns, hereby agree that if at any time the party of the first part herein named requires the use of a towing path along that part of the canal where this lease covers any part of the present towing path embank-

ment, he will construct, at his own expense, a connected towing path embankment upon the present berme embankment on the opposite side of said Ohio canal, including all necessary change bridges or cross-overs, and said towing path embankment and change bridges or cross-overs to be constructed by the party of the second part as soon as he is notified so to do by the superintendent of public works of Ohio, and to be constructed in conformity with plans and specifications to be approved by said superintendent of public works; and if at any time a temporary towing path is required or desired by the party of the first part before a new towing path is constructed, then and in that event the said party of the first part shall have the right to enter upon and use for towing path purposes, and without compensation to said second party, the road bed of the railway located upon parts of the present towing path embankment of said Ohio canal under the terms of this lease."

I also suggest that in the event of the preparation of a new lease the description of the leased premises be modified to read as follows:

"Beginning at a point in the berme embankment of the Ohio canal in the city of Akron, Summit county, Ohio, opposite station 1803 of G. F. Silliman's survey of said canal, made under the direction of the state board of public works in the summer of 1912, and extending thence southerly over and along said berme embankment, including the full width thereof, a distance of 1037 feet, more or less, to the southerly line of Cherry street in said city; thence along the outer slope of the present towing path embankment of said canal 163 feet to a point opposite station 1816 of Silliman's survey; thence southerly and easterly by a twenty-four degree curve to the left across a portion of the present widewater of said canal between locks 6 and 7 of the Ohio canal, north of Portage Summit level, to station 1821 of Silliman's survey; thence southeasterly over and along the outer slope of the present towing path embankment to station 1833; thence continuing in a southerly direction on and along the present towing path embankment to a point opposite station 1833, plus 65.8 of Silliman's survey of said canal; thence southwesterly crossing over lock No. 3 of said Ohio canal north of Portage Summit level to a point at or near station 1835 of Silliman's survey of said canal; thence in a southwesterly direction over and along the outer slope of the present towing path embankment to a point opposite station 1845 of said Silliman's survey; thence southerly over and along the inner slope of the present towing path embankment, and including a strip of ground about 8 feet in width along the easterly side of the present canal channel to station 1849 of said Silliman's survey; thence southerly over and along the present outer slope of said towing path embankment to the northerly line of Bartges street in said city of Akron, at station 1881 of Silliman's survey of said canal, and containing 168,950 square feet, more or less, excepting therefrom so much of said canal land as has heretofore been leased by the state of Ohio to the following parties."

The right of the state to operate lock No. 3, and to pass boats through the same, should be protected by the insertion of a clause in the lease, and the following language is suggested for use in this connection:

"At the point where the party of the second part constructs a line of railway over lock No. 3 of said Ohio canal, said party of the second part shall construct a good and sufficient drawbridge, according to plans and specifications approved by the superintendent of public works, and shall provide for the operation of the same at his expense, so that the party of the first part

may at all times during the continuance of this lease operate said lock and its appurtenances, and freely pass boats through the same, and said party of the second part shall not be entitled under this lease to construct any railway tracks or other works that will in any way interfere with the free use and operation of said lock and its appurtenances and the passage of boats through said lock and canal."

In order that the rights of prior lessees may be fully protected I also suggest that if the lease be redrawn the following paragraph be inserted:

"The party of the second part shall fully respect all the rights of the other lessees of the state of Ohio, hereinbefore referred to, and shall not interfere in any way with their rights under their respective leases, and shall be liable to said lessees for any interference with or infringement upon their rights."

For the reasons above stated I am returning, without my approval, the lease as submitted, but if a new lease is drawn and executed in accordance with the suggestions herein contained, I will approve the same.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1503.

ANTITOXIN—WHEN COUNTY COMMISSIONERS MAY PAY FOR ANTITOXIN PROCURED BY PHYSICIAN FOR INDIGENT PERSON.

Antitoxin procured by a physician for person in indigent circumstances under section 2500, *G. C., may be paid for on proper certificate under the provisions of section* 2501, *G. C.*

COLUMBUS, OHIO, April 22, 1916.

HON. F. C. GOODRICH, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—I have your letter of April 13, 1916, which is as follows:

"The statutes provide that arrangements shall be made for the furnishing of diphtheria antitoxin free to physicians. John W. Fulkerson, a druggist of this city, has furnished some of this antitoxin to certain physicians upon the order of the health officer of the city of Troy, and has presented his bill to the commissioners of Miami county. Have the commissioners any authority to pay this bill, or should the bill be sent to the state board of health?

"The civil service commission for the city of Troy held some investigations in reference to the suspension of the chief of police and chief of the fire department of Troy. They were suspended, and the costs of the hearing have been certified to the county auditor. Have the commissioners any authority to pay these costs when no money has been set apart for this purpose?"

Sections 2500 and 2501 of the General Code are as follows:

"Sec. 2500. When a physician, regularly authorized to practice medicine under the laws of this state, is called upon to treat a person suffering from diphtheria who is in indigent circumstances, or a child suffering from

diphtheria whose parents are in indigent circumstances, and he is of the opinion that antitoxin should be administered to such person or child or to others who may have been exposed to the contagion of such disease, he may make application to any health officer within the county therefor."

"Sec. 2501. When satisfied of the indigent circumstances of the persons to be treated, such health officer shall certify the fact to the county commissioners and immediately authorize the attending physician or any druggist to furnish such antitoxin for the persons so to be treated. The antitoxin so furnished shall be paid for upon the allowance of the county commissioners from the general fund of the county."

Under the provisions of the sections quoted there is ample authority lodged in the commissioners to make payment of the bill referred to in your letter specific provision for such a course being found in the concluding sentence of section 2501 of the General Code, supra.

I am not unmindful of the provisions of the act "to authorize the state board of health to produce antitoxin for distribution for the sure and prevention of diphtheria" passed at the last session of the general assembly and to be found at page 23 of 106 O. L.

The very nature of a case demanding the administering of antitoxin emphasizes the necessity for prompt action on the part of a physician which in the great majority of cases could not be safeguarded if resort had to be made to the authority granted by the latter act and the benefits of the former law, sections 2500 and 2501 of the General Code, supra, could not be invoked.

Sections 2500 and 2501 of the General Code, supra, afford the authority necessary to reach the question under consideration, and it is therefore my opinion that the commissioners may and should pay the bill in question, which, of course, is assumed to be correct and reasonable.

The matter involved in the second branch of your inquiry involves some questions now under consideration by the department and as soon as a determination has been reached you will be advised with reference to it.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1504.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, LORDSTOWN TOWNSHIP RURAL SCHOOL DISTRICT, TRUMBULL COUNTY, OHIO.

COLUMBUS, OHIO, April 22, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Lordstown township rural school district, Trumbull county, Ohio, amounting to $25,000.00 for the purpose of purchasing a site and the erection and equipment of a school building for the accomodation of the centralized schools of said school district, being fifty bonds of $500.00 each."

I have examined the transcript of the proceedings of the board of education and other officers of Lordstown township rural school district relative to the issuance of the above bonds, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of said rural school district.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1505.

OHIO STATE UNIVERSITY—SUPPLEMENTAL CONTRACT FOR CONSTRUCTION OF SHOP BUILDING APPROVED.

COLUMBUS, OHIO, April 24, 1916.

HON. CARL E. STEEB, *Sec'y Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I am in receipt of a supplemental contract submitted on behalf of the Ohio State University entered into by said university with The Dawson Construction Company, which said company has the contract for the construction of a shop building on the campus of the Ohio State University. The supplemental contract is for the purpose of amending the plans and specifications, and it appears that the amendments thereto were duly approved by the governor, secretary of state and auditor of state under the provisions of section 2320, G. C., the amount involved in such change being in excess of one thousand dollars ($1,000.00).

I have carefully examined the contract in question and find that the amount called for therein is not in excess of the architect's estimate, and that the amount called for in the supplemental contract and the amount called for in the original contract do not together exceed the amount appropriated for the purpose.

I have therefore this day approved of said contract and filed the same in the office of the auditor of state.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1506.

COUNTY COMMISSIONERS—WITHOUT AUTHORITY TO EXTEND AID TO CHILDREN IN THEIR OWN HOMES RATHER THAN IN COUNTY CHILDREN'S HOMES.

County commissioners are without authority to extend aid to children in their own homes rather than in children's homes established by counties. The proper place to care for children who may require such aid is in children's homes, the only exception being in the case of the awarding of relief under the Mother's Pension Act, sections 1683-2 *to* 1683-9, *G. C.*

COLUMBUS, OHIO, April 24, 1916.

HON. CHARLES L. BERMONT, *Prosecuting Attorney, and* HON. PHILIP L. WILKINS, *Probate Judge, Knox County, Mt. Vernon, Ohio.*

GENTLEMEN:—Your joint request for an opinion as to the care and support of children in their own homes as distinguished from the care and support of children's home is as follows:

"The officials of Knox county who have to do with the care and maintenance of dependent children are interested in the following proposition and kindly request your opinion in the matter:

"Question: In a county which has already been provided with a children's home, are county commissioners authorized to provide for the care and support of children in their own home or that of another family, when it is deemed best for the interest of such child, and when such child is eligible to the children's home?

"In explanation of the above question we have this condition: Prior to April 1st this year this county had no children's home and Richland county was caring for a number of our children on contract. The board of county commissioners were also providing for the care and support of certain other children in private homes by granting to the parent or relative, who might have the child in charge, a weekly allowance. In other words, a small allowance paid such parents and relatives would enable them to keep the family together and save the breaking up of the home and the committing of the children to an institution where it would cost more than under the other arrangement and not so good for the child because family ties are then broken and no institutional home can make up for the loss.

"I ask the foregoing because of the reading of section 3092, General Code, which reads in part as follows:

" 'Except such as are imbeciles, idiots or insane, no child or children entitled to admission into a children's home shall be kept or maintained in any county infirmary in this state. In any county where such home has not already been provided, the board of county commissioners shall make temporary provisions for such children by transferring them to the nearest children's home where they can be received and kept at the expense of the county, * * * but the commissioners may provide for the care and support of such children within their respective counties, in the manner deemed best for the interest of such children, and they shall levy an additional tax, which shall be used for that purpose only.'

"Now under present conditions as they exist in Knox county must the commissioners discontinue the help given children in their homes and homes of other relatives? In other words, must all children eligible to the home be committed to said institution when support and care become necessary?

"The prosecuting attorney, Mr. Charles L. Bermont, joins me in this request for an opinion and we thank you in advance for your direction in the matter.'

Recognizing the fact that under ordinary circumstances institutional life does not afford the best means to promote the interest of children when compared with proper home life surroundings, I am strongly inclined to view with favor any plan which may be proposed to continue the home life surroundings and influences which may be provided by the laws which control such matters and to that end I have given thoughtful consideration to the plan proposed by you.

In your letter you refer to and quote a portion of section 3092 of the General Code. This section which has been amended is to be found in its present form on page 891 of 103 O. L., as follows:

"In any county where such home has not already been provided, the board of commissioners shall make temporary provisions for destitute children by transferring them to the nearest children's home where they can be received and kept at the expense of the county, or by leasing suitable premises for that purpose, which shall be furnished, provided and managed in all

respects as provided by law for the support and management of children's homes, but if such child be not abandoned or surrendered by its parents, a complaint must first be filed with the juvenile court setting forth the facts as to such children, and if such court commits such children to an institution or agency for the care of children, then said commissioners may pay reasonable board for such child, whether placed in an institution or with a private family. But the commissioners may provide for the care and support of such children within their respective counties, in the manner deemed best for the interest of such children, which may include the payment of board for such children in a private home, when placed therein by an institution or society certified by the board of state charities as provided by section 1352-1 of the General Code, and they shall levy an additional tax, which shall be used for that purpose only."

From a reading of the entire section it will at once be observed that, while there is a provision therein to the effect that the commissioners may provide for the care and support of the children in the manner deemed best for the interest of the children, the part of the section clearly indicates that their action in that direction is to follow the consideration of the matter by one of the institutions provided for in section 1352-1 of the General Code.

Children's homes are erected and maintained in the various counties of the state for a definite and specific purpose, which purpose has been set out in section 3089 of the General Code, as amended, 103 O. L., page 890, as follows:

"The home shall be an asylum for children under the age of eighteen years, of sound mind and not morally vicious and free from infectious or contagious diseases, who have resided in the county not less than one year, and for such other children under such age from other counties in the state where there is no home, as the trustees of such home and the persons of authority having the custody and control of such children, by contract agree upon, who are, in the opinion of the trustees, suitable children for admission by reason of orphanage, abandonment or neglect by parents, or inability of parents to provide for them. In no event shall a delinquent or incorrigible child, be committed to or be accepted by such home. If an inmate of such home is found to be incorrigible, he or she shall be brought before the juvenile court for further disposition. Parents or guardians of such children shall, in all cases where able to do so, pay reasonable board for their children received in such children's home."

Full and complete machinery is provided in the various related statutes for the care of children in children's homes and the intention of the general assembly with reference to the exceptions to be made with reference to any other relief is expressed in the Mothers' Pension Act, which in its original form is to be found on pages 877 and 878 of 103 O. L., with the amendment thereto to be found in 106 O. L., at page 436.

This law which is embraced in sections 1683-2 to 1683-9 inclusive, of the General Code has been made part of the juvenile court act which is to receive a liberal construction to the end that proper guardianship may be provided for the child, etc.

In view of the provisions of law for the care of eligible children in children's homes and the relief afforded through the Mothers' Pension Law, it is my opinion that the county commissioners are not authorized to extend relief in the manner proposed by you, there being no provision of law which allows such a course to be pursued.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1507.

COUNTY TUBERCULOSIS HOSPITAL—MAINTENANCE FUND FOR SAME CANNOT BE USED FOR ANY OTHER PURPOSE—SECTION 2434, G. C, MAY BE INVOKED FOR ENLARGING SUCH HOSPITAL.

The maintenance fund provided for a county tuberculosis hospital cannot be used for any other purpose than maintenance.

The authority contained in section 2434, G. C., to enlarge "other necessary buildings" may be invoked for the purpose of enlarging a county tuberculosis hospital.

COLUMBUS, OHIO, April 24, 1916.

State Board of Health, Columbus, Ohio.

GENTLEMEN:—I have your request for an opinion with special reference to the enlargement of the Lucas county tuberculosis hospital, which request is as follows:

"In 1908 the general assembly passed an act (O. L. 99, Vol. 62, 121) 'to provide for county hospitals for the care and treatment of inmates of county infirmaries and other residents of the county suffering from tuberculosis,' and to correct an error in section 3 of said act.

"You will note that this act gives to each county in the state the authority to erect and maintain a county hospital for the treatment of such inmates of the county infirmary as may be suffering from pulmonary tuberculosis, and for the care and treatment of such other residents of the county as may be afflicted with this disease.

"Under the authority of this act, county hospitals for tuberculosis were established in Franklin, Lucas and Butler counties. In the following year, the legislature passed an act (O. L. 100, Vol. 86) 'to provide for county hospitals for the care and treatment of inmates of county infirmaries and other residents of the county suffering from tuberculosis,' passed April 2, 1908, and to supplement said act by adding thereto sections 6, 7, 8, 9 and 10 to provide for district hospitals.

"As the state board of health was responsible for this legislation, I would inform you of the reasons for supplementing the original act by providing for district hospitals. It was found, after investigation, that there were few counties in the state that could afford to establish a separate institution for the care of a limited number of tuberculosis patients who would be transferred from the infirmary, or who would apply for admission to the hospital. In order to provide every facility possible for the restriction of this disease, it was found to be advisable to secure such legislation as would authorize a number of contiguous counties (not to exceed five) to enter into an agreement to construct and maintain an institution for the treatment of pulmonary tuberculosis, and to provide for the construction and maintenance of a jointly owned and controlled hospital.

"In 1913 (O. L. 103, Vol. 492) the law was again amended so as to rescind the authority of a county to construct a county hospital for tuberculosis, but provision was made (see section 3141) for the continuance of county hospitals for tuberculosis that had been erected.

"In Lucas County, it has been found that the county hospital for tuberculosis is too small to properly care for those who have been committed to the infirmary and who are suffering from pulmonary tuberculosis, and to care for the other residents of the county who have this disease and who wish admission to the hospital. The county commissioners are anxious to enlarge

the institution so that it will have sufficient capacity to care for those who should now be receiving such care and treatment in such an institution, with reasonable forethought as to the immediate future.

"This matter was submitted, as I understand, to the prosecuting attorney of the county, and a doubt has been raised as to the authority of the county commissioners to enlarge the present institution as well as to provide for the maintenance of the institution. The matter came to this department from the prosecuting attorney's office for information as to what had been done in other counties under similar conditions, and for our interpretation of the provisions of the law and the intention of the legislature with respect to tuberculosis patients, and as the matter is of more than local application, I shall be glad to have your opinion on the following questions:

"1. Can a county that, under sanction of the law, has erected a county tuberculosis hospital enlarge such institution, using for that purpose the maintenance fund raised by annual levy?

"2. Can a county sell bonds for the purpose of enlarging its tuberculosis hospital in anticipation of a levy made for maintenance purposes?

"3. Will the provisions of the statutes, affecting the erection and enlargement of district tuberculosis hospitals, apply to county tuberculosis hospitals, or will the county commissioners in raising funds for the enlargement of such institution proceed to raise funds as they would in the event that it is proposed to enlarge or improve any county building?

"For a discussion of the subject of tuberculosis hospitals, although not having a direct bearing on this enquiry, I would refer you to an opinion of your department, annual report of the attorney-general, 1914, Vol. I, page 984, and an opinion given by yourself under date of February 3, 1915, also the decision of the supreme court in the case of Brissell v. State ex rel., 87 O. S., 154."

The authority for the erection of a county tuberculosis hospital was brought to an end through the enactment of house bill No. 265, passed in 1913. In this bill is to be found an amendment to section 3140 of the General Code, under which the erection of such county tuberculosis hospitals was authorized, so that at the present time there is absolutely no authority of law for the erection of such hospitals, the work of caring for tubercular patients being taken up under the district hospital system, which has been inaugurated, and only such counties as had erected county tuberculosis hospitals before the repeal of the section granting the authority of caring for patients in their own hospitals. Section 3141 of the General Code, as amended, 103 O. L., 492, is as follows:

> "In any county where a county hospital for tuberculosis has been erected, such county hospital for tuberculosis may be maintained by the county commissioners, and for the purpose of maintaining such hospital the county commissioners shall annually levy a tax and set aside the sum necessary for such maintenance. Such sum shall not be used for any other purpose."

The first two questions propounded by you are answered by the provisions of section 3141 of the General Code, supra, particularly in view of the provisions of the last sentence of the section quoted.

It is my opinion in view of the provisions of section 3141 of the General Code, as amended, supra, that the maintenance fund may not be used for enlarging a tuberculosis hospital, nor may a county sell bonds for that purpose in anticipation of a levy made for maintenance purposes.

This same question was considered in the case of Warren hospital for the insane, reported in 15 Pa., county court reports, at page 83, and in that case it was held that

"money specifically appropriated by the legislature for the maintenance of patients in an insane hospital cannot properly be applied either to the purchase of additional land, the erection of additional buildings, or the furnishing or equipment thereof."

Coming to your third question, which is as to whether or not the provisions of the statute affecting the erection and enlargement of a district tuberculosis hospital, or those providing for the enlargement of county buildings, will apply, I have to say that there is absolutely no provision of law which specifically deals with the question of enlarging or extension of county tuberculosis hospitals. In enacting the legislation for the erection of county tuberculosis hospitals, the subsequent amendment thereto, providing for the maintenance of hospitals erected prior to the amendment of the law, no provision is made for the enlargement of county hospitals. That these buildings were necessary for the care of unfortunate persons who were afflicted with tuberculosis, and who require care in a public institution, goes without saying.

The care and treatment of this disease has made rapid strides in a comparatively short time, and while the method of caring for tubercular patients in county hospitals or in district hospitals was probably unheard of at the time the original of section 2434 of the General Code was enacted, it is fair to assume that in the absence of any special provision being made by the general assembly in the laws passed for the purpose of authorizing the erection of county hospitals, that it must have had in mind the fact that the provisions of section 2434 would be sufficient to care for the natural extension of the buildings therein provided for. Section 2434 of the General Code is to be read in connection with section 2433 of the General Code, which sections are, in part, as follows:

> "Section 2433. When, in their opinion, it is necessary, the commissioners may purchase a site for a court house, or jail, or land for an infirmary or a detention home, or additional land for an infirmary or county children's home at such price and upon such terms of payment, as are agreed upon between them and the owner or owners of property. The title to such real estate shall be conveyed in fee simple to the county.
>
> "Section 2434. For the execution of the objects stated in the preceding section, or for the purpose of erecting or acquiring a building in memory of Ohio soldiers, or for a court house, county offices, jail, county infirmary, detention home, or additional land for an infirmary or county children's home or other necessary buildings or bridges, or for the purpose of enlarging, repairing, improving, or rebuilding thereof, or for the relief or support of the poor, the commissioners may borrow such sum or sums of money as they deem necessary, at the rate of interest not to exceed six per cent. per annum, and issue the bonds of the county to secure the payment of the principal and interest thereof. * * *"

In section 2434 of the General Code, supra, provision is made for the enlargement of various county buildings as referred to in section 2433 of the General Code and "other necessary buildings." In view of the fact, therefore, that it cannot be disputed that county tuberculosis hospitals where erected are "necessary buildings," and of the further fact that in the passing of the law authorizing their erection, the General assembly did not make provision for the natural growth of such institutions by the specific enactment, it is my opinion that the necessity of the occasion demands that the authority contained in section 2434, for the enlargement of county buildings be invoked under the head of "other necessary buildings" for the enlargement of a county tuberculosis hospital, as the laws relating to district hospitals have no application to the same.

Answering your question specifically, I would say that the maintenance fund cannot be used for the purpose of enlarging a county tuberculosis hospital, or for any

purpose other than the maintenance thereof, and that the only authority for the enlargement of a county tuberculosis hospital is to be found in the provisions of section 2434 of the General Code, supra. Respectfully,

EDWARD C. TURNER,
Attorney-General.

1508.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, CITY OF IRONTON, OHIO.

COLUMBUS, OHIO, April 24, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the city of Ironton, in the sum of $13,500.00, being one bond of $500.00, and thirteen bonds of $1000.00, issued to secure funds to pay the city's portion of the cost of improving Sixth street, from Walnut street to Vine street."

I have examined the transcript of the proceedings of the council and other officers of the city of Ironton, in connection with the issuance of the above bonds, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted, and executed by the proper officers of the city, will, upon delivery, constitute valid and binding obligations of said city. Respectfully,

EDWARD C. TURNER,
Attorney-General.

1509.

APPROVAL, TRANSCRIPT OF PROCEEDINGS, BOND ISSUE, CITY OF NORWALK, OHIO.

COLUMBUS, OHIO, April 24, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the city of Norwalk, Ohio, in the sum of $6,500.00 to secure funds to pay the city's portion of the cost and expense of improving certain streets, being thirteen bonds of $500.00 each."

I have examined the transcript of proceedings of council and other officers of the city of Norwalk, Ohio, in connection with the issuance of the above bonds, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted, when executed by the proper officers, will upon delivery, constitute valid and binding obligations of the city of Norwalk.

Respectfully,

EDWARD C. TURNER,
Attorney-General.

1510.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, CITY OF NORWALK, OHIO.

COLUMBUS, OHIO, April 24, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—City of Norwalk bonds in the sum of $11,000.00, as follows:

"(a) $3,500.00 in anticipation of the collection of special assessments upon abutting property for the improvement of West street between Main street and the Wheeling and Lake Erie Railroad, being seven bonds of five hundred dollars each.

"(b) $7,500.00 in anticipation of the collection of special assessments upon abutting property for the improvement of Hester street from Monroe street to Clifton street, being fifteen bonds of five hundred dollars each."

I have examined the transcript of proceedings of the council and other officers of the city of Norwalk in connection with the issuance of the above bonds, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted, when executed by the proper officers, will, upon delivery, constitute valid and binding obligations of the city of Norwalk.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1511.

APPROVAL, ORDER OF STATE BOARD OF HEALTH WITH REFERENCE TO SEWAGE IN CITY OF AKRON.

COLUMBUS, OHIO, April 25, 1916.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Enclosed herewith you will find an order of the state board of health to the city of Akron with reference to the installation of a new sewage treatment plant or sewers or equipment for conveying or pumping sewage to the general sewerage system of the city, to correct the pollution of the county infirmary lateral ditch, being the order concerning which Hon. W. J. Laub, Mayor, and Hon. Scott D. Kenfield, city solicitor of said city, appeared before the governor and attorney-general and expressed themselves as satisfied with the order.

I have examined said order, which is issued under section 1251 of the General Code. I find the same to be regular and it is my opinion that it should be approved. Having myself approved the same under the provisions of section 1251, G. C., I am transmitting the same to you for your approval.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1512.

APPEAL FROM ORDER OF STATE BOARD OF HEALTH BY CITY OF GREENVILLE — REFEREE ENGINEERS — THEIR POWERS — PAST, PRESENT AND FUTURE PHYSICAL CONDITION TO BE CONSIDERED BY SAID ENGINEERS.

1. *In deciding questions submitted to them, engineers appointed as referees under sections 1257 and 1258, G. C., should consider conditions existing at the time of their decision, and the possibilities of the future, as well as conditions which existed at the time the order of the state board of health submitted to them was made.*

2. *Such decision of the referees embraces:*

(a) The necessity of the order, i. e., whether the conditions found by the state board of health do exist, and require action on the part of the city to correct the same.

(b) The method to be adopted for the correction of such conditions, i. e., whether by means of a sewage treatment plant or otherwise; the question of the kind, size and capacity of the plant and the degree of treatment necessary to correct the conditions not having been passed upon by the state board of health, and not being properly before them at the time the order was made, is not before the referee engineers, those being matters which the city is to determine, subject to approval by the board under section 1240, G. C., and

(c) The time within which the city shall be required to comply with the order.

COLUMBUS, OHIO, April 25, 1916.

MESSERS. A. ELLIOTT KIMBERLY and PAUL HANSEN, *Referee Engineers, Columbus, Ohio.*

DEAR SIRS:—Your letter of March 13, 1916, requesting my opinion, received. Your letter is quite lengthy and, without setting the same out in full herein, the facts upon which your inquiries are based as gleaned from your letter and from the records of the state board of health may be stated as follows:

"On November 3, 1895, the following communication was sent to the mayor and council of the city of Greenville by the state board of health:

" 'COLUMBUS, OHIO, November 3, 1895.

" '*To the Mayor and Council, Greenville, Ohio.*

" 'SIRS:—The state board of health considered your application to approve plans for a sewerage system and sewage purification works for Greenville, as prepared by Mr. John P. Force, consulting engineer, and you are hereby notified that the plans have been approved.

" 'Respectfully,

" '(Signed) C. O. PROBST,

" '*Secretary.*'

" 'By order of the Board.'

"On January 19, 1897, the following communication was received by the state board of health from the consulting engineer of the city of Greenville, and action was taken thereon by the state board of health as follows:

" 'FOSTORIA, OHIO, January 19, 1897.

" '*To the Honorable State Board of Health, Columbus, Ohio.*

" 'GENTLEMEN:—I am directed by the city council of Greenville to ask your honorable body to allow a modification in the plans for the disposal of the sewage of said city, approved by you October 30, 1895. The modifica-

tion to consist in the construction of the works in part for the present, leaving out all parts of the works as shown on plans with the exception of the screen chamber and filter beds. The area to be used in filter beds is about 10 acres of gravel overlaid by loam. As it is not likely that for several years at least over 40 per cent. of the present population of 5000 will avail themselves of the advantages of sewerage, this will place the population contributing sewage at about 200 per acre. It is believed that with this low rate per acre the separation of the sludge will not be necessary before applying the sewage to the soil. The citizens of Greenville will vote on the question of sewerage at the April election and it is likely that the reduced cost of the works will induce many to vote favorably, thus increasing the chances of introducing sewerage, badly needed at present in the city of Greenville.

" 'Respectfully submitted,

" '(Signed) JOHN P. FORCE,

" '*Consulting Engineer.*'

"At a meeting of the state board of health held in Columbus, Ohio, January 20, 1897, the above named modification in the plans for sewage disposal for the city of Greenville were approved.

"(Signed C. O. PROBST,

"*Secretary.*

"By Order of the Board."

"Further action of the state board of health with reference to this matter is shown by the following communications sent to the city of Greenville, Ohio, by said board:

" 'COLUMBUS, OHIO, February 14, 1900.

" '*To the City Council, Greenville, Ohio.*

" 'SIRS:—The state board of health has considered your proposal to construct a system of sewerage and discharge the same into Greenville Creek at a point indicated on map accompanying said proposal.

" 'You are hereby notified that said plans have been approved subject to the condition that within a period not to exceed five years arrangements be made for the purification of the sewage in a manner which will be satisfactory to the state board of health.

" 'Yours truly,

" '(Signed) C. O. PROBST,

" 'By order of the board.' " " '*Secretary.*

" 'COLUMBUS, OHIO, April 29, 1907.

" '*To the Mayor and Council, Greenville, Ohio.*

" 'DEAR SIRS:—At a meeting of the state board of health, held April 24, 1907, the secretary was instructed to notify you that the board will expect you to make provision for installing the sewage disposal plant without further delay; and to suggest that, in as much as it has been seven years since the plans for the sewage disposal plant were prepared, it might be advisable to have them submitted to some competent sanitary engineer, to determine whether improvements could be made in said plans; and further, that before plans are finally adopted for a disposal plant, they should be resubmitted to the state board of health at its meeting to be held in June, 1907, for approval.

" 'Yours truly,

" '(Signed) C. O. PROBST,

" 'By order of the board.' " " '*Secretary.*

" 'COLUMBUS, OHIO, January 4, 1909.

" '*To the Mayor and Council, and Board of Public Service, Greenville, Ohio.*

" 'DEAR SIRS:—I enclose herewith an order of the state board of health, duly approved by the governor and attorney-general, requiring the city of Greenville to purify its sewage in a manner satisfactory to said board, on or before October 1, 1909.

" 'Yours very truly,

" '(Signed) C. O. PROBST,

" '*Secretary.*

" 'By order of the board." '

The order of the state board of health referred to in the communication last above set out was as follows:

"WHEREAS, The state board of health of the state of Ohio, having under consideration the conditions existing in and adjacent to the city of Greenville, Darke county, Ohio, as set forth in the complaint, in writing, made to said state board of health by the trustees of Greenville township, Darke county, as required by section 1 of an act of the general assembly of Ohio, entitled, 'An act to authorize the state board of health to require the purification of sewage and public water supplies, and to protect streams against pollution,' passed April 8, 1908 (99 O. L., p. 74), did, in accordance with the duties imposed upon said board by said act, pursue all and singular the requirements and duties to be performed by said state board of health, and having inquired into and investigated the conditions complained of in said complaint; and

"WHEREAS, The state board of health, after investigating the conditions complained of, found that the said city of Greenville, Darke county, Ohio, is discharging and permitting to be discharged, sewage and other wastes into the Greenville Creek, and by reason thereof has so corrupted said creek as to give rise to foul and noxious odors, thereby creating conditions that are detrimental to the comfort of the citizens of Greenville township, Darke county, who reside in the vicinity of said creek, and

"WHEREAS, Acting pursuant to the requirements of the act aforesaid, said state board of health thereupon, on the 16th day of September, 1908, notified such city so causing the contamination or pollution of such stream, of its said findings, and gave said city an opportunity to be heard before said board on the 23d day of September, 1908, and

"WHEREAS, On the 23d day of September, 1908, no representatives from said city of Greenville having appeared, a letter was presented from the city clerk of said city of Greenville, acknowledging the receipt of said notice to appear.

"Thereupon, after discussion and due consideration of said complaint, the state board of health does find and determine that the following improvements or changes in said conditions aforesaid are necessary, and should be made, to wit: That the city of Greenville should be required to purify its sewage in a manner satisfactory to the state board of health, on or before October 1st, 1909.

"Thereupon, on motion duly seconded, the report and findings of said state board of health are hereby ordered transmitted to the governor and attorney general for their action thereon.

"I hereby certify that the foregoing report and findings were duly made by said state board of health of the state of Ohio, and that the proceedings

above set forth were duly had before said board, as shown by the minutes thereof.

"(Signed) C. O. PROBST,
"Secretary of the State Board of Health of the State of Ohio.

"COLUMBUS, OHIO, December 31, 1908.

"The foregoing report and findings having been examined by us, respectively, the governor of the state of Ohio, and the attorney-general of the state of Ohio, the same are in all respects approved this 4th day of January, 1909.

"U. G. DENMAN,
"Attorney-General.

"A. L. HARRIS,
"Governor of Ohio."

The foregoing order was made pursuant to sections 1249, 1250 and 1251 of the General Code, which provide as follows:

"Sec. 1249. Whenever the council or board of health of a city or village, the commissioners of a county, or the trustees of a township, set forth in writing, to the state board of health, that a city, village, corporation or person is permitting to be discharged sewage or other waste into a stream, water course, lake or pond, and is thereby creating a public nuisance detrimental to health or comfort, * * * the state board of health shall forthwith inquire into and investigate the conditions complained of.

"Sec. 1250. If the state board of health finds * * * that such sewage or other wastes have so corrupted a stream, water course, lake or pond as to give rise to foul and noxious odors, or to conditions detrimental to the health or comfort of those residing in the vicinity thereof, it shall notify such city, village, corporation or person causing such contamination or pollution of its findings and give an opportunity to be heard.

"Sec. 1251. After such hearing, if the state board of health determines that improvements or changes are necessary and should be made, it shall report its findings to the governor and attorney-general, and, upon their approval, the board shall notify such city, village, corporation or person to install works or means, satisfactory to the board, for purifying or otherwise disposing of such sewage or other wastes, or to change or enlarge existing works in a manner satisfactory to the board. Such works or means must be completed and put into operation within a time fixed by the board, which time shall be subject to the approval of the governor and attorney general. * * *"

The order of the state board of health cannot require more than is authorized by the statutes under which it is made, and, consequently, the order, in the absence of specific language to the contrary, must be construed in the light of such statutes.

In matters respecting disposition of sewage or other wastes, and the pollution of streams thereby, the board can act only upon complaint duly filed with it, and manifestly the result to be accomplished by the board is the correction of the conditions complained of, and that only. With this in mind it is clear that the word "purifying" as used in section 1251, G. C., supra, does not imply absolute purity, but is a relative term, and means merely that the sewage or wastes in question must be so treated as to correct the conditions complained of, or, as stated in the statutes above quoted, so that they will no longer "give rise to foul and noxious odors, or to conditions detrimental to the health or comfort of those residing in the vicinity thereof."

Said order when construed in the light of the history of the entire transaction, as shown by the foregoing communications, and with due regard to the provisions of the sections above quoted, and to section 1240, G. C., which provides that before any city or village shall provide or install for public use "purification works for * * * sewage, plans therefore must be submitted to and approved by the state board of health, may be paraphrased as follows:

> "That the city of Greenville shall be required to install, on or before October 1, 1909, a sewage treatment plant for the treatment of the sewage of said city so that it will no longer give rise to foul and noxious odors, or to conditions detrimental to the health and comfort of those residing in the vicinity of Greenville Creek, in Greenville Township, Darke County, Ohio, and that plans, therefor, shall be submitted to the state board of health for its approval."

By said order, when so construed, the state board of health has fully complied with the statutes above quoted, in that it has made its findings as to the physical conditions, has fixed the time within which such conditions must be corrected, and has indicated the nature and extent of the action which must be taken by the city. In view of the provisions of section 1240, G. C., above mentioned, it was clearly not contemplated by the general assembly that such an order should contain full details of the improvement, for the preparation of plans to carry out the order is a matter which is left, in the first instance, to the city, subject to the approval of the board.

Further action on said order was suspended pending the final determination of a suit which was commenced by the city of Greenville in the court of common pleas of Darke County, in which an injunction was sought to restrain the state board of health from enforcing its order. The final decision being adverse to the city (see State Board of Health et al., v. city of Greenville et al., 86 O. S., 1), said city then took advantage of the provisions of sections 1257 and 1258 of the General Code, which at the time the proceeding under consideration was commenced were embraced in section 4 of an act found in 99 O. L., page 76, as follows:

> "Section 4. If in any case any order of the state board of health, when approved by the governor and attorney-general, and made in pursuance to the provisions of this act, is not acceptable to any city, village, corporation or owner affected thereby, such city, village, corporation or owner shall have the right of appeal as follows, to wit: The necessity for and reasonableness of such order may be submitted to two reputable and experienced sanitary engineers, one to be chosen by the city, village, corporation or owner to which such order of the state board of health applies, and the other chosen by the state board of health, who shall not be regularly employed by said board, and who shall act as referee engineers. If the engineers so chosen are unable to agree then they shall choose a third engineer of like standing, and the vote of the majority shall be final and binding. The referee engineers herein provided for, shall have power to affirm, modify, or reject the order of the state board of health submitted to them, and their decision, as reported in writing to the governor and attorney-general, which shall be rendered within a reasonable time, shall be accepted by the state board of health, and shall be enforced by said board in the manner provided for in this act. The fees and expenses of said referee engineers shall be equally divided between the city, village, corporation or owner requesting such reference and the state board of health."

At a meeting of the state board of health held on July 23, 1913, the board was notified by the city of Greenville that A. Elliott Kimberly, sanitary engineer, Columbus,

Ohio, had been appointed referee engineer to act on behalf of the city of Greenville, and on April 16, 1914, after further negotiations with said city, Paul Hansen, sanitary engineer, of Urbana, Illinois, was appointed referee engineer by the state board of health to serve with the said A. Elliott Kimberly, of Columbus, Ohio.

You now inquire:

> "1. As of what date shall conclusions be drawn as to the findings and the order of the state board of health of January 4, 1909? That is, shall stream conditions as of today be taken into consideration, or conditions as of the date of the petition of the trustees of Greenville Township, Darke County, namely, June 6, 1908, or as of the date the controversy was judicially determined?"

The portion of section 4 of the act, above quoted, which is now section 1257, G. C., designates the submission of the question to referee engineers as an "appeal", and prescribes the precise question to be decided by them, to wit, "the necessity and reasonableness of such order."

The referee engineers in considering the questions submitted to them under their appointment must, of necessity, deal not only with conditions as they existed at the time of the issuance of the order but with present and future conditions.

While the proceeding of the referee engineers is perhaps technically an appeal from the decision of the state board of health, it is in reality a reference to a substitute board in the person of the referee engineers, and as it was assumed that the state board of health in issuing the original order intended to provide for the future, from the facts presented at the time the matter was considered, it is equally true that the functions of the referee engineers would be to take into consideration the future, basing their calculations on conditions as they exist at the present, and with no necessity for reference to the conditions as they existed at the time the original order was issued. It is possible that upon consideration of the matter in controversy the referee engineers might find conditions in substantially the same shape as they were at the time the order was issued, in which case it would only be necessary for them to determine whether the original order was necessary and reasonable and then modify it insofar as the method prescribed, and the fixing of the time allowed for the compliance of the city with the order.

Your second question is as follows:

> "2. Would the authority given to said referee engineers to 'affirm, modify or reject the order of the state board of health submitted to them' (section 1258 of the General Code), allow them to define and declare a degree of treatment to which the sewage of the city of Greenville shall be subjected if said referees shall conclude that the said order of the state board of health should not be affirmed unconditionally, yet should not be rejected? It is understood by said referees that such definition and declaration shall constitute a modification of the original order to the extent that the state board of health shall not have authority to require any further or greater degree of treatment than is declared by said referees to be necessary and advisable, and that said degrees of treatment, as defined by said referees, the city of Greenville must accept as the standard of treatment that must be provided by said city."

The portion of section 4 of the above act, which is now section 1258, G. C., prescribes the powers of the referee engineers, to wit, to "affirm, modify or reject the orders of the state board of health submitted to them."

The order of the state board of health, as hereinbefore construed, presents to the referee engineers three questions:

> "1. The necessity of an order, i. e., whether the conditions complained of and found by the state board of health do actually exist, and require some action on the part of the city.
>
> "2. The method to be pursued in correcting such conditions so existing; and
>
> "3. The time within which the city is to comply with the terms of the order."

Taking up these matters in the order stated, it is clear that the referee engineers have the right to reject the order entirely on the ground that no such conditions exist, and there was, therefore, no necessity for the order.

Assuming, as indicated by your letter, that the conditions do exist, and that you have found in favor of the board on the question of the necessity for an order, we pass to the second consideration, to wit, the method to be pursued. An examination of the order as herein construed shows that the board has directed the city of Greenville to construct a sewage treatment plant. The question of the reasonableness of this feature of the order is before you, and if it is your opinion that the conditions complained of and found to exist can be corrected more effectively, or at less cost by some other means, such as the emptying of the sewage into some other stream of sufficient flow to take care of it without causing unsatisfactory conditions, it is within your power to so find and determine, and such determination would be final and binding upon the state board of health and the city of Greenville. On the other hand, if you find that the order is reasonable in its requirement that a sewage treatment plant be constructed, the details thereof, such as the kind of plant, its size and capacity, and the character of the effluent which such plant will discharge into Greenville creek, are not before you, for the reason that no such details are or should be contained in the order of the state board of health, as these are matters which the legislature has seen fit to leave to the city in the first instance, subject to the approval of the state board of health, under section 1240, G. C., which is a part of the act creating the state board of health, and separate and distinct from the Bense act, under which the particular order in question was issued.

Section 1240, G. C., is in part as follows:

> "No city, village, public institution, corporation or person shall provide or install for public use a * * * sewerage system, or purification works for * * * sewage, * * * until the plans therefor have been submitted to and approved by the state board of health. * * *"

In other words, the only questions which have been properly before the board and covered by its order are that the conditions complained of exist and that a plant must be installed to correct the conditions within a specified time. The questions of the kind and size of the plant, the character of the effluent which will be discharged into the stream from such plant, and whether the stream will take care of such effluent without creating unsatisfactory conditions, have not yet been before the board, but are matters to be considered by them when plans are submitted to them under section 1240, G. C., supra. Not being covered by the order, and not being properly before the board at the time the order was made, it follows that such questions are not before the referee engineers, and a finding by such engineers thereon would not be binding either on the city or the board.

Assuming that the referee engineers have found that the conditions complained

of and found by the board do exist, and that the sewage treatment plant is the proper method of correcting such conditions (bearing in mind that the engineers have the power to prescribe some other means as above suggested), there remains the question of the time within which the city is required to comply with the order. The reasonableness of this feature of the order is before you, and you have the power to affirm or modify the same, and if a modification is desired you should prescribe the time, and your determination thereof will be binding upon both the state board of health and the city of Greenville.

Summing up, it is my opinion that the referee engineers in taking up the consideration of the questions growing out of the issuance of the order of the state board of health must at this time look to the provisions for the future, and in so doing must take into consideration conditions of the present, if they are found to be different from those existing at the time the original order was made, and that their conclusion as to the necessity and reasonableness of the order should be based upon present conditions; that their determination should cover

> "1. The necessity of the order, i. e., whether the conditions complained of and found by the state board of health exist and require action on the part of the city to correct the same;
>
> "2. The method to be adopted for the correction of such conditions, i. e., whether by means of a sewage treatment plant or otherwise;"

the question of the kind, size and capacity of the plant and the degree of treatment necessary to correct the conditions complained of not having been passed upon by the state board of health, and not being properly before them at the time the order was made, is not before the referee engineers, and their recommendations as to the same would not be binding upon either party to the reference; and

> "3. The time within which the city shall be required to comply with the order."

While as stated above, recommendations of the referee engineers as to the kind, size and capacity of the plant, the degree of treatment necessary, and the character of effluent from such plant which could be discharged into said stream without creating the conditions complained of and covered by said order, would not be binding upon the parties to said reference, yet it should be stated that if the investigations made by you have enabled you to reach conclusions on any or all of said subjects, it would be entirely proper for you to include same in your report, and give the city and the board the benefit thereof.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1513.

MUNICIPAL CORPORATION—MEMBER OF COUNCIL—HOW MEMBER MAY BE EXCUSED FOR FAILURE TO ATTEND PREVIOUS SESSIONS OF COUNCIL.

Members of council, two-thirds agreeing thereto, may excuse a member for his failure to attend a previous session.

COLUMBUS, OHIO, April 26, 1916.

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

GENTLEMEN:—I am in receipt of your letter of April 17th, to the following effect:

> "The council of a certain city at their regular meeting on April 10th, passed resolutions excusing two members from attendance at sessions of March 27th, preceding, and the city auditor desires to know whether or not such action should be recognized by him in making full payment of salary to said excused councilmen under provisions of section 4209, General Code, as amended 106 O. L., 114."

The statute to which you refer provides for the compensation of members of council, which compensation is to be paid semi-monthly, and then follows the provision which bears upon the question asked by you, and which is as follows:

> "A proportionate reduction in his salary shall be made for the non-attendance of any member upon any regular or special meeting of council; provided, however, that two-thirds of the members elected to council may excuse any member from attendance at any regular or special meeting, and when so excused no reduction in his salary shall be made for such non-attendance."

Your inquiry involves the question as to whether or not the excusing of a member from attendance must take place before or can take place after the meeting which the said member did not attend, and the particular provision that bears upon this question is "that two-thirds of the members elected to council *may excuse* any member from attendance."

The word "excuse" is defined by the New Standard dictionary as follows:

> "1. To absolve or free from imputation of fault;
> "2. To pardon and overlook, as a fault."

Either of these two meanings given to the word "excuse" would incline one to the view that the members of council were entitled to act after the meeting which the member did not attend, pardoning and overlooking the fact that he did not attend.

Another meaning given to the word "excuse" by the same authority is as follows:

> "To relieve from an obligation of service; as, he begged to be excused from attendance."

This meaning given to the word "excuse" would apparently make it the duty of council to act before the meeting and excuse the member from attending at such subsequent meeting.

It would appear, therefore, that the phrase "that two-thirds of the members elected to council may excuse any member from attendance" is susceptible of either of the two meanings foregoing mentioned, and I know of no reason why the same should not receive either of the two meanings.

I hold, therefore, that two-thirds of the members of council have the right to excuse a member from attendance at a former session.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1514.

APPROVAL, LEASE OF CERTAIN CANAL LANDS IN AKRON TO GLEN BROWN.

COLUMBUS, OHIO, April 26, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of April 25, 1916, transmitting to me for examination a lease to Glen Brown of Akron, Ohio, covering certain canal lands located in that city.

I have examined the lease and find it to be in regular form, and am therefore returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1515.

COUNTY COMMISSIONERS—REQUIRED TO CONSTRUCT AND KEEP IN REPAIR ALL NECESSARY BRIDGES ON ALL STATE AND COUNTY ROADS, WHETHER SUCH BRIDGES ARE LOCATED WITHIN OR WITHOUT A MUNICIPAL CORPORATION—MUNICIPAL CORPORATION MAY CONSTRUCT SAME.

County commissioners are required to construct and keep in repair all necessary bridges over streams and public canals on all state and county roads, free turnpikes, improved roads, transferred and abandoned turnpikes and plank roads in common public use or which are of general and public utility, without regard to whether such bridges are located within or without municipal corporations.

A municipality has the power to construct a bridge upon any street or highway within the corporation, even though such highway be one in reference to which the duties of county commissioners, with respect to bridges, attach under sections 2421 *and* 7557, *G. C.*

COLUMBUS, OHIO, April 26, 1916.

HON. HAROLD W. HOUSTON, *Prosecuting Attorney, Urbana, Ohio.*

DEAR SIR:—I acknowledge receipt of a communication signed by you and Mr. Benj. E. Seibert, city solicitor of Urbana, under date of February 2, 1916, in which communication my opinion is requested upon three questions set forth therein. I am indebted to Mr. Seibert for additional information furnished under date of February 25, 1916, bearing upon the question submitted. Two of the three questions may be stated as follows:

"(1) Are the county commissioners required to construct or repair bridges situated wholly within a city, in any case?

"(2) If the above question is answered in the affirmative, has a municipality the power to construct a bridge upon any street or highway within the corporation which, under sections 7557 or 2421, G. C., the county commissioners are to construct and keep in repair?"

Section 2421, G. C., reads as follows:

"The commissioners shall construct and keep in repair necessary bridges over streams and public canals on state and county roads, free turnpikes, improved roads, abandoned turnpikes and plank roads in common public use, except only such bridges as are wholly in cities and villages having by law the right to demand, and do demand and receive part of the bridge fund levied upon property therein. If they do not demand and receive a portion of the bridge tax, the commissioners shall construct and keep in repair all bridges in such cities and villages. The granting of the demand, made by any city or village for its portion of the bridge tax, shall be optional with the board of commissioners."

Section 7557, G. C., reads as follows:

"The county commissioners shall cause to be constructed and kept in repair, as provided by law, all necessary bridges in villages and cities not having the right to demand and receive a portion of the bridge fund levied upon property within such corporation, on all state and county roads, free turnpikes, improved roads, transferred and abandoned turnpikes and plank-roads, which are of general and public utility, running into or through such village or city."

In an opinion rendered by this department to Ortha O. Barr, prosecuting attorney of Allen county, under date of March 8, 1916, the effect of these two sections was fully considered and it was held that the sections in question are of general application, and require the county commissioners to construct and keep in repair all necessary bridges over streams and public canals on all state and county roads, free turnpikes, improved roads, transferred and abandoned turnpikes and plank roads in common public use or which are of general and public utility, without regard to whether the bridges are located within or without municipal corporations.

The above constitutes a complete answer to the first question submitted, and I am enclosing for your further information a copy of the opinion rendered to Mr. Barr.

The nature of the duty imposed upon county commissioners by section 7557, G. C., was considered by the court in the case of State ex rel. v. Commissioners, 49 O. S., 301, the syllabus being as follows:

"The expediency of the construction or repair of a bridge, under section 4938, Revised Statutes (section 7557, G. C.), rests in the administrative discretion of the county commissioners, and such discretion cannot be controlled by mandamus."

A careful study of this case discloses the fact that it cannot be regarded as authority for the proposition that there are no circumstances under which county commissioners could be compelled by mandamus to perform the duty enjoined upon them by section 7557, G. C. The case establishes the proposition, however, that in view of the considerations of time, means and the number of other bridges required by

public convenience at other places in the county, there may be and undoubtedly are many situations where a court would not compel county commissioners by mandamus to build a particular bridge on a state or county road within a municipal corporation. It therefore becomes important to consider the general powers of municipal corporations with respect to bridges.

Section 3616, G. C., reads as follows:

> "All municipal corporations shall have the general powers mentioned in this chapter, and council may provide by ordinance or resolution for the exercise and enforcement of them."

Section 3629, G. C., reads as follows:

> "To lay off, establish, plat, grade, open, widen, narrow, straighten, extend, improve, keep in order and repair, light, clean and sprinkle, streets, alleys, public grounds, places and buildings, wharves, landings, docks, bridges, viaducts, and market places, within the corporation, including any portion of any turnpike or plank road therein, surrendered to or condemned by the corporation."

In view of the fact that the duty of county commissioners with respect to bridges within municipalities is one that cannot, under all circumstances, be enforced by mandamus, and in view of the fact that municipal corporations are in express terms given general powers with reference to bridges within their corporate limits, I am of the opinion, in answer to the second question above stated, that a municipality has the power to construct a bridge upon any street or highway within the corporation, even though such highway be one in reference to which the duties of county commissioners, with respect to bridges, attach under sections 2421 and 7557, G. C. Any other conclusion would deprive municipal authorities of the power to construct a bridge within the corporation and on a road of the character referred to in section 2421 and 7557, G. C., which bridge the county commissioners, in the proper exercise of their discretion, might refuse to build on account of the superior demands of another locality, but which in the judgment of the municipal authorities and as a matter of fact might be essential to the convenience of the citizens of the municipality.

No opinion is herein expressed as to whether a bridge built by a municipality on a road of the character referred to in sections 2421 and 7557, G. C., is to be maintained by the municipality or by the county, or as to whether the municipality or the county would be liable for injuries to travelers resulting from defects in the same. Indeed, in view of the fact that the question passed upon is a close one, and of the further fact that the same does not appear to have been decided by any court, it is suggested that it might be advisable for the proper officers of a municipality, before making an expenditure of this character, to raise the question in an appropriate action and secure a judicial determination of the same.

The third question submitted in the communication referred to above relates solely to the respective duties of the city of Urbana and certain railroad companies, in regard to the construction of a new overhead crossing or bridge across the tracks of the railroad companies within the city, the bridge being required to replace an old structure, built over thirty years ago, under a special act of the legislature. The duties of this department in the furnishing of opinions and advice are limited by statute to state officers, boards and commissions, and to the prosecuting attorneys of the several counties respecting their duties in complaints, suits and controversies in which the state is or may be a party. It is not the present practice of the department to so far enlarge its activites beyond statutory requirements as to advise city solicitors,

and in view of the provisions of the law in this respect, and of the amount of work now before the department, I regret to state that I will be unable to advise you on this matter, especially as the preparation of an opinion would involve an extensive examination of the records of the city of Urbana and Champaign county.

I am forwarding a copy of this opinion to Mr. Seibert.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1516.

CLERK OF COURTS—WHO SHALL PROCURE SUPPLIES AND PAY BILLS FOR SUCH OFFICES—INTERPRETATION OF SECTION 2872, G. C.

Section 2872, G. C., authorizes clerks to procure necessary supplies for their offices, but county commissioners must allow and pay all bills for said supplies so procured.

COLUMBUS, OHIO, April 26, 1916.

HON. A. M. HENDERSON, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—I have your letter of April 11, 1916, as follows:

> "I have been requested by the clerk of courts of this county to secure from your department an opinion on the question of the right of the clerk of a county to purchase supplies needed by him in the performance of his official duties, where the commissioners are insisting upon the exercise of their right to purchase the supplies upon requisition made by the clerk to the commisssioners rather than to the person from whom the supplies are bought. I am, therefore, inclosing you letter from J. Arthur Ferris, clerk of courts of Mahoning county, dated April 5, 1916, requesting that your department render such an opinion, together with a copy of an opinion that I rendered to the board of county commissioners of this county, under date of October 8, 1915, the latter of which I should be glad to have you return after it has answered your purpose."

It appears from the correspondence of the clerk, attached to your letter, that your county commissioners are refusing to allow and pay any bills for supplies procured by the clerk for his office, upon the theory that he is without authority to purchase the same. In view of this contention, I fully concur in the conclusion stated in your opinion, to which you refer in your letter, and from which I quote as follows:

> "In my opinion, therefore, the intention of the law is that, while the clerk is expressly authorized by virtue of section 2872, G. C., to purchase the supplies and things necessary for the proper administration of the affairs of his office, yet, the person or persons with whom he deals in connection with the purchases so made by him, are bound to have notice of the fact that any price or prices agreed upon by the clerk to be paid for such supplies are not binding obligations upon the county until such time as the clerk shall have certified these accounts to the board of county commissioners, and such board shall have approved the prices agreed to be paid therefor."

This conclusion, from your opinion, I think states the matter clearly, and is in harmony with the cases of State ex rel. Flanagan v. McConnell, auditor, 28 O. S., 589, and Lyle Printing Co. v. Commissioners, 10 O. D., 89, and makes unnecessary any further discussion.

Respectfully,
EDWARD C. TURNER
Attorney-General.

1517.

MORROW COUNTY COMMISSIONERS—TWO PETITIONS PRESENTED AT DIFFERENT TIMES FOR SAME ROAD IMPROVEMENT—NOT AUTHORIZED TO PROCEED UNDER FACTS SUBMITTED.

Under the facts as submitted, the county commissioners of Morrow county are not now authorized to proceed with the improvement of a certain road in that county upon petitions heretofore filed.

COLUMBUS, OHIO, April 26, 1916.

HON. BENJ. OLDS, *Prosecuting Attorney, Mt. Gilead, Ohio.*

DEAR SIR:—I have your communication of March 25, 1916, which communication reads as follows:

"A petition for the improvement of public highway known as 'Pompey Road,' under the provisions of sections 6926 to 6956, G. C., was filed with the commissioners of this, Morrow county, on March 6, 1911. On March 16, 1911, the commissioners viewed the road. On March 20, 1911, the commissioners granted the road and ordered the surveyor to go upon the road, make the plat and profile of said improvement, together with the plans and specifications of the work and file the same, together with an estimate of the entire cost of said improvement. Under said order the surveyor expended $188.02. No further proceedings were had under this petition.

"On January 6, 1913, a petition for the improvement of the same road, under sections 6956-1 to 6956-16 inclusive, G. C., was filed with the commissioners. On January 7, 1913, bond filed. On December 6, 1913, petition referred to surveyor to count to determine whether or not a majority have signed said petition. January 6, 1914, surveyor reported a majority of 17 for said improvement. No further proceedings were had under this petition.

"Can the commissioners now proceed under either of these petitions and construct the improvement?

"I have advised the commissioners: That sections 6956-1 to 6956-16 inclusive, G. C., by implication, repeal sections 6926 to 6956 inclusive, G. C. See case of Goff et al. v. Gates et al. 87 O. S., 142; that not having taken advantage of the Curative act passed after the decision of the supreme court in the case of Goff et al. v. Gates et al. Vol. 103 Ohio Laws, 132, March 5, 1913, and the original sections 6926 to 6956 having been re-enacted, Vol. 103 O. L., 198, and the Cass road law Vols. 104 and 105 O. L., 574 to 667, repealing all existing road laws, having been enacted; they were without jurisdiction to construct the improvement under sections 6926 to 6956, G. C., and in as much as the improvement on the petition under sections 6956-1 to 6956-16, G. C., had never been granted, the Curative provisions of the Cass law, being section 300 of the Cass law, would not apply, and that they were with-

out jurisdiction to construct the improvement under sections 6956-1 to 6956-16, G. C."

It is very clear that the county commissioners are without authority to proceed under the petition filed on January 6, 1913, and praying for the improvement of the road in question under the provisions of sections 6956-1 to 6956-16, G. C., inclusive. The sections in question were repealed by the Cass highway law, 106 O. L., 574, and the saving provisions of that act applicable to this situation and found in section 303 of the act, are not sufficiently broad to preserve a proceeding in which no finding in favor of the improvement has been made by the county commissioners. This matter was passed upon by me in opinion No. 1098, rendered to Hon. S. W. Ennis, Prosecuting attorney of Paulding county, on December 14, 1915, in which opinion it was held that the county commissioners were without authority to proceed under the old law where they did not, prior to the going into effect of the Cass highway law on September 6, 1915, go upon the line of the road covered by the petition and determine that the public utility and convenience required that the road in question should be laid out, constructed, repaired, improved, altered, straightened or widened, as petitioned for, and did not determine the route and termini of such road and did not determine the kind and extent of the improvement or repair and the alterations in the lines and changes of grades, if any.

The question of whether or not the commissioners are now authorized to proceed under the petition filed on March 6, 1911, is not so easy of determination. In the case of Goff v. Gates, referred to by you, decided by the supreme court on November 26, 1912, and reported in 87 O. S., 142, which case originated in your county, it was held that sections 6926 to 6956, G. C., inclusive, were repealed by implication by the act of the general assembly of May 10, 1910, 101 O. L., 247. The force and effect of this decision is such that on the 6th day of March, 1911, when the petition in question was filed, the sections of the General Code under which the improvement in question was asked for were not in existence. On March 5, 1913, after the decision of the supreme court in the case of Goff et al. v. Gates et al. supra, the General Assembly passed an act, found in 103 O. L., 132, seeking to validate all petitions filed or granted or all proceedings had or contemplated under such petitions, all contracts made or to be made, bonds issued or to be issued, taxes and assessments levied or to be levied under the provisions of sections 6926 to 6956, G. C., inclusive. The preamble of the act in question recites the passage of the act found in 101 O. L., 247, the fact that such act did not repeal sections 6926 to 6956, G. C., unless by implication, the action of the county commissioners of many counties since the passage of the act found in 101 O. L., 247, in receiving or granting petitions and taking other action under sections 6926 to 6956, G. C., inclusive, the doubt as to the validity of such acts and the demands of public welfare that such petitions filed or granted and all action taken thereunder be validated.

Section 1 of the act in question reads as follows:

"That proceedings for the construction, improvement or repair of stone and gravel roads in this state under the provisions of section 6926 to 6956, inclusive, of the General Code since May 10th, 1910, and all petitions filed or granted, bonds issued or to be issued, taxes and assessments levied or to be levied on account of such roads, and all contracts made or to be made under the provisions of said sections, and any and all steps taken thereunder are hereby declared and held to be valid, and boards of county commissioners or other officers shall have full power and authority to proceed with the construction and completion of all roads in process of construction under said sections or contemplated by any petition heretofore filed or granted

under said sections, and shall also have full power and authority to levy taxes and assessments and to sell bonds to pay for the construction and improvement of any such roads, and to do any and all things contemplated by such petitions under said sections."

It will be noted that the legislature in this act endeavored to give full force and validity to all proceedings had under sections 6926 to 6956, G. C., inclusive, between May 10, 1910, and the date of the passage of the act under consideration, March 5, 1913, and to confer the right to thereafter complete such proceedings. It is provided that boards of county commissioners shall have full power and authority to proceed in the premises, but the statute does not in terms enjoin upon commissioners the duty of proceeding under the old act, which act had been declared by the supreme court to be repealed by implication. It appears from your communication that no action under the petition filed on March 6, 1911, has been taken by the county commissioners since March 20, 1911, and on December 6, 1913, some nine months after the passage of the validating act, the county commissioners took action on another petition for the improvement of the same road, under a different act of the legislature, referring such petition to the county surveyor to count the names of the petitioners for the purpose of determining whether or not a majority had signed said petition.

In view of the facts that no action whatever has been taken by the county commissioners under the original petition for over five years, that in the meantime land owners have signed and filed a petition praying for the improvement of the same road under a different law, that the county commissioners have acted upon said second petition to the extent of referring the same to the surveyor for the purpose of determining whether or not it was signed by the requisite number of land owners, that the act under which the original petition was filed has been declared by the supreme court to be repealed by implication and under the decision in question was not in force on the day on which the petition was filed and that the validating act found in 103 O. L., 132, does not in terms enjoin upon the county commissioners the duty of proceeding under the invalid petition but only goes so far as to confer upon them power and authority to proceed, it is my opinion that your conclusion in the premises is correct and that the proceeding under the original petition must be regarded as abandoned or discontinued and that the county commissioners are now without authority to act under said petition.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1518.

BOILER INSPECTION—INSURANCE COMPANIES CANNOT BE COMPELLED TO COLLECT FEE FOR CERTIFICATE PROVIDED FOR IN SECTION 1058-21, G. C.—GENERAL OR SPECIAL INSPECTORS MAY COLLECT SAID FEES AT TIME OF INSPECTION.

The Department of Boiler Inspection cannot compel insurance companies, when writing insurance on boilers, to charge and collect $1.00 additional per annum to cover the fee for certificate provided for in section 1058-21, *G. C.* (103 *O. L.*, 649).

Said fees could properly be collected by the inspectors, whether general or special, at the time the inspection is made.

COLUMBUS, OHIO, April 26, 1916.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your letter of April 19, 1916, requesting my opinion, received and is as follows:

"The industrial commission of Ohio respectfully requests that you render an opinion as to whether or not the department of boiler inspection under this commission could legally compel insurance companies, when writing insurance on a boiler, to charge and collect $1.00 additional per annum, to cover the legal certificate issued by the boiler inspection department, and remit the same to said department, thereby relieving it of correspondence and clerical work necessary to make these collections."

The following provisions of the General Code are pertinent to your inquiry:

Section 1058-16, G. C., provides for the examination of applicants for the position of boiler inspector and provides:

"Upon a favorable report * * * of the result of an examination, to the chief inspector of steam boilers, he shall immediately issue to the successful applicant a certificate to that effect."

Section 1058-17, G. C., provides:

"The chief inspector of steam boilers may, with the consent of the governor, appoint from the holders of certificates provided for in section 11 (section 1058-16, G. C.) not to exceed ten general inspectors."

The general assembly, recognizing the existence of the business of boiler insurance and the consequent periodical inspection of boilers by insurance companies, deemed it unnecessary to duplicate the work of the inspectors of the insurance companies and therefore provided in section 1058-17, G. C., as follows:

"Any company authorized to insure boilers against explosion in this state may designate from holders of such certificates persons to inspect the boilers covered by such company's policies, and the chief inspector of steam boilers shall issue to such persons commissions authorizing them to act as special inspectors. Such special inspectors shall be compensated by the company designating them, and the fee provided for in section 20 shall not be collected by such special inspectors.

"The chief inspector of steam boilers shall issue to each of such appointees, a commission to the effect that the holder thereof is authorized to inspect steam boilers for the state of Ohio."

The result of the foregoing provision of law is that when an insurance company employs as its inspector a man who possesses a certificate of qualification provided for in section 1058-16, G. C., and the chief inspector of boilers appoints the same man as a special inspector, as above provided, such an inspector acts in a dual capacity, to wit, as a representative of the insurance company and as a representative of the state. The powers and duties of such special inspector, so far as the state is concerned, are the same as those of a general inspector appointed by the state, except that such special inspector does not collect the inspection fee provided for in section 1058-25 of the General Code (103 O. L., 649).

However, whether the inspection be made by a general inspector or by a special inspector, the provisions of sections 1058-20 (103 O. L., 649) and 1058-21 (103 O. L., 649) apply. Said sections are as follows:

Sec. 1058-20 (103 O. L., 649).

"If, upon making the internal and external inspection, the inspector finds the boiler to be in safe working order, with the fittings necessary to

safety, and properly set up, upon his report to the chief inspector of steam boilers, the chief inspector shall issue to the owner or user thereof, a certificate of inspection stating the maximum pressure at which the boiler may be operated, as ascertained by the rules established by the board of boiler rules, and thereupon such owner or user may operate the boiler mentioned in the certificate for one year from the date of inspection, unless such certificate shall be sooner withdrawn."

Sec. 1058-21 (103 O. L., 649).

"The owner or user of a steam boiler herein required to be inspected shall pay to the chief inspector of steam boilers the sum of one dollar for each certificate issued."

In opinion No. 756, rendered by this department to the bureau of inspection and supervision of public offices, under date of August 24, 1915, and found at page 1588 of the opinions of the attorney-general for the year 1915, it was held that the inspection fee and certificate fee should be paid before the certificate is issued.

Section 1058-25, G. C., 103 O. L., 649, recognizes the authority of the industrial commission to have the inspection fee collected and the receipt given therefor by the general inspector who makes the inspection. There is no such provision with reference to the $1.00 certificate fee, but I can see no reason why the chief inspector of boilers, whose duty it is to collect the $1.00 certificate fee, should not, if he desired, authorize the inspector to collect said fee and give a receipt therefor at the time the inspection is made, and such a rule could be made to apply to both general and special inspectors. The result of this would be that when the inspection is made by a general inspector, he would collect the inspection fee and the $1.00 certificate fee, give a receipt therefor and turn the money over to the chief inspector with his report. The special inspector would collect merely the $1.00 certificate fee, give a receipt therefor and turn the money over to the chief inspector.

The above plan is possible because of the fact that the special inspector is a duly authorized representative of the state, appointed and commissioned by the chief inspector of boilers to represent the state, and the authority of such inspector to collect the money and give a receipt therefor is entirely independent of his connection with the insurance company. In other words, the chief inspector has no connection with the acts of a special inspector in so far as he is representing the insurance company, but only in so far as he is representing the state. Neither your commission nor the chief inspector of boilers has any control or authority over the insurance companies or their representatives, as such, and your specific question must be answered in the negative, to wit: you have no authority to compel the insurance companies, or their representatives, as such, to collect the $1.00 inspection fee at the same time they collect their insurance premiums, or at any other time, but such collection, if made by a special inspector, would be a transaction between your commission and the owner of the boiler, entirely separate and distinct from any transaction between the insurance company and such owner.

I am therefore of opinion that the department of boiler inspection, under the industrial commission, could not legally compel insurance companies, when writing insurance on a boiler, to charge and collect $1.00 additional per annum to cover the legal certificate issued by the boiler inspection department and remit the same to said department, but that the department might authorize the inspectors, both general and special, to collect said $1.00 fee at the time the inspection is made.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1519.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, KINSMAN TOWNSHIP, IMPROVED ROADS DISTRICT, TRUMBULL COUNTY, O.

COLUMBUS, OHIO, April 27, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Kinsman township improved roads district of Trumbull county, Ohio, to the amount of $50,000.00 for the improvement of the roads of said road district, being one hundred bonds of $500.00 each."

I have examined the transcript of proceedings of the trustees and other officers of Kinsman township improved roads district of Trumbull county, Ohio, relative to the issuance of the above bonds; also the bond and coupon form attached, and I find the same regular and in comformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of Kinsman township improved roads district.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1520.

DISAPPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, NORWICH TOWNSHIP, HURON COUNTY, OHIO—ROAD BONDS NOT ISSUED UNDER PROVISION OF CASS HIGHWAY LAW.

COLUMBUS, OHIO, April 27, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Norwich township, Huron county, Ohio, in the sum of $17,000.00, being thirty-four bonds of $500.00 each issued to provide means with which to improve the highways of Norwich township."

The resolution of the township trustees authorizing the issuance of said bonds, which is set forth in the transcript, recites that said bonds are issued under authority of sections 3295, 3939 and 3940 of the General Code.

The Cass road law (106 O. L., 574), which was enacted by the general assembly

"To provide a system of highway laws for the state of Ohio, and to repeal all sections of the General Code and acts inconsistent herewith."

became operative September 6, 1915, and expressly repealed all township road improvement laws. Since that date, therefore, township trustees have had, and can now exercise only such power in constructing, improving and repairing roads within their respective townships as is conferred upon them by the provisions of said act.

Sections 60 et seq. of the Cass road law, being sections 3298-1 et seq. of the General Code (106 O. L., 589), provides comprehensive and complete machinery for the con-

struction improvement and repair of roads by township trustees including provision for securing necessary funds by taxation, assessment and bond issues.

I believe that it was clearly the legislative intent to limit the authority of township trustees in borrowing money for road improvements to the methods prescribed in sections 3298-8, 3298-9 et seq. of the General Code (106 O. L., 591). By section 3295 of the General Code (106 O. L., 536), which is general in its terms, authority is conferred upon the township trustees to issue and sell bonds for numerous purposes, one of which is for road improvements. The provisions of the Cass road law, on the other hand, are special in character, dealing only with roads. If, therefore, there is any inconsistency between the general powers conferred by section 3295 and the special provisions of sections 3298-1 of the General Code, the provisions of the special act must control.

From a careful examination of the provisions of the Cass law, just referred to, it is apparent that the method of issuing bonds by the township trustees for road improvement purposes therein conferred was intended to be exclusive, and that if section 3295 of the General Code be construed as conferring additional power upon the township trustees to issue bonds for the same purpose without a vote of the electors, then the plan and system provided by the Cass law, so far as it affects the improvement of roads by township trustees, cannot be carried into execution, and the clear intent of the legislature will be defeated.

I am therefore of the opinion that the township trustees of Norwich township, Huron county, have no authority to issue the bonds under consideration, and I advise your commission to decline to accept the same.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1521.

WHEN FOREIGN CORPORATION PURCHASES PROPERTY IN OHIO AND CONVEYS SAME TO TRUSTEE—WHETHER VALUE OF SUCH PROPERTY IS TO BE CONSIDERED AS CAPITAL OF FOREIGN CORPORATION WHEN IT IS QUALIFIED TO DO BUSINESS IN OHIO.

A foreign corporation which purchases property in Ohio and conveys the same to a trustee, must, if it enjoys the entire benefits or use of such property, report the same as "property owned and used" by it in this state for the purpose of fixing the basis of the fee to be paid by it in complying with sections 183 *et seq., G. C.*

COLUMBUS, OHIO, April 27, 1916.

HON. C. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of April 12th, submitting for my opinion the following question:

> "A foreign corporation purchases property in Ohio and conveys same to a trustee. The trustee pays the taxes on the property, so that in effect the foreign corporation is not the owner of real estate in Ohio. Under such circumstances, must a foreign corporation, when it is qualified to do business in Ohio, consider the value of that real estate as capital of a foreign corporation, invested in Ohio?"

The group of sections which is involved in your inquiry, viz.: Sections 183 et

seq., of the General Code, appear upon examination to be strangely inconsistent among themselves in the use of language material to the solution of your question. Thus, section 183, the first of them, provides that

> "Before doing business in this state, a foreign corporation organized for profit and *owning or using* a part or all of its capital or plant in this state, shall make and file with the secretary of state, * * * a statement under oath * * *."

It will be observed that in this part of the section the corporations subject to compliance are those which are doing business in this state, and owning *or* using a part or all of their capital or plants in this state.

However, the same section in setting forth the facts which are to be contained in the statement under oath provides as follows:

> "3. The value of the property *owned and used* by the corporation in Ohio, * * *.
>
> "4. The proportion of the capital stock of the corporation represented by property *owned and used* and by business transacted in Ohio."

Section 184, G. C., provides in part as follows:

> "From the facts thus reported, and any other facts coming to his knowledge, the secretary of state shall determine the proportion of the capital stock of the corporation represented by *its* property and business in this state, and shall charge and collect from such corporation *for the privilege of exercising its franchise in this state*, one-tenth of one per cent. upon the proportion of its authorized capital stock represented by property *owned and used* and business transacted in this state. * * *"

Section 185, G. C., which provides for the filing of supplemental statements in the event of a change in proportion, etc., provides in part as follows:

> "A corporation which has filed its statement, * * * and which thereafter shall increase the proportion of its capital stock, represented by property *used* and business done in this state, shall file, etc. * * *"

If the strict language of the statutes is of determining importance, it will be observed that the phrase is "owned or used" in one place, "owned and used" in another place, and "used" in a third place.

It is probably true that for many purposes, and indeed prima facie, the trustee is the "owner" of the trust property. The reference in your letter is to but one of the situations in which the obligations of ownership and the rights and burdens incident thereto attach to the trustee and not to the beneficiary.

But nothing is better established than that it is competent for the legislature to treat the beneficiary as the owner, at least provided the trustee has himself no beneficial interest.

Of course, if the trustee has no beneficial interest the beneficiary is the one who is entitled to the "use" of the property. The trustee administers and manages the property for the use of the beneficiary. So, the beneficiary would be the one "using" the property, whether he would be regarded as the "owner" thereof or not, unless the trustee's interests were such as to entitle him also to a substantial use.

You do not state the facts which you have in mind fully, but I am assuming that the trustee is managing the property for the use of the corporation and in furtherance

of its corporate objects. If that is the case, then it is clear that the corporation is exercising its corporate powers and franchises by means of the confidence reposed in the trustee, and with respect to the property in his mere legal custody and control. It will, of course, be assumed that the corporation has the power so to conduct its business under its charter or articles of incorporation. That being the case, it is, therefore, also clear that the corporation is exercising its corporate franchises with respect to the beneficial use and enjoyment of the property to an extent different in degree only, and not in substance, from that to which it would exercise its franchises if it actually owned the legal title to the property.

In my opinion, the corporation, upon the assumptions above made, is to be regarded as "owning and using" property in Ohio within the meaning of the Ohio statutes.

Looking through the form of these statutes to their substance, I am satisfied that the intention thereof is to measure the initial fee or tax by the extent to which the corporate franchise is exerted in Ohio in a proprietary way.

The statute is aimed at two kinds of franchises or privileges which are granted by the state, viz.: the privilege of "having" and the privilege of "doing." I think every possible corporate franchise that could be exercised in this state was intended to be comprehended within these two groups.

The question then is as to whether the actual interest of a beneficiary, under the circumstances named, is to be regarded as proprietary, in the nature of the exercise of the property interest, or as the "doing of business." As previously intimated, I think that a beneficiary's interest and its exercise as to Ohio property is to be regarded, for the purposes of the statutes under consideration, as a property interest.

This interpretation does no violence to the phraseology of the statute, for, as has been pointed out, while the term "owner" is usually more appropriately applied to the trustee than to the beneficiary, yet it is competent for the legislature to treat the latter as the owner, and the ultimate solution of any such question is always a matter of ascertaining the legislative intention.

For the foregoing reasons, then, I am of the opinion that when the corporation which you describe qualifies to do business in Ohio, it must report the property in which it has the beneficial interest and the legal title, to which is vested in a trustee, as property "owned" by it in Ohio.

The same result might be reached by holding that property "used" is required by the statutes to be reported and employed pro tanto as the basis of the computation of the fee, whether owned or not. I am not entirely satisfied, however, that this is the true interpretation of the statute, and I prefer to rest my conclusion upon the principle above outlined, to the effect that the corporation is to be regarded as the "owner" of the property for the purpose of the statute.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1522.

ROADS AND HIGHWAYS—IMPROVEMENT EXTENDED INTO OR THROUGH A VILLAGE—HOW COST TO BE APPORTIONED—AN UNEXPENDED BALANCE OF A BOND ISSUE UNDER SECTION 7004, G. C., NOW REPEALED, NOT AVAILABLE TO PAY TOWNSHIP'S SHARE OF IMPROVEMENT CARRIED FORWARD BY STATE HIGHWAY DEPARTMENT.

When a road improvement is made by the state highway department on the application of county commissioners or township trustees and is on their application extended into or through a village, the village may assume and agree to pay some portion of the cost and expense of that part of the improvement within its corporate limits. The agreement of the village should be made with the board on whose application the improvement is being made.

An unexpended balance of the proceeds of a bond issue, under section 7004, G. C., now repealed, may not be used to pay a township's share of the cost and expense of an improvement carried forward by the state highway department.

COLUMBUS, OHIO, April 27, 1916.

HON. THOMAS H. MOORE, *Prosecuting Attorney, Ashland, Ohio.*

DEAR SIR:—I have your communication of March 18, 1916, which communication reads as follows:

> "Will you please give me your opinion upon the following question?
>
> "Where a state aid road has been extended through a village in accordance with section 1231-3 of the General Code, and there is an agreement between the county, state and village as to the division of the cost of construction, can the township trustees of the township in which the village is located assume a part of the village's share?
>
> "And if they are allowed to assume a part of the village's share as above, will it be legal to use an unexpended balance in a fund raised by the sale of bonds under section 7004 of the Code?
>
> "I will appreciate an early reply to the above question."

Section 1231-3, G. C., referred to by you, being section 229 of the Cass highway law, reads as follows:

> "The state highway commissioner may extend a proposed road improvement into or through a village when the consent of the council of said village has been first obtained, and such consent shall be evidenced by the proper legislation of the council of said village duly entered upon its records, and said council may assume and pay such proportion of the cost and expense of that part of the proposed improvement within said village as may be agreed upon between said state highway commissioner and said council. The state highway commissioner may also enter into an agreement with the council of said village to improve any part of the road within said village to a greater width than is contemplated by the proceedings for said improvement, and the state highway commissioner and the council of said village shall be governed as to all matters in connection with said improvement within said village by the statutes relating to road improvements through municipalities, by boards of county commissioners."

It is apparent from a consideration of the above quoted section that the same was intended by the legislature to apply primarily only in those cases where the state highway commissioner is proceeding without the co-operation of county commissioners or township trustees and the only co-operation falling fully within the terms of the section is that which may be had between the state highway commissioner and the authorities of a village. Under the section in question if the state highway commissioner has available for expenditure in any given county, inter-county or main market road funds, and the county commissioners of the county in question or the trustees of the several townships thereof do not apply for state aid and co-operate with the state highway department, then the state highway commissioner may expend such funds upon a road or street within a village when the consent of the council of such village has been first obtained, provided the road or street in question is an extension of the inter-county highway or main market road, as the case maybe. This expenditure may be made even if the village does not co-operate in the making of the improvement and meet a share of the expense thereof. The village may, however, co-operate and may pay such part of the cost of the work within the village as may be agreed upon between the state highway commissioner and the council.

While the section is not primarily applicable where a road improvement, made on the application of county commissioners or township trustees, is extended into or through a village, yet the section indicates that it was the intention of the legislature to authorize villages to contribute toward the expense of improvements carried on within their limits by the state highway commissioner. It is also worthy of note that the section contains a provision that the state highway commissioner and the council shall be governed by the statutes relating to road improvements through municipalities by boards of county commissioners.

The only reference in the statutes to the extension of inter-county highway and main market road improvements into or through villages, when such improvements are made on the application of county commissioners or township trustees, is found in section 186 of the Cass highway law, section 1193, G. C., which section provides, among other things, that each application for state aid in the construction, improvement, maintenance or repair of inter-county or main market roads, shall be accompanied by a properly certified resolution of the county commissioners or township trustees, stating that the public interest demands the improvement of the inter-county or main market roads therein described, which may include any portion of a highway in the limits of any village, when the same is a continuation of the proposed improvement and the consent of the village has been first obtained. The statute is silent as to the subsequent procedure where the proposed improvement is wholly or partly within a village and this department has therefore held in opinion No. 1317, rendered to Hon. Clinton Cowen, state highway commissioner, on March 4, 1916, and in opinion No. 1387, rendered to Hon. George Thornburg, prosecuting attorney of Belmont county, on March 16, 1916, that where the application relates to any portion of a highway within the limits of any village and the application is made by county commissioners or township trustees, all steps subsequent to the application are to be taken in the same manner as though the projected improvement were situated outside a village.

To the above may be added the observation that the statutes are also silent as to the division of the cost of the work under such circumstances, and waiving for the present the question of the right of the village to make a contribution toward the cost of the improvement and assuming that no such agreement has been made or attempted to be made by the village, it must be concluded that the division of the cost and expense of the inter-county highway or main market road improvement, made on the application of county commissioners or township trustees, is the same without regard to whether or not the improvement is situated in whole or in part within the limits of the incorporated village. In other words, under any of the circumstances above

enumerated, ten per cent. of the cost of the improvement, excepting therefrom the cost of bridges and culverts, must be assessed against the land abutting thereon, according to benefits, and fifteen per cent., excepting therefrom the cost and expense of bridges and culverts, is to be paid by the township or townships in which the improvement is situated, assuming that the improvement is made on the application of the county commissioners. The remainder of the cost of the work is to be paid by the county and state, where the application is made by county commissioners, with the qualification that the state, in the case of an inter-county highway improvement, cannot pay more than one-half of the total cost and expense.

The above statement is subject to the further qualification expressed in section 210 of the act, section 1217, G. C., to the effect that the commissioners may assume on behalf of the county all or any part of the township's share, and that the trustees may assume on behalf of the township all or any part of the county's share. In other words, where an inter-county highway or main market road improvement is made on the application of county commissioners, the cost, in the absence of an agreement to the contrary, is to be divided between the state, county, township and owners of abutting land, and there is no provision for casting upon the village, as such, any part of the cost and expense of the improvement, in the absence of an agreement on the part of the village. Where the improvement is made on the application of township trustees, the cost is to be divided in the manner pointed out in the statute, and the village, in the absence of an agreement on its part, cannot be required to meet any part of the cost. Of course the village is, for the purpose of the present discussion, to be regarded as a part of the township, and will be called upon to meet its proportionate share of that part of the cost and expense borne by the township. It remains to consider the question of whether or not, when an improvement of this character is made on the application of county commissioners or township trustees, and is on their application extended into or through a village, the village may assume and agree to pay some portion of the cost and expense of that part of the improvement within the village, and, if so, to determine with whom the agreement is to be made. A discussion of this question is properly introduced by the statement deduced from an examination of the several provisions of the Cass highway law that where the state highway department undertakes an improvement on the application of the county commissioners, all the subsequent dealings of that department are to be had with the county commissioners, and likewise where the state highway department undertakes an improvement upon the application of township trustees, all the subsequent dealings of the state highway department are to be had with the trustees. I think it may, therefore, safely be assumed that if, under the circumstances above set forth, a village is authorized to assume and agree to pay some portion of the cost and expense, the agreement in question should be made with the county commissioners or township trustees applying for the improvement, as the case may be, and not with the state highway commissioner.

There seems to be no direct authority for an agreement of this character, but I am of the opinion that a consideration of the several provisions of the act warrants the conclusion that such agreement is authorized. As previously pointed out, section 1231-3, G. C., authorizes the village to assume and pay a part of the cost and expense where the improvement is made on the initiative of the state highway commissioner and without the co-operation of county commissioners and township trustees. This section also provides that under such circumstances the state highway commissioner and the council are to be governed by the statutes relating to road improvements through municipalities by boards of county commissioners, those statutes, being sections 6949 to 6954, G. C., inclusive, providing that county commissioners may extend road improvements into or through municipalities, and that the council may assume and pay such proportion of the cost of that part of the improvement within the municipality as may be agreed upon between the commissioners and the council.

Section 7467, G. C., provides that the state, county or township, or any two or more of them, may, by agreement, expend any funds available for road construction, improvement or repair upon roads inside a village. I think, therefore, the several sections of the General Code herein cited support the conclusion that where an inter-county highway or main market road improvement is, upon the application of county commissioners or township trustees, extended into or through a village, the village council may assume such portion of the cost and expense of that part of the improvement located within the village as may be agreed upon between the council of the village and the commissioners or trustees, as the case may be. This agreement should be made with the board upon whose application the improvement is being made.

It is impossible to properly answer the express question submitted by you in reference to this matter, for the reason that the section referred to by you is not primarily applicable to the state of facts disclosed by your inquiry. If the question, as submitted, were to be answered directly, the answer would necessarily be in the negative, but such an answer might be misleading, for the reason that, in the view I take of the law, a division of cost between the state, county, township and village may be accomplished by mutual agreement. I have, therefore, endeavored to answer your question by a general discussion of the rule that is to govern in these matters, and under the same you will, I think, be able to work out the desired division of the cost and expense of the contemplated improvement in your county. The conclusion herein expressed will enable the county to make any desired agreement with the township trustees and the council of the village in question.

Coming now to consider your second inquiry, section 7004, G. C., now repealed, was a part of the scheme of legislation designed for the improvement of the public roads within a township, and including a road running into or through a village or city. There is no provision of law to the effect that funds of this character may be used to meet the township's share of the cost and expense of improving inter-county highways or main market roads, and inasmuch as the Cass highway law provides a special method of raising funds for such purposes, I am of the opinion that an unexpended balance in a fund raised by the sale of bonds, under section 7004, G. C., may not be used to pay the township's share of the cost and expense of an improvement carried forward by the state highway department. This conclusion is strengthened by the provision of section 2296, G. C., to the effect that township trustees may transfer public funds, except the proceeds or balances of special levies, loans or bond issues, and the provision of section 5654, G. C., to the effect that the proceeds of a special tax, loan or bond issue shall not be used for any other purpose than that for which the same was levied, issued, or made, except as therein provided, and that when there is in the treasury of any state, village, county, township or school district a surplus of the proceeds of a special tax or of the proceeds of a loan or bond issue, which cannot be used or which is not needed for the purpose for which the tax was levied, or the loan made or the bonds issued, all of such surplus shall be transferred immediately by the officer, board or council having charge thereof to the sinking fund, and shall thereafter be subject to the uses of such sinking fund.

While the proceeds of bonds issued under section 7004, G. C., are to be used for improving roads, yet the bonds were issued for the improvement of certain designated roads, which roads were not necessarily, and probably never would be, identical with the inter-county highways and main market roads within the township, and I cannot, therefore, conclude that the improvement of the inter-county highways and main market roads within a township is the same purpose for which the bonds were issued.

I think the above will constitute a substantial answer to the second question submitted by you in your inquiry.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1523.

INFIRMARY BUILDING COMMISSION—RESTRICTIONS UNDER SECTION 2358, G. C., IN MAKING CONTRACTS FOR ERECTION OF BUILDING—CONTRACT MUST NOT EXCEED ESTIMATE OF COST OF ENTIRE BUILDING NOR ON THE PART OR ITEMS OF CONTRACT—NO CHANGE IN BIDS AFTER THEY HAVE BEEN OPENED.

A building commission constituted under the provisions of section 2333, G. C., is restrained by the provisions of section 2358, G. C., from making a contract for the erection of a public building at a price in excess of the estimates thereof, nor may it contract for the construction of any part of said building at a price in excess of the estimate on the part or items covered by said contract. When said commission invites sealed bids for the construction of said building, no change or amendment of said bids may be made after they are opened except to correct a mistake apparent upon their face.

COLUMBUS, OHIO, April 28, 1916.

HON. DEAN E. STANLEY, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—I have your letter of April 24, 1916, containing the following statements and inquiries:

> "The infirmary building commission of Warren county advertised for bids upon the several branches entering into the erecting of a new infirmary building, the architects having made estimates of the cost of each branch of work. Bids were received for all branches except for an elevator (for which none were asked) the lowest bid being that of a contractor who bid on all save two of the branches on which bids were asked. His bid was a lump bid and, taken together with the lowest on the other two branches of work, was some $800.00 in excess of the estimates for all said branches of work bid on. The contractor offers to reduce his bid by an amount which, taken together with the bids on the other two branches of work above referred to, will bring the total within the aggregate estimates on all the work bid on. At the same time, however, the bid of the contractor above referred to will be in excess of the aggregate estimates on the work on which he bids (this condition arises by reason of the fact that the two separate bids above mentioned are each below the estimates on those two kinds of work). In view of the provisions of sections 2338, 2343 and 2358 of the General Code of Ohio, I desire to inquire:
>
> "First, may the building commission let the contract in excess of the estimate?
>
> "Second, may the low bidder, when his bid exceeds the estimate, reduce his bid and legally make the contract with such commission?
>
> "Third, when the general contractor's bid is in excess of the aggregate estimates of the work on which he bids, but when his bid, taken together with bids on other branches of work, is below the aggregate estimate on all of the branches of work, may a valid contract be made?"

In addition to the facts stated in your foregoing letter I have learned through interviews with yourself and your building commission that it is the unanimous wish of said commission to let the contract for the erection of said infirmary building to the contractor named in your letter, if such contract may legally be made with him. It appears that his bid, while in excess of the estimate of the engineer, was several thousand dollars below the next lowest bid, and it seems to be the impression of your

commission that a re-advertisement for bids will not result in relieving the situation because of the rapidly advancing prices of material, especially iron and steel, to be used in the construction of said building. It is apparent, therefore, from all the circumstances of the case as presented by the commission, that it would result in the saving of considerable money to the taxpayers if the commission could legally make a contract with the party named in your letter.

It must be observed in discussing the questions presented that by the concluding clause of section 2338, G. C., the commission must be governed by the provisions of the chapter of which said section is a part, relating to the erection of public buildings of the county. In other words, the building commission in the letting of this contract must observe the general provisions of law relating to contracts by county commissioners for the erection of public buildings.

Referring now to your first inquiry, I must advise that section 2358, G. C., expressly prohibits the making of any contract for the erection of any public building at a price in excess of the estimates thereof made by the engineer. This section provides as follows:

> "No contract shall be made for a public building, bridge or bridge substructure, or for any addition to, change, improvement or repair thereof, or for the labor and materials herein provided for, at a price in excess of the estimates required to be made by the preceding sections."

It is apparent, therefore, from the provisions of the foregoing section that your building commission is absolutely without any authority to let the contract in question in excess of the estimate.

Your second inquiry is based upon the proposal of the contractor named in your letter to amend his sealed bid and bring it, in connection with the bids on other branches of the work not covered by his bid, within the estimate. You desire to know whether he may now be permitted to make such changes in his bid. It has been repeatedly held by the courts of this state that whenever public authorities are required by law to invite sealed bids and to let the contract to the lowest bidder, no alteration, change or amendment of a sealed bid may be made after it is opened, except to correct a mistake apparent on the face of the proposal.

Beaver & Butt v. Trustees, 19 O. S., 97.
McGreevy v. Board of Education, 20 C. C., 114.
McAlexander v. Haviland School District, 7 N. P. (n. s.) 590.

In the case first cited Judge Brinkerhoff, commenting upon the purpose and effect of the law requiring sealed bids, says:

> "The proposals are to be in writing and sealed; and the action of the trustees is to be taken on the basis of what those proposals are found to be when opened, and not on what they may have been intended to be, but are not. To hold otherwise would be to nullify or reverse the evident policy of the statute, and to render possible and easy the exercise of such favoritism by the trustees towards particular parties as it is the obvious policy and intention of the statute to render impossible. 'The contract or contracts shall be awarded to and made with the person or persons who shall offer to perform the labor and furnish the materials at the lowest price. How offer to perform and furnish? Through the medium of written, sealed proposals, filed within the time limited in the advertisement. The statute knows no other proposals or offers but these. The trustees are invested with no discretion in the matter; but, on the contrary, we are satisfied it is the intent and policy

of the statute to withhold it, and thereby shut the door against all favoritism on the part of the trustees on the one hand, and, on the other, to prevent such an excited, intriguing, and perhaps ruinous scramble among builders, as would be not unlikely to ensue if the proceeding were assimilated to an open auction sale of contracts. By the provisions of this statute, the state has declared her policy to be to rely, for procuring the labor and materials for her public buildings at a reasonable price, upon the secret, sober, and unexcited estimates, inquiries, and calculations of individual builders, made with full knowledge that others are likely to be similarly engaged, and upon the provisions made in the seventh section of the act, to the effect that no contract for labor or materials shall be made at a price in excess of the detailed estimates previously made by the official engineer."

The construction thus placed by the supreme court upon a statute exactly similar in its terms and requirements to that which controls the commission in the present case is, in my judgment, decisive of the question you submit. Adopting the reasoning of the court in this case, it may be said that the law requires the contractor in question to submit his offer through the medium of a written, sealed proposal,and the statute recognizes no other bid but the one made in this manner. The building commission is invested with no discretion. It must act upon the proposal as it is found to be when opened, and any contract made upon any amendment or change of said proposal would, in my judgment, be invalid, and the performance of which would be subject to injunction at any time.

While this construction of the law may result in additional expense to the taxpayers of your county, I can approve no method of letting a contract for the erection of said building except as provided by law. Your second inquiry, therefore, must be answered in the negative.

The conclusion reached as to your second inquiry of course finally disposes of the whole matter and renders unnecessary any extended discussion of the matter submitted in your third inquiry. However, I will say in answer to this inquiry that if the contractor's bid is in excess of the aggregate estimate on the different branches of the work upon which he bids, I am of the opinion that the provisions of section 2358 supra, preclude any consideration of said bid. The provisions of this section apply to any contract that may cover the whole or a part of the labor and materials necessary in the construction of any public building. If a contract is made for the entire construction of the building, such contract must not exceed the estimate of the cost of the entire building, but if two or more contracts are made for the erection of the same building the consideration named in each contract must not be in excess of the estimate of that part or branch of the construction which said contract covers. I therefore conclude that your third inquiry must also be answered in the negative.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1524.

ROADS AND HIGHWAYS—COUNTY HIGHWAY SUPERINTENDENT—APPOINTMENT OF ASSISTANTS, SUPERINTENDENTS AND INSPECTORS FOR STATE WORK—EMPLOYED BY COUNTY HIGHWAY SUPERINTENDENT WITH APPROVAL OF CHIEF HIGHWAY ENGINEER—WHEN STATE HIGHWAY COMMISSIONER APPOINTS UNDER SECTION 1182, G. C.—ROAD OILING MACHINES.

In those counties in which the county highway superintendent is designated to have charge of state work, the assistants, superintendents and inspectors required on any specific work being carried forward by the state highway department are to be employed by the county highway superintendent with the approval of the chief highway engineer, and the compensation of such employes is to be fixed by the chief highway engineer. This is true not only where counties or townships are co-operating with the state highway department, but also in those counties in which the local authorities are not co-operating. However, if it should become necessary or advisable, in the opinion of the state highway commissioner, to have persons employed whose work is not local in character, but is general throughout the state, their services being required in any one county only for brief periods and for some special work, such employes should be appointed by the state highway commissioner.

COLUMBUS, OHIO, April 28, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of March 13, 1916, which communication reads as follows:

> "Kindly refer to your opinion No. 907, under date of October 9, 1915, in which you state that the county highway superintendent, duly appointed in charge of state work, was to be regarded as the appointing officer of superintendents and inspectors required on state work in that county.
>
> "The question has arisen as to whether or not your opinion was intended to apply in those counties where the county is not co-operating with this department in the financing of either a construction or repair operation in the county.
>
> "I therefore, respectfully request an opinion from your office as to who is to be regarded as the appointing officer of inspectors or superintendents in a county where this department is improving, either by construction or repair, a portion of an inter-county highway or main market road without financial assistance from that county."

In the opinion referred to by you, I was called upon to construe certain apparently conflicting provisions of sections 105 and 212 of the Cass highway law, being sections 1182 and 1219, G. C. Section 1182, G. C., provides, among other things, that the state highway commissioner may appoint such superintendents, inspectors and other employes within the limits of appropriations as he may consider necessary to carry out the provisions of the chapter relating to the construction, improvement, maintenance and repair of roads and bridges by the state highway department. Section 1219, G. C., provides, among other things, that the county highway superintendent, with the approval of the chief highway engineer, may employ such assistants as are necessary in the preparation of plans and surveys, and such superintendents and inspectors as may be necessary in the construction of an improvement.

It was pointed out in the opinion in question that a consideration of certain other

provisions of the Cass highway law discloses that any conflict between the provisions referred to above is only apparent and that the provisions may be reconciled and effect given to both. It was held that in those counties in which the county highway superintendent has been designated to have charge of all highways, bridges and culverts within his county under control of the state, such county highway superintendent has the authority to appoint such superintendents and inspectors as are needed on state work, his action in the premises being subject to the approval of the chief highway engineer; and that in those counties in which some engineer other than the county highway superintendent is designated to have charge of the construction, improvement, maintenance and repair of roads under control of the state, the state highway commissioner has the authority to appoint the superintendents and inspectors needed on state work.

Your inquiry now is as to whether the rule announced in the opinion in question is to be taken as applicable in all cases without regard to whether the local authorities, either county or township, are co-operating in the improvement, or whether the rule is to be taken as applicable only in those cases in which the improvement is being carried forward with the co-operation of the local authorities.

Section 1219, G. C., is a part of the chapter relating to the construction, improvement, maintenance and repair of roads and bridges by the state highway department. While the section in question is a part of the scheme designed for the co-operative improvement of highways, it is equally a part of the scheme designed for the improvement of highways without co-operation. An examination of the entire chapter in question, being chapter VIII of the Cass highway law, discloses that certain of its provisions are applicable without regard to whether or not there is co-operation, other provisions are applicable only where there is co-operation, and still other provisions are applicable only where the state highway commissioner is proceeding without the co-operation of the local authorities. These several provisions are mingled, and provisions of a different class are often found in the same section. Under a provision found in the preceding chapter, the county highway superintendent, if so designated by the state highway commissioner, has charge of all highways, bridges and culverts within the county under control of the state. See section 139 of the Cass highway law, section 7182, G. C. This provision is applicable without regard to whether the county or townships co-operate with the state. In other words, the state highway commissioner may designate the county highway superintendent to have charge of all highways, bridges and culverts within his county under control of the state, without reference to whether the particular county or any of its townships co-operate with the state, and in such cases the one-fifth part of the salary of the county highway superintendent will be paid by the state. Co-operation by the local authorities is not essential to the authority of the state highway commissioner to designate the county highway superintendent to have charge of state highways, and the duty of the state to pay the one-fifth part of the county highway superintendent's salary, in case he is so designated, does not depend in any way upon whether or not there is local co-operation in the improvement of the inter-county highways and main market roads of the county in question.

Coming now to consider section 1219, G. C., the first sentence of the section provides that the chief highway engineer may direct the county highway superintendent to make the necessary surveys and plans for the proposed highway improvement. It is apparent that this sentence applies with equal force to co-operative improvements and to improvements carried forward by the state highway commissioner without the co-operation of the county commissioners or township trustees. In either event, if the county highway superintendent has been designated to have charge of state work, a fifth part of his salary will be paid by the state, and it will be his duty to perform the services referred to in the sentence in question, and it will be the duty of the state highway commissioner to direct him to perform the services in question. The state

highway commissioner would, under such circumstances, be without any authority to designate any other subordinate to do this work. It is equally apparent that the second sentence of the section in question is applicable only where there is co-operation with the local authorities. This sentence provides that the expense of the surveys and plans shall be equally divided between the state and county, except in cases where the improvement is being made on application of the township trustees, in which case the expense of such plans and surveys shall be equally divided between the state and township. I see no reason for holding that the third sentence of the section is not applicable under all conditions, and am of the opinion that it is to be given the same construction as the first sentence of the section. It seems to have been the intention of the legislature to lodge the appointing power in a local official familiar with the local conditions and having direct supervision over the work of the appointees. The same conclusion is to be reached as to the two succeeding sentences, while as to the last sentence in the section, which provides that the expenses of supervision and inspection shall be apportioned on the same basis as the cost of construction, it is apparent that the application is to be limited to those cases in which the improvement is being constructed with the co-operation of county or township authorities.

Referring to the provision, the proper construction of which is especially involved in your inquiry, it may be observed that the state highway department is given a check upon the action of the county highway superintendent in the premises in that the employment of assistants, superintendents and inspectors is subject to the approval of the chief highway engineer, and their compensation is to be fixed by that official.

In harmony with the above interpretation of section 1219, G. C., I advise you, in answer to your specific inquiry, that the rule announced in opinion 907, referred to by you, is applicable not only where counties or townships are co-operating with the state highway department, but also in those counties where the local authorities are not co-operating with your department, and that in either event, if the county highway superintendent is designated to have charge of state work, the assistants, superintendents and inspectors required on any specific work being carried forward by your department are to be employed by the county highway superintendent, with the approval of the chief highway engineer, and the compensation of such employes is to be fixed by the chief highway engineer.

It should be pointed out, however, that while it was the intention of the legislature to lodge the general appointing power in the county highway superintendent, he being a local officer familiar with local conditions, and having direct supervision over the work of the appointees, yet the fact remains that some appointing power has been lodged in the state highway commissioner, and if it should become necessary or advisable, in the opinion of the state highway commissioner, to have persons employed whose work is not local in character, but is general throughout the state, their services being required in any one county only for brief periods and for some special work, such employes should be appointed by the state highway commissioner. For example, I understand that you have found it desirable to purchase machines for oiling roads, such machines to be sent to the various counties throughout the state from time to time, when needed. The reasons for the appointment by the county highway superintendent of employes, would not apply to the crews of such machines, and it would be proper for the state highway commissioner to exercise the appointing power vested in him by section 1182, G. C., 106 O. L., 624, in the selection of men to operate such machines.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1525.

APPROVAL, RESOLUTION AND CERTIFICATES FOR EXPENDITURE ON INTER-COUNTY HIGHWAYS OF HARDIN COUNTY—PROPER APPLICATION UNDER SECTION 1203, G. C.

COLUMBUS, OHIO, April 28, 1916.

HON. CLINTON COWAN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of April 5, 1916, which communication reads as follows:

> "I am submitting herewith certificate of the county highway superintendent of Hardin county, together with resolution of the board of county commissioners of Hardin county, requesting that this office order the sum of $18,500.00, which sum will be available for expenditure on the inter-county highways of Hardin county this year, paid into the treasury of Hardin county, in accordance with section 1203, G. C.
>
> "A certificate is also attached signed by the auditor of Hardin county, to the effect that $26,500.00, as set forth in the resolution of the county commissioners, is in the county treasury of Hardin county, and has not been otherwise appropriated.
>
> "I respectfully request an opinion from your office as to whether or not these papers constitute a proper application under section 1203 which would authorize my issuing vouchers at the proper times upon the auditor of state for the total sum of $18,500.00, payable to the county of Hardin."

I have examined the resolution and attached certificates referred to in your communication and find that the same are in every respect regular, being drawn in substantial compliance with the form suggested in opinion No. 998 of this department, rendered to you on November 6, 1915.

I therefore advise you that the resolution and attached certificates constitute a proper application under section 1203, G. C., and are such as to authorize and require the issuing, at the proper time, of vouchers upon the auditor of state for the total sum of $18,500.00, if that be the sum apportioned to Hardin county.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1526.

COUNTY CHILDREN'S HOME—WHEN COMMISSIONERS MAY SELL REAL ESTATE—TRACT MAY BE SUBDIVIDED INTO LOTS BY COMMISSIONERS BEFORE SALE—CITY OF PORTSMOUTH.

Section 2447, G. C., as amended, and section 2444-1, supplemental thereto (106 O. L., 399), provide that real estate owned by the county and not needed for public use may be sold at public sale when the interests of the county require. If, in the opinion of the county, it is deemed expedient to subdivide the property into lots to dispose of it to the best advantage, such a course may be pursued.

COLUMBUS, OHIO, April 29, 1916.

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

GENTLEMEN:—Your request for an opinion as to the sale by county commissioners of certain real estate now used for the Scioto county children's home is as follows:

> "At the request of the county commissioners and the trustees of the children's home of Scioto county the following statement of facts and questions relating thereto are submitted and we would respectfully ask your written opinion in regard to same.
>
> "The buildings of the Scioto county children's home have been condemned by a state inspector of public buildings, thereby making it necessary for the county commissioners to provide means for the repair of the present buildings or the construction of new ones to meet with the requirements of law and the directions of that department.
>
> "The children's home fund is completely exhausted, making it necessary for the commissioners to either borrow money to meet the expenses of the necessary improvement or to sell the real estate now occupied by the children's home and use the proceeds for this purpose. The buildings now in use are located upon a valuable tract of land of about eight acres, in the city of Portsmouth, estimated to be worth about one hundred thousand dollars.
>
> "In consideration of the high value of this property, it has been suggested by the trustees of the children's home that the commissioners dispose of the same and with the proceeds of sale thereof purchase a less expensive site and construct the necessary modern buildings. The commissioners fully agree that this procedure is for the best interests of the county, but are uncertain as to the best manner of disposing of the property. This property being located in a residence section of the city both the commissioners and the trustees believe that by subdividing the tract into lots and offering such lots at public sale a greater sum can be realized for the county than by offering the tract as a whole.
>
> "The sole question at issue is as to the right of the commissioners to subdivide this tract, and if so divided, to sell at public sale."

Section 2447 of the General Code, as amended, and the supplemental section, 2447-1, 106 O. L., 399, are as follows:

> "If, in their opinion, the interests of the county so require, the commissioners may sell any real estate belonging to the county, and not needed for public use; and, in case of the sale of such real estate not used for county purposes, the proceeds of such sale or such parts thereof as the board of

commissioners may designate may be placed by the commissioners in a separate fund to be used only for the construction, equipment, maintenance or repair of other county buildings, and the provisions of section 5638 of the General Code shall not apply to appropriations or expenditures of said fund.

"Sec. 2447-1. No sale of such real estate shall be made unless authorized by a resolution adopted by a majority of such commissioners. When such sale is so authorized a deed therefor shall be made by such board of county commissioners and only to the highest responsible bidder, after advertisement once a week for five consecutive weeks in a newspaper of general circulation within such county. Such board of county commissioners may reject any or all bids and readvertise until all such estate is sold."

Under the provisions of the sections above quoted, which control in the matter under consideration, the commissioners of the county may sell real estate belonging to the county under the two conditions, namely: "when the interests of the county so require," and when the same is "not needed for public use." Before making such sale a resolution authorizing it must be adopted by a majority of the commissioners, which resolution should set out wherein the interests of the county require a sale of the property and the reasons why such property is not needed for public use.

The question presented by you must be viewed from the angle of practicability, one of the most important features of which is the fact that in addition to the value of the property now used as a children's home, by reason of its being located in the city of Portsmouth, is the fact that the nature of its uses would readily lead to the conclusion that if the home were located outside of the city in a desirable place in the country, not only would it be more economical, and, therefore, for the interest of the county, but the surroundings would be more conducive to the welfare of the inmates of the home.

Under the provisions of section 2447 of the General Code, as amended, supra, the board of county commissioners has the right to make a sale of property, and that point being determined, the question of the most expedient manner of disposing of the property is one which should engage the attention of the commissioners.

It is my opinion, therefore, that the commissioners, under a proper showing made pursuant to the provisions of sections 2447 and 2447-1 of the General Code, as amended, supra, have the right to dispose of the property, and the manner of its disposal is one for their discretion. No definite plan of sale, other than that it be public, as set out by the statutes, is prescribed, and if the interests of the county will best be subserved by selling the property in lots or parcels, it is my opinion that the letter or the spirit of the law will not be violated by the subdividing of the real estate into lots and selling same at public sale if that course shall be determined to be the most expedient to pursue in the matter.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1527.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF TRUMBULL COUNTY, OHIO.

COLUMBUS, OHIO, April 29, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Trumbull County, Ohio, in the sum of $13,000.00, for the purpose of creating a fund to pay the cost and expense of constructing certain bridges, being twenty-six bonds of $500.00 each."

I have examined the transcript of the proceedings of the county commissioners and other officers of Trumbull County relative to the issuance of the above bonds, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted, and executed by the proper officers will, upon delivery, constitute valid and binding obligations of Trumbull County, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1528.

ROADS AND HIGHWAYS—CONSTRUCTION OF RETAINING WALL FOR PURPOSE OF PROTECTING ROADWAY—HOW COST CAN BE PAID—SEE SECTIONS 6926, 6927 AND 6929, G. C.

The construction of a retaining wall for the purpose of protecting a roadway from the encroachment of a stream may properly be regarded as an improvement or repair of a road.

Taxes for the purpose of constructing such a wall may be levied under sections 6926 *and* 6927, *G. C., and if in the judgment of the county commissioners it is necessary to sell the bonds of the county for the purpose of paying the cost and expense of such a wall, said bonds may be sold under authority of section* 6929, *G. C.*

COLUMBUS, OHIO, April 29, 1916.

HON. GEORGE C. VON BESELER, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication of March 24, 1916, which communication reads as follows:

"The county commissioners, in co-operation with the trustees of Painesville township, are about to improve East Main street in the city of Painesville, running into Madison avenue without the corporation. Grand river approaches Madison avenue, and is parallel with it for a distance of perhaps a thousand feet, making a bend. The waters as they approach Madison avenue have been cutting away the bank so that the road is in imminent danger of sliding into the river. The abutting property on the other side is very valuable, and it would be an exceedingly expensive arrangement to

purchase real estate for a relocation of the highway. Even if that were done it would be only a temporary expedient. The county engineer has submitted an estimate of $40,000.00 as the probable cost of a retaining wall.

"After having gone through the statutes again and again, I am unable to ascertain under what section, if any, the commissioners would have authority to issue and sell these bonds. It may be that the larger experience of your office would be able to cite me to some provision of law under which this emergency could be met. If so, both the county commissioners and I, and as well other county officials, will be exceedingly grateful to you."

Prior to the passage of the Cass highway law, 106 O. L., 574, it was provided by section 7483, G. C., that

"When a principal public road in a county, except a turnpike road over which tolls are collected, is subject to overflow or inundation so as to render it, at any time, unfit for public travel, or hinder free and necessary transportation, the commissioners of such county may repair or reconstruct such road by changing the beds of small streams to avoid crossing, changing roads to avoid bridges when the public travel would be better accommodated, or building an embankment or levee sufficiently elevated above all such overflows or inundation."

It was further provided in the section in question that the expense of such embankment, changes or levee should be paid out of the money in the county treasury raised by taxation for road or bridge purposes. The section in question was, however, repealed by the Cass highway law, and no relief for the situation presented by you may therefore be had thereunder, even if it might be determined that the provisions of the section in question were sufficiently broad.

I desire, however, to direct your attention to section 85 of the Cass highway law, section 6906, G. C., which reads in part as follows:

"The board of commissioners of any county shall have power, as hereinafter provided, to construct a public road by laying out and building a new public road, or by improving, reconstructing or repairing any existing public road or part thereof by grading, paving, draining, dragging, graveling, macadamizing, resurfacing or apply dust preventives, or *by otherwise improving the same.*"

It will be noted that the language of this section is very broad, and I am of the opinion that under the terms of the same the construction of a retaining wall for the purpose of protecting a road way from the encroachment of a stream may properly be regarded as an improvement or repair of a road. That being true the tax for the purpose of producing the amount needed for such a retaining wall, in case the same is to be built entirely at the expense of the county, may be levied under section 105 of the Cass highway law, section 6926, G. C. In case any part of the cost is to be paid by the interested township or townships, the tax levied for the purpose of raising the share of the township or townships in question may be levied under section 106 of the Cass highway law, section 6927, G. C. If in the judgment of the county commissioners it is necessary to sell bonds of the county for the purpose of paying the cost and expense of the retaining wall, the authority therefor is to be found in section 108 of the Cass highway law, section 6929, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1529.

CORPORATION—REDEEMED PREFERRED STOCK HELD TO BE MERELY WITHDRAWN AND MAY BE REISSUED—THE GOODYEAR TIRE AND RUBBER COMPANY OF AKRON, OHIO.

The authorized capital stock of a corporation is not automatically reduced by the redemption of preferred stock under power reserved in the certificate issued therefor. Such preferred stock upon redemption assumes the status of authorized but unissued preferred stock and may be re-issued with such redemption clause in the certificate therefor as the corporation through proper action of its stockholders may provide.

COLUMBUS, OHIO, May 3, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of April 28, 1916, enclosing a communication to you from Messrs. Slabaugh, Seiberling and Huber, attorneys of Akron, Ohio, and requesting my opinion upon the question therein submitted to you.

The facts recited in the letter of Messrs. Slabaugh, Seiberling and Huber are, in substance, as follows:

The Goodyear Tire and Rubber Company, of Akron, has an authorized preferred capital stock of $7,000,000.00. Its charter provides that the corporation shall each year redeem $350,000.00 of said preferred stock at 120% of par and accrued dividends; and also provides that it shall have the right at its option to redeem all or any part of said preferred stock at 120% of par and accrued dividends on any dividend-paying date on or after July 1, 1915. The corporation has redeemed and cancelled $700,000.00 of this preferred stock and now has a few shares in the treasury which have been redeemed but not yet cancelled. There is still outstanding of its authorized preferred stock 62,313 shares of $6,231,300.00 par value. The corporation desires to increase its preferred stock to $25,000,000.00.

Upon the facts stated Messrs. Slabaugh, Seiberling and Huber inquire whether the redemption of its preferred stock by The Goodyear Tire and Rubber Company automatically reduces its authorized capital stock to the extent of the stock redeemed or does the authorized preferred stock of the corporation remain in the original amount of $7,000,000.00.

Section 8669 of the General Code provides as follows:

> "A corporation issuing both common and preferred stock may create designations, preferences, and voting powers, or restrictions or qualifications thereof, in the certificate of incorporation, and if desired, preferred stock may be made subject to redemption at not less than par, at a fixed time and price to be expressed in the stock certificates thereof."

It will be observed that the "designations, preferences and voting powers, or restrictions or qualifications thereof" are not made applicable to preferred stock only, but may attach to either class of stock—common or preferred. If created, however, they must be set forth in the certificate of incorporation.

On the other hand, the authority to make stock redeemable at not less than par at a fixed time and price attaches only to preferred stock, and if exercised must be expressed in the stock certificates issued therefor, but it is not required to be set forth in the certificate of incorporation, and is therefore not a necessary part of the corporate charter.

The conclusion naturally follows that the question of whether or not the preferred stock of a corporation should be made redeemable was intended by the general assem-

bly to be determined by the corporate by-laws or by subsequent action of its stockholders.

There is no provision of the General Code which requires a corporation by certificate, publication or otherwise to inform the secretary of state or the public whether it has or has not elected to make its preferred stock redeemable at a fixed time and price other than in the stock certificates which are issued to the purchasers of such preferred stock; neither is there any requirement that the secretary of state or the public be informed when a corporation redeems any of its preferred stock.

The word "redemption" is defined in "WORDS AND PHRASES," Vol. 7, pages 6022 and 6023, and the authorities there cited, as meaning to "purchase back; to regain, as mortgaged property, by paying what is due; to receive back by paying the obligation."

In Mannington v. Hocking Valley Railway Company, 183 Fed. 135, "The word 'redeem' as used in statutory provisions authorizing a party to redeem means 'repurchase.' "

It is the established policy of this state, evidenced by numerous provisions of the General Code, that a complete record of the authorized capital stock of all Ohio corporations shall be kept in the office of the secretary of state. The authorized capital stock of a corporation can neither be increased nor decreased, except in the manner provided in the General Code, and when either power is exercised a certificate thereof must be filed in the office of the secretary of state.

In view of the general policy of the law and the specific provisions referred to, a reduction in the capital stock of a corporation cannot be effected by inference unless necessary to make effective other provisions of the General Code. Therefore, when preferred stock is redeemed under power reserved in the certificates of stock it regains its original status of unissued authorized preferred stock and may be re-issued with such conditions relative to future redemption as may be fixed by the corporation.

Answering the question submitted, I am of the opinion that the redemption of preferred capital stock of The Goodyear Tire and Rubber Company has not, and will not to that extent, automatically reduce the company's authorized capital stock, but that such redeemed preferred stock takes the status of authorized but unissued preferred capital stock, and may be reissued by the corporation.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1530.

TOWNSHIP TREASURER—CUSTODIAN OF FUNDS RAISED UNDER SECTION 7033 TO 7052, G. C. (NOW REPEALED)—NOT ENTITLED TO FEES FOR DISBURSING SUCH FUNDS—RECOVERY MAY BE HAD AGAINST HIM.

1. *The township treasurer is the legal custodian of funds raised under the provisions of sections* 7033 *to* 7052, *G. C. (since repealed.)*

2. *Following the decision in the case of Forney v. Nolt, Medina county common pleas court, the township treasurer is not entitled to any fees for disbursing such funds.*

3. *Following such decision, if the treasurer has received compensation for disbursing such funds, recovery may be had against him.*

COLUMBUS, OHIO, May 3, 1916.

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

GENTLEMEN:—Under date of April 17th, you submitted for my opinion the following inquiries:

> "(1) Is the township treasurer the legal custodian of the proceeds of bonds sold for the construction of road improvements under the provisions of section 7035, G. C. (Old section)?
>
> "(2) If it is held that the treasurer is the custodian of such moneys, what, if any, would be his legal fees for disbursing same?
>
> "(3) In the event that an examination discloses that a township treasurer has assumed the custody of such moneys and disburses same upon warrants or orders signed by the township clerk and by at least two trustees, and had received for such services two per cent. upon amount disbursed, would a finding for recovery against him and his bondsmen for such fees be enforcible in the event you held that he was not the legal custodian of such moneys?
>
> "(4) Are township treasurers entitled to two per cent. upon disbursements made by them in payment of such bonds (and interest thereon) issued under the authority of section 7035, G. C., and redeemed by tax levy as provided in section 7051, G. C. (Old section)?"

The sections referred to by you are all found in a scheme of road improvement, incorporated in the General Code, within sections 7033 to 7052, both inclusive, as the same appeared prior to the enactment of amended senate bill No. 125 (106 O. L. 574), known as the "Cass highway law." In said law the said sections 7033 to 7052, were repealed.

The question as to whether or not a township treasurer is entitled to any fees for handling the funds provided for under sections 7033 to 7052, G. C., was passed upon by my predecessor, Mr. Hogan, in two opinions.

In an opinion rendered to Hon. Irving Carpenter, prosecuting attorney of Huron county, under date of July 24, 1913, Mr. Hogan held that as no compensation is provided by sections 7033 to 7052, G. C., for the services of the township treasurer in disbursing funds raised thereunder, he is entitled to the compensation prescribed by section 3318, G. C., for all of such moneys actually paid out by him on the order of the township trustees.

On June 17, 1914, Mr. Hogan rendered an opinion to Hon. Archer L. Phelps, prosecuting attorney of Trumbull county, wherein he reviewed the same question, but held that since the moneys raised under the scheme of legislation as found in

sections 7033 to 7052, G. C., were not moneys belonging to the township treasury, the township treasurer was not entitled to compensation under section 3318, G. C., and further, that the statutes—sections 7033 to 7052—were likewise silent with reference to the payment of any compensation to a township treasurer for his services in handling the funds of a road district, and concluded that since the money raised under sections 7033 et seq. belongs to the road district and not to the township treasury, he was of the opinion that the township treasurer was not entitled to any compensation for handling the same.

The question as to whether or not the township treasurer would be entitled to any fees for receiving and disbursing funds under the provisions of sections 7033 to 7052, G. C., was litigated in the common pleas court of Medina county, in the case of S. E. Forney, plaintiff, v. Jacob Nolt, et al., as the board of trustees of Homer township, Medina county, Ohio, defendants, and was decided by said court on October 9, 1915. In the opinion in said case the court states:

> "Counsel upon both sides agree that there is no express statutory authority imposing a duty upon the township treasurer to receive said funds. But the question is not as to the proper custody of the fund but as to whether compensation can be allowed for the service. And even though there were an express provision of the statute, designating the township treasurer as the custodian of the funds of the township road district, in the absence of any provision, other than section 3318, G. C., fixing his compensation for the service, the court would still be constrained to hold under the authority of cases herein cited, that the treasurer would not be entitled to receive compensation for receiving and distributing said road funds."

The court concludes, therefore, that there being no express statutory authority for the payment of fees to the township treasurer for services rendered under sections 7033 to 7052, G. C., the treasurer is not entitled to any compensation for such services.

Upon inquiry of the prosecuting attorney of Medina county, as to the further disposition of said case, I am informed that no action has been taken to review the decision of the common pleas court.

We therefore not only have the final opinion of my predecessor, that the township treasurer is not entitled to any compensation under said sections, but likewise a judicial determination of said question to the same effect.

Your first question is whether the township treasurer is the legal custodian of the proceeds of bonds sold for the construction of road improvements under the provisions of section 7035, G. C.

A careful reading of the law, both in its original form as enacted in 94 O. L., page 129, and the same act as codified in sections 7033 to 7052, will disclose that this scheme of road improvement was placed entirely under the jurisdiction of the trustees of the township, and that the township clerk was required to perform certain duties in respect thereto. The said statutes are absolutely silent as to who should be the proper custodian of the funds in question, but since the entire matter was placed in the hands of the township trustees and the township clerk was required to perform certain duties in regard to such improvement, I am of the opinion that although the statutes are silent as to the custody of the money when raised under the provisions of said sections, there is a strong implication that the legislature intended that the township treasurer should have the custody thereof, and I so hold.

Your second question is as to what fees, if any, the township treasurer would be entitled, if it be held that he is the proper custodian of such moneys.

As pointed out in the decision of the court of common pleas, hereinbefore referred to, the statutes containing this scheme of road improvement are silent as to any com-

pensation to be paid to the township treasurer, although there is statutory legislation in regard to the compensation to be paid to the township clerk, and since the moneys raised under this scheme of legislation could not be considered as moneys belonging to the township treasury, as the road district may or may not comprise the whole township, I am of the opinion that the township treasurer would not be entitled to any fees for disbursing such moneys.

Your third question is as follows:

> "In the event that an examination discloses that a township treasurer has assumed the custody of such moneys and disburses same upon warrants or orders signed by the township clerk and by at least two trustees, and had received for such services two per cent. upon amount disbursed would a finding for recovery against him and his bondsmen for such fees be enforcible in the event you held that he was not the legal custodian of such moneys?"

Following the decision of the court in the case of Forney v. Nolt et al., hereinbefore referred to, which case holds that the township treasurer is not entitled to compensation for disbursing the moneys received under sections 7033 to 7052, G. C., it would appear that if he was not entitled to retain fees out of moneys received by him under the provisions of section 7033 to 7052, G. C., as compensation, the retention of such fees by him would be illegal and, therefore, the said treasurer would have received moneys to which he was not entitled. Such being the case, a finding for recovery can properly be made against him.

The answers heretofore given dispose of your fourth question.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1531.

DISAPPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, RIDGEFIELD TOWNSHIP, HURON COUNTY, OHIO.

COLUMBUS, OHIO, May 3, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

> "RE:—Bonds of Ridgefield Township, Huron county, Ohio, in the sum of $15,000.00 issued for the purpose of providing funds to improve highways of said township, being thirty bonds of $500.00 each."

I have examined the transcript of proceedings of the township trustees and other officers of Ridgefield township relative the above bond issue, and I am of the opinion that the trustees of said township are without authority to issue bonds for road improvement purposes under sections 3295, 3939 and 3940 of the General Code.

Under date of April 27, 1916, in opinion No. 1520 to your commission, I advised you that the township trustees of Norwich township, Huron county, Ohio, were not authorized to issue road improvement bonds under the sections of the General Code above referred to and there stated in detail my reasons for the conclusion reached, which are equally applicable in connection with the bond issue under consideration.

I therefore advise your commission to refuse to accept the bonds above referred to.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1532.

STATE HIGHWAY DEPARTMENT—DISAPPROVAL OF BONDS OF CERTAIN EMPLOYEES—POWER OF ATTORNEY AND FINANCIAL STATEMENT OF COMPANIES NOT ATTACHED.

COLUMBUS, OHIO, May 4, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of April 5, 1916, transmitting to me for examination bonds of the following employes of your department:

"W. G. Smith	Div. Engr.	$4,000 00
"E. W. Davis	Div. Engr.	4,000 00
"D. W. Seitz	Div. Engr.	4,000 00
"T. T. Richards	Div. Engr.	4,000 00
"A. S. Rea	Test Engr.	2,000 00
"R. E. Lowther	Bookkeeper	1,000 00
"F. E. Withgott	Engineer	3,000 00
"J. W. Graham	Engineer	3,000 00
"G. R. Logue	Engineer	2,000 00

The bonds of F. E. Withgott and G. R. Logue are executed by the Maryland Casualty Company, as surety, and the other seven bonds are executed by the Fidelity and Deposit Company of Maryland, as surety.

The bonds executed by the Fidelity and Deposit Company of Maryland, as surety, have been executed on behalf of the company by John Doyle, as attorney in fact but no power of attorney is attached. All of the bonds are in regular form, but before approving the same a power of attorney authorizing Mr. Doyle to execute the bonds signed by the Fidelity and Deposit Company of Maryland, should be attached to each bond.

I note that financial statements of the companies are not attached to any of the bonds and suggest that such statements should be attached before the bonds are finally approved.

When the bonds are returned to me with financial statements attached to the two bonds executed by the Maryland Casualty Company and with powers of attorney and financial statements attached to the seven bonds executed by the Fidelity and Deposit Company of Maryland, I will be glad to approve the same.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1533.

APPROVAL, RESOLUTIONS FOR IMPROVEMENT OF CERTAIN ROADS IN FRANKLIN AND CRAWFORD COUNTIES.

COLUMBUS, OHIO, May 4, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of April 28, 1916, transmitting to me for examination, final resolutions relating to the following roads:

"Franklin county—Sec. 'M,' Columbus-Sandusky Rd., Pet. No. 2339, I. C. H. No. 4.

"Crawford county—Sec. 'K,' Galion-Bucyrus Rd., Pet. No. 2232, I. C. H. No. 201.

"Crawford county—Sec. 'L,' Marion-Bucyrus Rd., Pet. No. 2226, I. C. H. No. 110.

"Crawford county—Sec. 'L,' Marion-Bucyrus Rd., Pet. No. 2226, I. C. H. No. 110.

"Crawford county—Sec. 'I,' 2 Columbus-Sandusky Rd., Pet. No. 2227, I. C. H. No. 4."

I find these resolutions to be in regular form and am therefore returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1534.

APPROVAL, TWO RESOLUTIONS FOR ROAD IMPROVEMENT IN MORROW COUNTY.

COLUMBUS, OHIO, May 4, 1916.

HON. CLINTON COWAN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of May 1, 1916, transmitting to me for examination, final resolutions relating to the following roads:

"Morrow county—Sec. 'F,' Mt. Gilead-Mt. Vernon Rd., Pet. No. 2747 (1188) I. C. H. No. 333.

"Morrow county—Sec. 'G,' Marion-Galion Rd., Pet. No. 2744 (1185), I. C. H. No. 114."

I find these resolutions to be in regular form and am therefore returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1535.

TOWNSHIP TREASURER—FOR MONEYS DISBURSED UNDER SECTIONS 6976 TO 7018, G. C. (SINCE REPEALED), HE IS ENTITLED TO COMPENSATION FIXED IN SECTION 7015, G. C.

For all moneys disbursed by the township treasurer under the provisions of sections 6976 to 7018, G. C. (since repealed), he is entitled to the compensation fixed in section 7015, G. C.

COLUMBUS, OHIO, May 4, 1916.

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

GENTLEMEN:—Under date of April 17th, you submitted for my opinion the following question:

> "What are the legal fees of a township treasurer for disbursing moneys raised by taxation for redemption of bonds (and interest thereon), said bonds having been issued under authority of section 7004, General Code (old section), and such levy for debt purposes having been made under authority of section 7006, General Code (old section)?"

The act passed April 22, 1904 (97 O. L. 550), contained the provisions authorizing the improvement of public roads of townships, including streets of cities or villages therein, and repealed a former act, passed April 16, 1900 (94 O. L. 284). The act found in 97 Ohio Law, has been both amended and supplemented, and the same was incorporated in the General Code within sections 6976 to 7018, inclusive. Said sections include sections 7004 and 7006, G. C., referred to in your inquiry.

Section 7015, G. C., provided as follows:

> "The treasurer of such township shall receive and disburse all money arising from the provisions of this subdivision of this chapter. He shall receive as compensation therefor one-half of one per cent. of the first ten thousand dollars, or less, distributed in any one year, and one-fourth of one per cent. of any amount in excess of ten thousand dollars, to be paid out of the township funds, and he shall not receive other compensation for services rendered under such subdivision."

There is no restriction in said section that the treasurer shall only be entitled to compensation on money disbursed under contract, but he is, under the provisions thereof, to receive and disburse all moneys arising from the provisions of said sections and, therefore, is to receive and disburse the moneys raised by taxation for the redemption of bonds issued under the provisions of said sections, as well as the moneys which are received from the sale of said bonds.

The provisions of section 7015, G. C., are clear that as compensation he is to receive the amount stipulated therein for the receiving and disbursing of all moneys. Consequently, I am of the opinion that the fees stipulated therein govern in regard to the disbursing of moneys raised by taxation for the redemption of bonds issued under section 7004, G. C., and interest thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1536.

TAXES AND TAXATION—LAND PURCHASED AT FORFEITED LAND SALE—NOT IN EXISTENCE—PURCHASER ENTITLED TO REFUND UNDER SECTION 2589, G. C.

Where, due to an error in the return of property for taxation, the county auditor's duplicate shows an entry of a certain parcel of land which in fact was not in existence at the time said return was made, and this entry finally appears on the list of forfeited lands, and in consideration of the payment of the taxes charged against said entry by a purchaser at the forfeited land sale, the auditor issues his certificate to such purchaser under authority of section 5672, G. C., such attempted sale is without legal effect and void; and the purchaser is entitled to a refund of the money paid by him into the county treasury, which may be made under authority and in the manner provided in section 2589, G. C.

COLUMBUS, OHIO, May 4, 1916.

HON. LEVI B. MOORE, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—In your letter under date of April 24th you request my opinion as follows:

> "In the year of 1900 one of the land appraisers reported for taxation 42 acres of land, together with the name of the owner. The land was placed upon the tax duplicate of the county but no taxes were paid on it, and it became delinquent and then forfeited, and was sold at forfeited land sale in 1911. It now appears upon an investigation of the records that no such land exists, and the purchaser at forfeited tax sale demands his money back. Is he entitled to a refund or does the rule of caveat emptor apply?"

While it is well settled in this state that the rule of *caveat emptor* applies to purchasers at tax sales, in so far as the validity of the sale is concerned (see Younglove v. Hackman, 43 O. S., 69), nevertheless the right of a purchaser at a tax sale to have his money refunded in case such sale in proven to be invalid, or in case the owner of the property so sold chooses to redeem the same in the manner provided by law, is recognized by the legislature in various provisions of the statutes as found in the chapter of the General Code relating to forfeited lands. For example, section 5764, G. C., provides:

> "The sale of any tract or lot of land under the provisions of this chapter, on which the taxes have been regularly paid previous to such sale, is void, and the purchaser, his heirs, or assigns, on producing the certificate of sale to the auditor of state, shall have his money refunded to him from the state treasury. The state auditor shall pay it out of the money appropriated for refunding taxes twice or improperly paid."

Section 5766, G. C., provides:

> "The purchaser of such lands, his heirs, or assigns, from the day of such purchase, shall be held in all courts as the assignee of the state of Ohio. The amount of taxes and penalties charged on the land at the time it was sold, with all legal taxes afterward paid thereon by such purchaser, his heirs or assigns, shall be a lien on it, and may be enforced as any other lien."

Section 5767, G. C., provides:

> "When the claimant of any lands sold, for the non-payment of taxes, under any law of the state, or his heirs or assigns, recover the land sold, as

aforesaid, such claimant, his heirs, or assigns, shall refund to the purchaser, his heirs, or assigns, the amount of taxes and penalties due to the state on the land when sold, with all other taxes paid thereon by such purchaser, his heirs, or assigns, to the time of such recovery, with interest. Such sum shall be paid to such purchaser, entitled thereto, before he shall be evicted or turned out of possession by any claimant so recovering such land."

While the courts have required a strict compliance with all provisions of the statutes governing the sale of land for taxes in determining the validity of such sale, they have invariably protected the rights of the purchaser as defined by the foregoing or similar provisions of the statutes.

I find no provision of the statute determining the answer to the question submitted by you. To my mind, however, it would be unreasonable to hold that the purchaser referred to in your inquiry is not entitled to a refund of the money paid by him into the county treasury upon the issuance to him by the county auditor of the certificate required by the provision of section 5762, G. C., in view of the fact that no such land as that mentioned in your inquiry, and referred to in said certificate, was in existence at the time of the making of the sale and the issuance of said certificate. The claim for the taxes in question was without foundation, the county auditor had nothing to sell, no consideration passed to the purchaser and the sale was void.

I am of the opinion, therefore, in answer to your question that the purchaser, mentioned in said inquiry, is entitled to a refund of the money so paid by him into the county treasury, and that the same may be made under authority and in the manner provided in the latter part of section 2589, G. C., which provides that:

"If at any time the auditor discovers that erroneous taxes or assessments have been charged and collected in previous years, he shall call the attention of the county commissioners thereto at a regular or special session of the board. If the commissioners find that taxes or assessments have been so erroneously charged and collected, they shall order the auditor to draw his warrant on the county treasurer in favor of the person paying them for the full amount of the taxes or assessments so erroneously charged and collected. The county treasurer shall pay such warrant from any surplus or unexpended funds in the county treasury."

Section 2590, G. C., provides that:

"At the next semiannual settlement with the auditor of state after the refunding of such taxes, the county auditor shall deduct from the amount of taxes due the state at such settlement the amount of such taxes that have been paid into the state treasury."

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1537.

DISAPPROVAL, TWO RESOLUTIONS FOR ROAD IMPROVEMENTS IN GEAUGA COUNTY.

COLUMBUS, OHIO, May 4, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of April 29, 1916, transmitting to me for examination final resolutions relating to the following roads:

"Geauga County—Sec. 'J' Chagrin Falls-Greenville road, Pet. No. 2377, I. C. H. No. 35.

"Geauga County—Sec. 'J' Chagrin Falls-Greenville road, Pet. No. 2377, I. C. H. 35."

It appears from the certificate of the chief clerk of the highway department attached to these resolutions that main market road funds are to be used in the payment of the state's portion of the cost and expense, but it does not appear either on the face of the resolutions or from any attached certificates that inter-county highway No. 35 has been designated as a main market road. For this reason I am returning the resolutions in question without my approval.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1538.

APPROVAL, RESOLUTION FOR IMPROVEMENT OF COLUMBUS-SANDUSKY ROAD, FRANKLIN COUNTY.

COLUMBUS, OHIO, May 4, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of May 3, 1916, transmitting to me for examination final resolution relating to Sec. "O" of the Columbus-Sandusky road, Pet. No. 2339, I. C. H. No. 4, in Franklin county.

I find this resolution to be in regular form and am therefore returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1539.

TOWNSHIP TRUSTEES—AUTHORIZED TO PURCHASE PIPE FOR BRIDGES AND CULVERTS ON TOWNSHIP ROADS—WHAT COUNTY HIGHWAY SUPERINTENDENT MUST APPROVE—DEPUTY COUNTY SURVEYOR OR AN EMPLOYE IN COUNTY SURVEYOR'S OFFICE MAY LAWFULLY PERFORM SERVICES FOR A MUNICIPALITY—LIMITATIONS FOR SUCH WORK.

Township trustees are authorized to purchase pipe for culverts and bridges on township roads and there is no requirement to the effect that such purchase must be authorized by the County surveyor. The amount that may be so expended is not limited by statute, and competitive bidding, while to be recommended, is not required. Before payment is made for culvert pipe purchased by trustees, the expenditure is to be approved by the county highway superintendent. His approval does not go to the advisability of the purchase, but before approving the bill he should ascertain that a contract of purchase was made and that the pipe has been delivered and is of the quantity and quality ordered.

A deputy county surveyor or an employe in the county surveyor's office may lawfully perform services for a municipality or for a private individual and be compensated therefor, provided all the work for such municipality or private individual is performed outside of business hours, and with the further qualification that the amount of time devoted to such outside work must not be so large as to interfere in any way with the performance of public duties or impair in any measure the efficiency of the deputy or employe.

COLUMBUS, OHIO, May 4, 1916.

HON. T. B. JARVIS, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR:—I have your communication of March 30, 1916, in which you submit the following inquiry with reference to the purchase of culvert pipe by township trustees:

> "I have been frequently consulted with reference to the authority of township trustees to purchase culvert pipe for township roads, and while I have advised our county surveyor that the township trustees under the Cass law may purchase pipe for bridges where needed, but the order for the same must be confirmed by the surveyor before the same can be paid, our surveyor has advised me that some counties in this state have been advised that only the county surveyor is authorized to purchase pipe for bridge purposes or for culverts, while others have been advised by their prosecuting attorney that the township trustees alone are authorized to purchase said material without any advice or confirmation of the county surveyor. I would be pleased to have your opinion on this question.
>
> "1st. Whether the township trustees may purchase pipe for culverts and bridges for township roads without authority or confirmation of county surveyor, and if so, to what amount may they expend township funds for this purpose, and should the contract be advertised? If the county commissioners and the county surveyor have authority to purchase pipe, must it be done upon advertisement or could it be done by direct application to the factory where such material may be obtained? Section 7199 provides how and the amount of work that shall be advertised. Does this govern the purchase of material by county commissioners and township trustees?"

It was held in opinion No. 1382 of this department, rendered to Hon. T. M. Potter, prosecuting attorney of Perry county, on March 15, 1916, that township trustees are authorized to purchase iron pipe or other materials suitable for culvert work and to

use the same in their repair work on township roads carried forward through the township highway superintendent.

It was held in opinion No. 1403, rendered to the bureau of inspection and supervision of public offices, on March 21, 1916, that there is no statutory provision which requires township trustees, in purchasing culvert pipe, to let the contracts for the same at competitive bidding. It was pointed out in the opinion in question that while there is no legal requirement as to the letting of such contracts by competitive bidding, yet the interests of the public will be best served under ordinary circumstances by inviting bids and awarding such contracts to the lowest responsible bidder.

It was held in opinion No. 847, rendered to the bureau of inspection and supervision of public offices, on September 21, 1915, that the county highway superintendent is required, generally, to approve all expenditures made from county or township funds for the construction, improvement, maintenance and repair of township and county roads and bridges, whether done by contract or force account, with the exception of claims for dragging, which are to be allowed upon the approval of the township highway superintendent.

In conformity with the above opinions, I advise you, in answer to your specific question, that township trustees are authorized to purchase pipe for culverts and bridges on township roads, and that there is no requirement of law to the effect that such purchase must be authorized by the county surveyor. There is no statutory limit as to the amount which may be expended for such purpose, and no requirement that township trustees must invite bids before letting a contract for culvert pipe, although the practice of letting such contracts at competitive bidding is to be recommended. Before payment can be made for culvert pipe out of the township treasury, the expenditure must be approved by the county highway superintendent. In determining whether or not he will approve a bill of this character, the county highway superintendent is not, however, to look to the advisability of the purchase. It is his duty, before approving the bill, to ascertain that a contract has been made by the township trustees for the purchase of the culvert pipe and that the pipe has been delivered, and is of the quantity and quality ordered by the trustees. If the seller has complied with his contract, and delivered the pipe in accordance with the terms of his agreement with the township trustees, it is the duty of the county highway superintendent to approve the bill. It should be noted, however, that under the provisions of section 155 of the Cass highway law, section 7198, G. C., township trustees, instead of purchasing culvert pipe themselves, may, if they so desire, authorize the county highway superintendent to make the purchase. The observations herein made, as to the powers and duties of the township trustees in this respect, are applicable with equal force to the county commissioners.

You also submit the following inquiry:

> "I am further confronted with this situation on which I would like to have an opinion. Can a deputy county surveyor, or an employee, while in the employ of a county surveyor, make a contract for any municipality or private engineering services, while at the same time being an employee of the county? I have advised that such cannot be done with impunity. Would be pleased, therefore, to have your opinion on this matter as soon as possible, in order to stop this contracting if this is your judgment."

It is provided by section 138 of the Cass highway law, section 7181, G. C., that the county surveyor shall give his entire time and attention to the duties of his office, but there is no such statutory provision as to assistants appointed under authority of said section 7181, G. C., or as to assistants, deputies, draughtsmen, inspectors, clerks or employes appointed under authority of section 2788, G. C.

The courts have generally recognized the right of a public officer, in the absence of a statutory inhibition, to contract with other persons for the performance of services not within the scope of the officer's duties, and which his office does not require him to perform, so long as such services do not interfere with the performance of his official duties. It may be questioned whether even a deputy county surveyor is to be regarded as a public officer, and it is extremely doubtful whether assistants, draftsmen, inspectors, clerks and other employes are to be so regarded. As to assistants, draftsmen, inspectors or clerks, it seems reasonably clear that they are to be regarded as employes rather than public officers. I am of the opinion, however, that the answer to your inquiry must be the same whether the particular persons involved are deputies or whether they are mere employes. It would have been within the power of the legislature to provide that all deputies and assistants of the county surveyor should give their entire time and attention to the duties of their offices, but there is no such provision in the statute. I am fully aware that a situation under which the deputies and assistants may accept private employment, is subject to grave abuse, and would prefer to reach the conclusion that outside employment may not be accepted under any circumstances, if I were able so to do. Even assuming that all of the deputies and employes of the county surveyor's office are to be regarded as employes, rather than public officers, it is clear, from a consideration of the authorities, that within certain narrow limits they may accept outside employment and receive compensation for the same.

The following is quoted from 26 Cyc., 1020:

> "It has been said, independent of any particuler provision in the contract therefor, that the master is entitled to the servant's exclusive services during the period of employment. This statement, it is submitted, is too broad. For instance, if the work does not require the whole time of the employe, there is no breach of contract, where the employe devotes the balance of his time to a business not injurious to the interest of his employer, and not impairing the value of his services to the employer. Even where there is an agreement to devote one's whole time to the services, such agreement must be reasonably construed. While an employe must be loyal and faithful to the interest of his employer and cannot serve or acquire any private interest of his own in opposition thereto, yet a contract to devote his whole time to the business of his employer does not prevent him from performing work for himself or others, of a different kind, and not conflicting with the work for his employer, outside of business hours."

It is my opinion, in answer to your specific question, that a deputy county surveyor or an employe in the county surveyor's office may lawfully perform services for a municipality or for a private individual and be compensated therefor, provided all the work for such municipality or private individual is performed outside of business hours, and with the further qualification that the amount of time devoted to such outside work must not be so large as to interfere in any way with the performance of public duties or impair in any measure the efficiency of the deputy or employe. Each particular case must be determined with reference to the surrounding facts, and it must be clear from the above discussion that deputies and assistants in the county surveyor's office will be unable to bring themselves within the rule above announced if they undertake any substantial amount of work for municipalities or private individuals. It should also be observed, that it is within the power of the county surveyor to prevent abuses along this line, and it is the duty of that official to see that his deputies and assistants do not perform work for third persons during

business hours or devote to such work an amount of time such as to interfere with the performance of public duties or impair the efficiency of the service due the county.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1540.

STATE HIGHWAY DEPARTMENT—APPROVAL, BOND OF CLIFFORD W. OZIAS, DIVISION ENGINEER.

COLUMBUS, OHIO, May 4, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication of May 3, 1916, transmitting to me for approval the bond of Clifford W .Ozias, recently appointed division engineer in your department.

I find this bond to be properly drawn, and am, therefore, returning the same with my approval as to f orm endorsed thereon. Respectfully,

EDWARD C. TURNER,
Attorney-General.

1541.

JOINT HIGH SCHOOL—RURAL SCHOOL DISTRICT CONTRIBUTES AN AVERAGE OF SEVENTY DOLLARS PER MONTH TOWARD SALARIES OF TEACHERS—VILLAGE SCHOOL DISTRICT AN AVERAGE OF TEN DOLLARS PER MONTH—RURAL DISTRICT FOR SUCH REASON NOT DEBARRED FROM STATE AID—POWERS AND DUTIES OF JOINT HIGH SCHOOL COMMITTEE—SEE SECTION 7670, G. C.

Where a rural school district is united with an adjoining village school district for high school purposes, under provision of section 7669 (104 *O. L.*, 229) *et seq., G. C., and contributes an average of* $70.00 *per month toward the salaries of the teachers in the joint high school established and maintained under said statutes, the village school district contributing an average of* $10.00 *a month toward said salaries, said rural school district is not, on this account, debarred from receiving state aid, providing its board of education has, in all other respects, complied with the requirements of section* 7595 (106 *O. L.*, 430) *et seq. of the General Code governing the administration of the state aid fund.*

With the exception of the power reserved by provision of section 7672, *G. C., to the board of education of each of the school districts comprising the union for high school purposes, to levy a tax and set aside the proceeds of such levy as a separate fund for the maintenance of said high school, the joint high school committee when properly elected under authority and in compliance with the requirement of section* 7670, *G. C., exercises the same powers and performs the same duties in connection with said high school as are exercised and performed by the board of education of a school district which maintains its own high school.*

COLUMBUS, OHIO, May 5, 1916.

HON. WILLIAM C. HUDSON, *Prosecuting Attorney, McArthur, Ohio.*

DEAR SIR:—In your letter of April 24th you request my opinion as follows:

"Wilkesville township school district and Wilkesville village school district maintain a joint high school under the provisions of section 7669,

G. C., which has been in operation since 1914. A joint high school committee was chosen by the boards of education of the respective districts according to section 7670, G. C., to manage the high school. The respective boards of education in 1915 duly certified to the county auditor an estimate of the amount necessary for the maintenance of the said high school according to section 7672, and county auditor made distribution accordingly.

"The high school committee of said joint districts employed three high school teachers at a salary in total of $240 per month. This amount was divided between the two districts forming the joint high school district according to that provision in section 7671, G. C., providing that 'funds * * * shall be provided * * * in proportion to the total valuation of property in the respective districts.' By this division the township paid for its share of the teachers' salaries $210 per month, and the village district paid $30 per month, making the $240 per month. $1,680 of the township school district funds being set aside as above stated for high school purposes, and the tax duplicate being comparatively low, the Wilkesville township school district has not sufficient funds in the tuition fund with which to pay its elementary teachers and has asked for state aid.

"Under the above conditions we ask opinion on the following questions:

"1. Is Wilkesville township school district entitled to state aid for the purpose of paying its elementary teachers under the provisions of section 7595-1?

"2. What power or control do the boards of education of the districts composing the joint high school district have over the acts or actions of the joint high school committee under section 7670 and 7671, G. C.?"

Section 7669, G. C. (104 O. L., 229), provides in part as follows:

"The boards of education of two or more adjoining rural school districts, or of a rural and village school district, by a majority vote of the full membership of each board, may unite such districts for *high school purposes.*"

From your statement of facts it appears that in 1914 the boards of education of Wilkesville township rural school district and Wilkesville village school district, acting under authority of and in compliance with the requirement of the above provision of the statute, united said districts for high school purposes, and that the high school established by said boards of education is under the management of a joint high school committee consisting of two members of each of said boards of education, elected by said boards under authority of section 7670, G. C., which provides:

"Any high school so established shall be under the management of a high school committee, consisting of two members of each of the boards creating such joint district, elected by a majority vote of such boards. Their membership of such committee shall be for the same term as their terms on the boards which they respectively represent. Such high school shall be free to all youth of school age within each district, subject to the rules and regulations adopted by the high school committee in regard to the qualifications in scholarship requisite for admission, such rules and regulations to be of uniform operation throughout each district."

Section 7671, G. C., provides:

"The funds for the maintenance and support of such high school shall be provided by appropriations from the tuition or contingent funds, or both,

of each district, in proportion to the total valuation of property in the respective districts, which must be placed in a separate fund in the treasury of the board of education of the district in which the school house is located, and paid out by action of the high school committee for the maintenance of the school."

You will observe, however, that the above provision of section 7671, G. C., that the funds for the maintenance and support of the high school shall be provided by appropriations from the tuition or contingent funds, or both, of each district in the manner prescribed by said statute, is modified by the provisions of section 7672, G. C. (104 O. L., 230), which are as follows:

"Boards of education exercising control for the purpose of taxation over territory within a rural or joint rural high school district, shall determine by estimate the amount necessary for the maintenance of any rural or joint rural high school to which such territory belongs, and shall certify such amount to the county auditor in the annual budget as provided in section 5649-3a. All funds derived from levies so made shall be kept separate, and be paid out for the maintenance of the school for which they were made."

Under the above provision of section 7672, G. C., each of the boards of education referred to in your inquiry is required to estimate the amount of money necessary to pay its proportionate part of the cost of maintaining such high school, and certify said amount in its annual budget, thus making separate levies for said purpose, subject to the action of the county budget commission under section 5649-3c, G. C., and the fund derived from said levies must be kept separate, the same as the fund formerly appropriated from the contingent and tuition funds of the district, and set apart as a separate fund under provision of section 7671, G. C.

You will further observe, however, that each board of education makes its own levy and maintains its own separate fund; that the two school districts in question are separate and distinct taxing districts, and that while the joint high school committee has the management of the high school under authority of section 7670, G. C., and administers the funds derived from the levies made by said boards of education for the maintenance and support of the high school, and kept separate and apart for said purpose in the respective treasuries of said school districts, under authority of the provisions of section 7671, taken in connection with the provisions of section 7672, G. C., said committee has no tax levying authority, and has nothing whatever to do with the elementary schools of said districts.

It seems clear to my mind that in determining the answer to your first question it is only necessary to ascertain whether the board of education of the Wilkesville township rural school district, in maintaining its elementary schools and employing teachers for said schools, and in contributing its proportionate part of the salaries of the teachers in the joint high school, has complied with all the requirements of the statutes governing state aid.

Section 7595, G. C. (106 O. L., 430), provides:

"No person shall be employed to teach in any public school in Ohio for less than forty dollars a month. When a school district has not sufficient money to pay its teachers such salaries as are provided in section 7595-1 of the General Code, for eight months of the year, after the board of education of such district has made the maximum legal school levy, at least two-thirds of which shall be for the tuition fund, then such school district may receive from the state treasurer sufficient money to make up the deficit."

Section 7595-1, G. C. (106 O. L., 430), provides:

"Only such school districts which pay salaries as follows shall be eligible to receive state aid: Elementary teachers without previous teaching experience in the state, forty dollars a month; elementary teachers having at least one year's professional training, forty-five dollars a month; elementary teachers who have completed the full two years' course in any normal school, teachers' college or university, approved by the superintendent of public instruction, fifty-five dollars per month; high school teachers not to exceed an average of seventy dollars per month in each high school."

Section 7597, G. C. (104 O. L., 165), provides:

"No district shall be entitled to state aid as provided in sections 7595, 7595-1 and 7596 unless the number of persons of school age in such district is at least twenty times the number of teachers employed therein, and the schools in such district are maintained at least eight months of the year."

Assuming that the board of education of said rural school district made the maximum legal levy for school purposes, at least two-thirds of which was for the tuition fund, including the levy for the joint high school tuition fund, as required by provision of section 7595, G. C.; that the number of persons of school age is such district is at least twenty times the number of teachers employed therein, and the the schools in said district are maintained at least eight months of the year as required by provision of section 7597, G. C., and that in so far as the elementary teachers of the district are concerned said board of education is complying with the requirements of section 7595-1, G. C., it only remains to be determined whether said school district in contributing its proportionate part of the salaries of the teachers in the joint high school has complied with the provision of the latter part of said section 7595-1, G. C., i. e., has paid to said high school teachers "not to exceed an average of seventy dollars per month."

From your statement of facts it appears that the amount contributed by the board of education of the Wilkesville township rural school district towards the salaries of the three teachers employed in said joint high school is $210.00 per month. It is evident that the average amount contributed by said board of education toward the salaries of said teachers does not exceed seventy dollars per month.

As I view it, it was clearly the intention of the legislature in enacting the above provisions of section 7669 et seq. of the General Code to afford to two or more school districts a legal procedure for the establishment and maintenance of a joint high school, and in this way give to the pupils residing in said district, and eligible to attend high school, the advantages of a first grade school of this class which could not be established and maintained by each of said districts acting separately.

In view of the liberal policy of the state in furnishing assistance to weak school districts which comply with the statutes governing state aid, as above set forth, I do not think a fair interpretation of said statutes would warrant me in holding that the Wilkesville township school district is debarred from receiving state aid solely on account of the fact that the salaries of the high school teachers in question, as paid from the aggregate of the tuition funds set apart for said purpose by the boards of education of said Wilkesville township rural school district and the Wilkesville village school district, exceeds an average of seventy dollars per month.

I am of the opinion, therefore, in answer to your first question, that said rural school district is not, on this account, debarred from receiving state aid, providing the board of education of said rural school district has in all other respects complied with the requirements of section 7695 et seq. of the General Code.

Your second question has been partially answered in determining the answer to your first question. In addition to what has already been said, it will be observed that under provision of section 7670, G. C., the joint high school committee is authorized to prescribe all rules and regulations governing the joint high school, such rules and regulations to be of uniform operation throughout each district, and under provision of the latter part of section 7671 taken in connection with the provision of the latter part of section 7672, G. C., said committee is charged with the proper expenditure of the funds established and maintained for joint high school purposes by the boards of education of the districts maintaining such high school.

I am of the opinion, therefore, in answer to your second question, that with the exception of the power reserved by provision of section 7672, G. C., to the board of education of each of the school districts comprising the union for high school purposes, to levy a tax and set aside the proceeds of such levy as a separate fund for the maintenance of said high school, the joint high school committee when properly elected under authority and in compliance with the requirement of section 7670, G. C., exercises the same powers and performs the same duties in connection with said high school as are exercised and performed by the board of education of a school district which maintains its own high school.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1542.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, CITY OF PORTSMOUTH, OHIO.

COLUMBUS, OHIO, May 5, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the city of Portsmouth, in the sum of $40,000.00 for the construction of levee and embankment, consisting of eighty bonds of $500.00 each."

I have examined the transcript of the proceedings of the council and other officers of the city of Portsmouth, relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted, and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of the city of Portsmouth, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1543.

BOARD OF STATE CHARITIES—WHEN ILLEGITIMATE CHILD IS "DEPENDENT CHILD" UNDER SECTION 1645, G. C.—JUVENILE COURT OF COUNTY IN WHICH CHILD IS FOUND HAS JURISDICTION IN SUCH CASE.

An illegitimate child which is homeless and destitute and cared for by strangers in the county in which it was born, the name or residence of the father being undisclosed, while the mother is confined in a state institution, is a "dependent child" under the provisions of section 1645, *G. C., as amended,* 106 *O. L.,* 459; *and as such, is subject to the jurisdiction of the juvenile court of the county in which it is found, and on complaint, may be committed by such court.*

COLUMBUS, OHIO, May 5, 1916.

Board of State Charities, Columbus, Ohio.

GENTLEMEN:—Your request for an opinion is as follows:

"Mary Doe, now nineteen years of age, was about ten years ago committed from A_____county to the Girls' Industrial School. She has been paroled several times, one of which was in November, 1914, at which time she was paroled to a family in B_____county. A few months afterwards she was returned to the Girls' Industrial School for immoral conduct. In June, 1915, she was sent to a maternity hospital in C_____ county, where a child was born in August. Since leaving the hospital she has been residing in the same county. Finding that she has been unable to secure employment and at the same time care for her child, she has applied to the juvenile court of C_____county for the purpose of having some disposition made of her child.

"The authorities of the Girls' Industrial School insist that they are not legally bound to care for the baby. Mary Doe is still a ward of that institution and could be returned at any time, but the custom of that institution prevents her bringing the child with her.

"The question has arisen as to whether the juvenile court in C_____ county has jurisdiction to determine the disposition of the baby. Inasmuch as some of the authorities having the case under observation contend that the infant should become a ward of the board of state charities, but as there seems to be no provision for the child's becoming a legal ward of the state board without commitment by some juvenile court, we ask your advice as to which county has the right to take action to that end.

"1. A_____county, from whence Mary Doe was committed and is still responsible to the juvenile court thereof.

"2. B_____county, in which the reputed father is supposed to reside.

"3. C_____county, in which the infant was born and where the mother and infant now reside.

"4. D_____county, wherein the Girls' Industrial School is located."

As you state you have been unable in your investigation to procure any definite information as to the whereabouts of the father of the child, and that its mother has been returned to the Girls' Industrial School, the question of disposition of the child which is being cared for in a hospital of another county must be determined independent of the residence of either parent.

The child being cared for by strangers, while the mother is confined in a state institution, can only come within one classification, namely, that of a "dependent" as described in section 1645 of the General Code, as amended, 106 O. L. 459. The section, in defining a dependent child, among other things, provides that for the purposes of the chapter, which is a part of the juvenile court law,

> " 'Dependent child' shall mean any child under eighteen years of age who is dependent on the public for support or who is destitute, homeless or abandoned, or who has not proper parental care or guardianship * * * or whose environment is such as to warrant the state in the interest of the child in assuming its guardianship."

The child in question, in the first place, is "homeless," "destitute," and without "proper parental care or guardianship," and in fact is entirely among strangers and dependent upon them for support, hence there can be no question but that it is a "dependent child," and as such, is subject to the jurisdiction of the juvenile court, under the provisions of section 1642 of the General Code, as amended, page 868, 103 O. L., and which in part is as follows:

> "Such courts * * * shall have jurisdiction over and with respect to delinquent, neglected and dependent minors under the age of eighteen years."

Under the provisions of section 1647 of the General Code, as amended (103 O. L., 870), the plan of procedure for bringing a dependent child before the juvenile court is in language as follows:

> "Any person having knowledge of a minor under the age of eighteen years who appears to be either a delinquent, neglected or dependent child, may file with such juvenile court a complaint sworn to, which may be upon information and belief, and for that purpose such complaint shall be sufficiently definite by using the word delinquent or dependent, as the facts may be."

Section 1653 of the General Code, as amended (103 O. L. 872), is specific in its terms as to the power of the court to dispose of any minor under the age of eighteen years or a ward of the court. Under its provisions the court may, among other things, "commit such child to the board of state charities or to some suitable state or county institution."

Nowhere in the juvenile court law is there to be found any provision which limits the court in the exercise of its power to extend the benefits of the law to a delinquent, neglected or dependent child. On the contrary, the juvenile court law is to be liberally construed to the end that proper guardianship may be provided for the child.

"Dependency" is a status, and when found to exist, is sufficient in itself to vest jurisdiction in the court wherever such dependency may occur. The residence of the parent does not operate to deprive a juvenile court of jurisdiction over a child because such residence may perchance be in a county different from the one in which the act causing delinquency, or dependency may have occurred. The parent would be subject to prosecution in the county in which the act was committed and no other.

In the case under consideration, it appearing that the child in question is being cared for in C----------county, where it was born, while the mother is confined in a state institution and therefore unable to support or care for the child, and there being no known person who can be charged with its support, it is my opinion that it is the duty of the juvenile court of the county in which the child is found to take

jurisdiction if a complaint is filed under the provisions of section 1647 of the General Code, supra.

If the father of the child can be located, vigorous steps should be taken to prosecute him for failing to support the child.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1544.

ROADS AND HIGHWAYS—COUNTY COMMISSIONER'S DUTY TO ACQUIRE RIGHT-OF-WAY FOR TEMPORARY HIGHWAY—STATE HIGHWAY COMMISSIONER MUST PROCURE RIGHT-OF-WAY FOR PERMANENT IMPROVEMENT WHEN HE IS PROCEEDING WITHOUT CO-OPERATION OF LOCAL AUTHORITIES—FORMS OF DEED AND STATEMENT TO PROBATE JUDGE IN SUCH CASES.

The duty of acquiring right-of-way for a temporary highway, and constructing such temporary highway, rests with county commissioners, even where the state highway commissioner is improving an inter-county highway or main market road without the co-operation of the local authorities. Where the state highway commissioner is proceeding without the co-operation of the local authorities, and right-of-way is needed for the actual improvement, the state highway commissioner must procure the same. This opinion prescribes form of deed and also form of statement to the probate judge in such cases.

COLUMBUS, OHIO, May 5, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I acknowledge the receipt of your inquiry of April 24, 1916, which inquiry reads as follows:

> "I beg to advise you that this department has entered into a contract with P. H. Dieffenbacker & Sons, of Canton, Ohio, for the improvement of section 'F' of inter-county highway No. 75 in Carroll County.
>
> "The county in this instance was unable to provide funds for co-operating with the state in the construction of this section, and the entire cost was assumed by the state, to be paid from the inter-county highway funds to the credit of Carroll County.
>
> "A slightly changed alignment of the road makes it necessary to procure additional right-of-way, and in your opinion of March 8th you advised this department that such right-of-way must be procured and paid for by the state highway department.
>
> "I am attaching hereto right-of-way maps, showing on a small scale the location of the old and new alignments through the properties of
>
> Joseph Blazer's heirs,
> S. H. McCausland,
> Arvilla Davis,
> A. H. Howey,
> John T. Cogsil,
> Harry W. Maple.
>
> The dotted lines on the enclosed maps indicate the old alignment and the straight lines the new.

"I am also attaching hereto a statement by Division Engineer T. T. Richards, in which he states the amount of compensation he believes reasonably due the property owners. He also indicates which of the property owners will accept the amount offered.

"I am also attaching hereto copies of statements made by Mr. V. G. Stoody, auditor of Carroll County, showing the amount of compensation and damage deemed reasonable by the board of county commissioners.

"The addresses of the parties interested are given in Division Engineer Richard's letter.

"Permit me to request your office to take such action as is proper in securing the required right-of-way, or if further action is necessary on the part of this department, please instruct us as to the necessary procedure."

The statement of Division Engineer T. T. Richards, attached to your communication, reads as follows:

"Complying with your request of March 22, 1916, relative to the procuring of additional right-of-way for the improvement of section 'F' on the I. C. H. No. 75, Carroll County, I submit the following:

"On March 28th I went over the entire line, accompanied by Mr. R. H. Lee, county highway superintendent, and we looked over and considered carefully the new location as regard to damage to adjoining properties. We interviewed those of the owners who reside along the road.

"On the lands of Arvilla Davis, in the southeast quarter of section 24, town 13, range 5, we will be required to purchase .186 acres, also a right-of-way for a detour during construction, for which Arvilla Davis asks $50.00, which I consider reasonable, and suggest she be paid that much.

"On the property of J. A. Blazer heirs (J. C. Blazer, administrator), in southeast quarter of section 24, 1.56 acres; in northeast quarter of section 23, .02 acres, and in northeast quarter of section 17 a very small tract, probably .01 of an acre, making in all about 1.8 acres actually used as a right-of-way, but in northeast quarter of section 24 the new location cuts off 2.27 acres which is greatly damaged, and his agreement to accept $350.00, including an easement for detour during construction, is, in my opinion, reasonable.

"On the lands of S. H. McCausland, in the northwest quarter of section 17, we need about .2 of an acre in order to take out an angle, which does not in any way damage the remaining land, and an offer of $25.00 was made him which was refused, his claim being $100.00.

"On land of R. H. Howey (Thos. R. Lee, agent), in northwest quarter of section 17, requires about 2.5 acres of land, which does not interfere with buildings or water. As this property is on both sides of the old road, the old road when abandoned will revert back, an offer of $150.00 was made the agent, but I suggest that this offer be increased to $200.00. He asks $800.00.

"On Harry Maple's land, in the southeast quarter of section 17, requires a little less than 2 acres. An offer of $200.00 was made him, which, in my opinion, is fair and reasonable, and which he refused to accept.

"The addresses of the parties interested are:

Arvilla Davis, Carrollton, Ohio.
J. C. Blazer, Carrollton, Ohio,
Thos. R. Lee, Agent, Harlem Springs, Ohio,
S. H. McCausland, Carrollton, Ohio, R. F. D. No. 2,
Henry Maple, Carrollton, Ohio.

"Right-of-way maps are attached, showing as well as possible on a small scale the location of new and old alignment."

In answering your inquiry it will be necessary, in the first instance, to distinguish between right-of-way needed for the actual construction of the new improvement and right-of-way needed for a detour during construction. As indicated in your communication I have heretofore advised you that under the provisions of section 1202, G. C., it is the duty of the state highway commissioner to procure and pay for additional right-of-way needed in the construction of an inter-county highway or main market road, where the work is being done without the co-operation of the county commissioners or township trustees. The section in question and the opinion construing the same are applicable, however, only to right-of-way needed for construction work and have no application where it is desired to procure right-of-way for a detour during construction. The acquisition and construction of temporary highways to be used by the traveling public in lieu of closed highways is governed by the provisions of section 1225, G. C., 106 O. L., 642, which section reads as follows:

> "The state highway commissioner shall, if he deems it advisable, close a highway or a section thereof which is being constructed, improved or repaired under this act, in order to permit a proper completion of such work. The state highway commissioner or chief highway engineer shall first execute a certificate and file the same in the office of the county commissioners of the county in which such highway is situated, which certificate shall describe the portion thereof to be closed, and not more than one mile of a highway shall be closed at a time. The contractor or other person acting under authority of said highway commissioner or engineer, shall thereupon close the same to the public by erecting suitable obstructions, and posting conspicuous notices to the effect that the highway is closed. The county commissioners shall, if practicable, construct a temporary highway to be used by the traveling public in lieu of the closed highway, and may erect temporary bridges. When necessary for the purpose of locating, constructing and erecting such highways or bridges, the county commissioners may enter upon the land required for such temporary highway. If they are unable to agree with the owners of such land as to the amount of damages sustained, the amount shall be ascertained, determined and paid as hereinafter provided in cases where lands are entered upon for the purpose of making surveys for a proposed improvement. When a road is so closed the state highway commissioner or chief highway engineer shall cause to be erected suitable signs or barricades warning the public that the highway or a part thereof is closed to traffic, and the temporary routes to be used shall be conspicuously marked by proper signs at all proper road crossings and forks. The state highway commissioner shall have full power and authority to open to traffic at any time any portion of the highway closed as heretofore provided."

It will be noted that this section casts upon the county commissioners the duty of constructing, if practicable, a temporary highway to be used by the traveling public in lieu of the closed highway and I am of the opinion that this provision is exclusive and that the duty of acquiring right-of-way for a temporary highway and constructing such temporary highway, if performed at all, must be performed by the county commissioners even in those cases in which the state highway commissioner is proceeding to improve an inter-county highway or main market road without the co-operation of the local authorities. Your department will not, therefore, be concerned with the matter of acquiring a right-of-way for a temporary highway and this duty is to be performed by the county commissioners in the manner pointed out in section 1225, G. C.

Coming now to consider the acquisition of right-of-way for the new improvement rendered necessary by the fact that the line of the proposed improvement deviates

from the existing highway, the pertinent sections of the General Code are sections 1201 and 1202, being sections 194 and 195 of the Cass highway law.

Section 1201, G. C., reads as follows:

"If the line of the proposed improvement deviates from the existing highway, or if it is proposed to change the channel of any stream in the vicinity of such improvement. the county commissioners or township trustees making application for such improvement must provide the requisite right of way. If the board of county commissioners or township trustees are unable to agree with the owner or owners of such land or property as may be necessary for such change or alteration, or if additional right-of-way is required for the same, and the county commissioners or township trustees are unable to agree with the owner or owners of the land or property in question then the board of county commissioners or township trustees, as the case may be, may by resolution declare it necessary to condemn and appropriate for public use such land or property, and shall proceed to fix what they deem to be the value of such land or property sought to be condemned or appropriated, and deposit the value thereof with the probate court of the county for the use and benefit of such owner or owners, and thereupon the board of county commissioners or township trustees, shall be authorized to take immediate possession of and enter upon said lands for the purpose aforesaid. The probate judge shall forthwith notify such owner or owners of the amount of money deposited with him on account of the land or property sought to be condemned or appropriated and upon application of such owner or owners he shall turn over to them the amount of moneys so deposited with him on account of the land or property sought to be taken. The probate judge may cause notice of such action to be served upon such owner or owners by the sheriff or any other person that he may direct. Proof of service shall be made by affidavit of the person making such service. In case the owner or owners are non-residents the probate judge shall give notice of the deposit of such money by publication for one week in some newspaper of general circulation in said county. A copy of such newspaper shall be forthwith mailed to such non-resident owner or owners, if their address is known to the probate court. If the address of such non-resident owner or owners is known the date of mailing shall be considered the date of service, and if the address of such non-resident owner or owners is unknown, the date of publication shall be considered the date of service for the purpose of fixing the time for appeal. If the owner or owners of such land or property are not satisfied with the amount fixed by such county commissioners or township trustees, they shall, within ten days after the service of such notice of the allowance aforesaid, appeal to the probate court of the county in which such land or property, or some part thereof is located, and the probate court upon the filing of such appeal shall fix the appeal bond which shall be furnished within five days after the same is fixed by the court, and thereupon a jury trial shall be had in the manner provided for appeals in road cases."

Section 1202, G. C., reads as follows:

"If the state highway commissioner proposes to improve and intercounty or main market road without the co-operation of the county commissioners or township trustees, and it is necessary as a part of the proposed improvement of the said highway, bridge or culvert, to acquire or appropriate lands or property, and the state highway commissioner is unable to agree

with the owner or owners of such land or property as to the value thereof, the said highway commissioner may proceed to condemn such land or property in the manner hereinbefore fixed for county commissioners and township trustees. The state highway commissioner may condemn materials for road purposes in like manner."

Your first duty in the premises will be to make an effort to agree with the owner or owners of the land in question as to the compensation to be paid therefor. At this point it is proper to observe that if the owner of land, or if one or more of several joint or common owners of a tract of land, are not of legal age or are under other disability, then of course a situation exists where you are unable to agree with such owners for the reason that such owners are not capable of contracting unless indeed such owners be represented by properly appointed and qualified guardians. If, however, the owner or owners of any given tract of land are of full age and otherwise competent to contract and you are able to agree with such owners as to the compensation to be paid for the right-of-way which you desire to obtain and which is necessary for the proposed improvement, then upon being satisfied that such owners have a fee simple title to the land in question and that the same is unincumbered, you may, upon receipt of a properly executed deed, pay to such owner or owners the compensation agreed upon. The deed should be placed on record in the office of the county auditor of the county in which the land is situated. The statute refers to "right-of-way" and it therefore seems clear that you are authorized to acquire an easement for the purposes of a public highway rather than to acquire the fee. In order that the necessary deeds may be prepared in your office. I suggest the following form:

"DEED.

"KNOW ALL MEN BY THESE PRESENTS: That

"WHEREAS, it is proposed by the State of Ohio, acting by and through Clinton Cowen, State Highway Commissioner of said state, to improve {inter-county highway / main market road} No._____in_____ Township, _____County, State of Ohio, and

"WHEREAS, said proposed improvement is to be constructed without the co-operation of the county commissioners of said county or the township trustees of said township, and

"WHEREAS, the line of said proposed improvement deviates from the existing highway,

NOW, THEREFORE, _____, the grantor, in consideration of_____Dollars ($_____), to him paid by the State of Ohio, acting by and through Clinton Cowen, State Highway Commissioner of said state, the grantee, the receipt of which is hereby acknowledged, does hereby grant and release unto said the State of Ohio, grantee, its successors and assigns forever, a right-of-way for said proposed highway improvement on and over a certain piece of land owned by_____, said grantor, the right-of-way herein granted, being situated in the township of_____, county of_____, State of Ohio, and being described as follows:

"_____

"(Here insert description of right-of-way.)

"_____

"_____

The State of Ohio, grantee, to have and to hold said right-of-way unto itself,

and successors and assigns forever, and to have the right to construct and forever maintain thereon a public highway.

"And the said grantor, for himself and his heirs, executors and administrators, hereby covenants with the said grantee, its successors and assigns, that said grantor is the true and lawful owner of said premises, and is well seized of the same in fee simple, and has good right and full power to bargain, sell and convey the same in manner aforesaid, and that the same are clear and free from all incumbrances, and further, that said grantor will warrant and defend the same against all claims of all persons whatsoever.

"IN WITNESS WHEREOF, the said_____, grantor, has hereunto set his hand this_____day of_____, A. D., 191____.

"_____

"Signed and acknowledged
in presence of

"_____

"_____"

If the grantor is married, the husband or wife, as the case may be, should release his or her right of dower in the premises and the last paragraph of the deed should be drawn in the following form:

"IN WITNESS WHEREOF, the said_____, grantor, and_____{wife / husband} of said grantor, who hereby releases all {her / his} right of dower in said premises, have hereunto set their hands this_____day of_____, A. D., 191____.

"_____

"Signed and acknowledged
in presence of: "_____

"_____

"_____"

The deed should, of course, be acknowledged, and the acknowledgment may be in the following form:

"STATE OF OHIO, }
} ss:
_____County, }

"Before me, a_____, in and for said county, personally appeared the above named_____, who acknowledged that he (she or they) did sign the foregoing instrument and that the same is his (her or their) free act and deed, for the uses and purposes therein named.

"IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my_____seal, at_____, this _____day of_____A. D., 191____.

"_____

"_____"

Coming now to consider the proper procedure where you are unable to agree with the owner or owners as to the compensation to be paid, it is provided in section 1201, G. C., that county commissioners or township trustees, when unable to agree with the owners, shall by resolution, declare it necessary to condemn and appropriate the land in question and shall proceed to fix what they deem to be the value of such land. There is no statute requiring the state highway commissioner to keep a journal of his proceedings or to act by a formal resolution, and I am of the opinion that a mere declaration on your part, that you are unable to agree with the owner or owners of the land in question and that it is necessary to condemn and appropriate the same for public use, is sufficient, and that such declaration may be properly made a part of the statement necessarily filed by you with the probate judge of the county in which the land is situated.

This statement may properly be in the following form:

"TO THE PROBATE JUDGE OF_____COUNTY, OHIO:

"WHEREAS, the State of Ohio, acting by and through the undersigned, is proposing to improve { main market road / inter-county highway } No... _____, in_____Township, _____County, Ohio, and

"WHEREAS, the undersigned proposes to improve said { main market road / inter-county highway } without the co-operation of the county commissioners of said county and without the co-operation of the township trustees of said township, and

"WHEREAS, it is necessary, as a part of the proposed improvement of said highway to acquire certain lands hereinafter described, and

"WHEREAS, the undersigned is unable to agree with the owner of such land as to the value thereof,

"NOW, THEREFORE, I, Clinton Cowen, State Highway Commissioner of the State of Ohio, hereby declare it necessary to condemn and appropriate for public use and for the uses and purposes of a right-of-way for said proposed highway improvement the following described land belonging to_____, and located in said township of _____, county of_____, State of Ohio, and described as follows:

"_____

"(Here describe the land desired for a right-of-way.)

"_____

"I deem the value of such land, which I seek to condemn and appropriate to be_____Dollars ($_____) and I herewith deliver to and deposit with you said sum of_____Dollars ($_____) in lawful money of the United States of America, which sum is for the use and benefit of said owner. I hereby request you to notify _____, said owner, of said amount of money so deposited with you on account of the land hereby sought to be condemned and appropriated and to take the action provided by sections 1201 and 1202, G. C., 106 O. L., 631 and 632, and all other and further action that may be proper in the premises.

"_____

State Highway Commissioner of
the State of Ohio."

The above declaration and statement should be signed by you and filed with the probate judge of the county in question, and, as therein indicated, you should

at the time of filing, deposit with the probate judge the value of the land in money as fixed by you. You may obtain the money by voucher or requisition on the auditor of state to issue his warrant on the treasurer of state, payable to you. This warrant should be cashed by you and the actual money delivered to the probate judge. As soon as this action has been taken by you, you will be authorized to take immedate possession of and enter upon the right-of-way in question for the purpose of constructing the proposed highway improvement. If the owner does not accept the compensation fixed by you and takes an appeal in the manner provided by section 1201, G. C., the question of compensation will be submitted to and determined by a jury in the probate court, in the manner provided by chapter II of the Cass highway law, relating to appeals in road cases, and you should be represented by counsel at the hearing. If this situation should develop, I will be very glad to send a representative of this department to the county in question for the purpose of representing you and protecting the interests of the state.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1545.

APPROVAL, ABSTRACT OF TITLE FOR REAL ESTATE SITUATED IN DECATUR TOWNSHIP, LAWRENCE COUNTY, OHIO.

COLUMBUS, OHIO, May 6, 1916.

HON. CHARLES E. THORNE, *Director, Ohio Agricultural Experiment Station, Wooster, O.*

DEAR SIR:—I beg to acknowledge receipt of abstract of title for the following described real estate situated in Decatur Township, Lawrence County, Ohio, to wit:

"The whole of section number twenty-six (26), township number three (3), range number eighteen (18), excepting therefrom certain real estate conveyed by this grantor to James T. Patton by deed dated November 28, 1912, and recorded in Lawrence County record of deeds No. 94, at page 637, being twenty acres more or less; also excepting therefrom certain real estate conveyed by this grantor to James T. Patton by deed dated May 9, 1913, and recorded in Lawrence County record of deeds No. 97, at page 1, being twenty acres more or less; also excepting therefrom certain real estate conveyed by this grantor to Sophia Dinnen by deed dated May 12, 1913, and recorded in Lawrence County record of deeds No. 97, at page 18, being twenty acres more or less; also excepting therefrom certain real estate conveyed by this grantor to Edward C. Walters by deed dated May 9, 1913, and recorded in Lawrence County record of deeds No. 97, at page 19, being forty acres more or less; also excepting therefrom the real estate conveyed by the grantor herein to the Cincinnati, Hamilton & Dayton Railway Company by deed dated August 11, 1902, and recorded in the Lawrence County record of deeds number 73, at page 468, containing seven and fifty one-hundredths (7.50) acres more or less; for a more particular description of said excepted parcels of real estate reference is here made to the records where said deeds are recorded as above set forth; the tract conveyed containing five hundred and thirty-two and fifty one-hundredths (532.50) acres more or less.

"Also the whole of section number thirty-five (35), township number three (3), range number eighteen (18), excepting therefrom certain real estate conveyed by this grantor to Nannie Emma Bass by deed dated November

21, 1914, and recorded in Lawrence County record of deeds number 98, at page 383, containing forty and five-tenths (40.5) acres more or less, also excepting therefrom the real estate conveyed by the grantor herein to the Cincinnati, Hamilton & Dayton Railway Company by deed dated August 11, 1902, above mentioned, containing one-half acre more or less; for a more particular description of said real estate reference is here made of the record where said deeds are recorded as above set forth; the tract hereby conveyed containing five hundred and ninety-nine (599) acres more or less.

"Also the southeast quarter and the southeast quarter of the northeast quarter (lying south of a tract of land sold by this grantor to Charles L. Hutchinson by deed dated April 1, 1913, and recorded in Lawrence County record of deeds number 100, at page 152, to which reference is here made), of section number thirty-four, township number three, range number eighteen, excepting therefrom the real estate conveyed by the grantor herein to the Cincinnati, Hamilton & Dayton Railway Company by deed dated August 11, 1902, above mentioned, containing six (6) acres more or less; the tract hereby conveyed containing two hundred (200) acres more or less.

"Also the southeast quarter of section number twenty-seven (27), township number three (3), range number eighteen (18), containing one hundred and sixty-eight and fifty one-hundredths (168.50) acres more or less, reference being made to J. R. C. Brown's survey of August 28, 1886, and recorded in vol. A, at page 100, of the surveyor's records of Lawrence County; said real estate hereby conveyed aggregating fifteen hundred (1500) acres more or less."

I have carefully examined said abstract and find no defects in the title to said real estate as disclosed thereby, which lapse of time has not cured. There are no liens or incumbrances against said real estate excepting the taxes for the last half of the year 1915 and the year 1916, the amount of which is not stated in the abstract.

Subject only to the payment of said taxes I am of the opinion that the abstract discloses a good and sufficient title in fee simple in The Vernon Iron Company, a corporation incorporated under the laws of the state of Ohio.

I an returning the abstract under separate cover.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1546.

BOARD OF EDUCATION—TRANSFER OF TERRITORY—REMONSTRANCE FILED—WHETHER OR NOT SAME WAS FILED WITHIN THIRTY DAY LIMITATION PROVIDED BY SECTION 4692, G. C., 106 O. L., 397.

A remonstrance filed on May 3, 1916, is within the thirty day limitation of section 4692, G. C., 106 O. L., 397, when the map therein referred to was filed on April 3, 1916.

COLUMBUS, OHIO, May 6, 1916.

HON. R. W. CAHILL, *Prosecuting Attorney, Napoleon, Ohio.*

DEAR SIR:—In yours under date of May 4, 1916, you request my opinion upon the following question:

"The Henry county board of education filed on April 3, 1916, as required by law, a map of the proposed territory to be added to the Malinta village school district.

"On May 3, 1916, a remonstrance was filed against adding the proposed additional territory.

"Was this remonstrance filed in time? That is, within the 30 day limit, as required by the provisions of section 4692, General Code of Ohio?"

Section 4692, G. C., 106 O. L., 396, to which you refer, in so far as pertinent to your inquiry, provides as follows:

"The county board of education may transfer a part or all of a school district of the county school district to an adjoining district or districts of the county school district. Such transfer shall not take effect until a map is filed with the auditor of the county in which the transferred territory is situated, showing the boundaries of the territory transferred, and a notice of such proposed transfer has been posted in three conspicuous places in the district or districts proposed to be transferred or printed in a paper of general circulation in said county, for ten days; nor shall such transfer take effect if a majority of the qualified electors residing in the territory to be transferred, shall, within thirty days after the filing of such map, file with the county board of education a written remonstrance against such proposed transfer. * * *"

It will be noted that it is here provided that if a written remonstrance shall be filed within 30 days from the filing of the map required by this section, the proposed transfer shall not become effective and your question is whether or not the filing of the remonstrance on the third day of May, 1916, after the filing of the map on the third day of April, 1916, was within such thirty-day limitation.

Section 10217, G. C., provides as to the computation of time in part as follows:

"When an act is to take effect or become operative, from and after a day named, no part of that day shall be included. * * *"

If we calculate the time from April 3, 1916, the day of filing the map, to May 3, 1916, the day on which the remonstrance was filed, according to the above statutory rule, the first day of the computation would be April 4. Beginning, then, with April 4th, as the first day in the computation, we find that the 3rd day of May, 1916, was the 30th day after the 3rd day of April, on which the map in question was filed, and by reason of the above stated rule, and the necessary result of its application in the present case, I am of the opinion that the remonstrance filed on May 3, 1916, against the proposed transfer of territory, was within the statutory limitation.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1547.

BOARD OF EDUCATION—TEACHERS' PENSION FUND—NOT RETROACTIVE.

The term "teacher" as found in the chapter relating to teachers' pensions and as defined by section 7881, G. C., does not include a person who, prior to the time of the establishment of a teachers' pension fund by the board of education as a teacher in the schools of said district, but whose employment was terminated before any steps were taken by said board to establish said fund.

COLUMBUS, OHIO, May 6, 1916.

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

GENTLEMEN:—I am in receipt of a letter from Hon. John C. Hover, secretary of the board of trustees of the teachers' pension fund for the city school district of Bellefontaine, Ohio, under date of April 25th, requesting my opinion on a certain question therein stated and inasmuch as the question is of general interest to the school districts of the state I deem it advisable to address my opinion on said question to you. Judge Hover's letter is as follows:

> "On the fourteenth day of January, 1916, Prof. S. L. Smith filed his application for teacher's pension, the application stating that he has served as a school teacher for thirty-four years and retired from the service in June, 1913.
>
> "The question that is bothering the board is this: In the spring of 1913, the teachers, or a majority of them, of the Bellefontaine school district, were desirous of creating a teachers' pension fund under section 7875 and following, and a petition to the board of education was prepared and filed. The applicant, S. L. Smith, was one of the petitioners. On the eighth day of August, 1913, the board of education passed the enabling resolution creating a teachers' pension fund within and for Bellefontaine district. Due notice was given of the action of the board as required by statute. On the third day of June, 1913, the board elected teachers. Mr. Smith was not an applicant at that time, by reason of failing health, not being able to teach the coming year.
>
> "It will be noticed that Mr. Smith was teaching and was willing and anxious to create a teachers' pension fund, and assisted in such action after the enactment of the teachers' pension law, but before the board of education had passed the resolution and before the law had been complied with, creating a board of trustees of the teachers' pension fund, Mr. Smith had retired from the service as above explained by reason of his ill health.
>
> "Briefly, the facts are these: First, Mr. Smith has complied with the law as to time and place of service; second, that he was teaching and in employment as a regular teacher after the law was enacted; third, that he did what he could with the other teachers to cause the fund to be created; fourth, before the fund was created, by reason of his failing health, he retired from the service.
>
> "The question is: Is Mr. Smith eligible for pension under our teachers' pension statute?
>
> "Your opinion on this question will be very much appreciated and will be of great value to the board of trustees. We are desirous of complying with the law. Not meaning to argue the case, but Mr. Smith has served the time required by law and more than the time, and was serving when the law was enacted, and by no fault of his the fund was not created while he was teaching."

In an opinion rendered to your bureau under date of June 28, 1915, in answer to a question submitted by Judge Hover, consideration was given to those statutes as found in the chapter relating to teachers' pensions, governing the establishment of the teachers' pension fund and determining in a general way the limitations placed on the board of trustees of that fund, chosen under provision of section 7875, G. C., in the administration of said fund. A copy of said opinion was sent to Judge Hover.

I do not deem it necessary, therefore, for the purpose of answering the question under consideration, to again comment on said provisions of said statutes further than to observe that with reference to the time of the establishment of the teachers' pension fund said statutes are prospective in operation. In other words, no provision of said statutes by its terms makes it possible for a person to become a beneficiary of the teachers' pension fund, who prior to the time of the establishment of such fund by the board of education of a school district, was employed by said board of education as a teacher in the schools of said district, but whose employment was terminated before any steps were taken by said board to establish said fund.

Section 7880, G. C., relates to the retirement of a teacher by action of the board of education of a school district which has established a teachers' pension fund and provides:

> "Such board of education of such school district, and a union, or other separate board, if any, having the control and management of the high schools of such district, may each by a majority vote of all the members composing the board, on account of physical or mental disability, retire any teacher under such board who has taught for a period aggregating twenty years. One-half of such period of service must have been rendered by such beneficiary in the public schools or high schools of such district, or in the public schools or high schools of the county in which they are located, and the remaining one-half in the public schools of this state or elsewhere."

Section 7882, G. C., relates to the voluntary retirement of a teacher in a school of such district and provides:

> "Any teacher may retire and become a beneficiary under this chapter who has taught for a period aggregating thirty years. But one-half of such term of service must have been rendered in the public schools or in the high schools of such school district, or in the public schools or high schools of the county in which the district is located, and the remaining one-half in the public schools of this state or elsewhere."

The meaning of the term "teacher" as found in the chapter relating to teachers' pensions is defined in section 7881, G. C., as follows:

> "The term 'teacher,' in this chapter shall include all teachers regularly employed by either of such boards in the day schools, including the superintendent of schools, all superintendents of instruction, principals, and special teachers, but in estimating years of service, only service in public day schools or day high schools, supported in whole or in part by public taxation, shall be considered."

In view of the foregoing provisions of the statutes taken in connection with the provisions of the statutes governing the establishment and maintenance of the teachers' pension fund, it seems clear to my mind that inasmuch as the employment of the applicant mentioned in your inquiry as a teacher in the schools of the Bellefontaine city school district was terminated before any steps were taken by the board of education

of such district to establish a school teachers' pension fund, said applicant was not a "teacher" within the meaning of the above provision of section 7881, G. C.

I am compelled to conclude, in answer to the question submitted by Judge Hover, that the applicant referred to in said inquiry is not entitled to a pension under any provision of the statutes governing the administration of the teachers' pension fund, and that said application must therefore be rejected.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1548.

FORMS OF DOCUMENTS TO BE USED IN EXTRADITION FROM OTHER STATES OF PERSONS CHARGED WITH CRIME IN THIS STATE.

COLUMBUS, OHIO, May 6, 1916.

HONORABLE FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—You have asked me to prescribe a form of application to be used in the extradition from other states of persons charged with crime in this state.

The material provisions of the General Code relative to this matter are found in sections 109 to 111, both inclusive. Section 111, G. C., after specifying certain things which must be done, provides:

"and such further evidence in support thereof as the governor may require."

The following provisions and forms, therefore, embraces not only those things which are required by the sections above mentioned, but certain other steps which are believed to be proper requirements for the guidance of the governor in the performance of the duty thus placed upon him. Analyzed and placed in logical order, the application and other papers presented to the governor should be as follows:

First. An application signed by the prosecuting attorney of the county in which the crime was committed for which the following form is suggested:

"_____County, Ohio.

"OFFICE OF THE PROSECUTING ATTORNEY

"_____191___.

"TO HIS EXCELLENCY, THE GOVERNOR:

"SIR:—I have the honor to request that you issue a requisition upon the governor of the state of_____, for the apprehension and rendition of_____
who stands charged by *_____
with the crime of_____
_____
committed in this County, on the_____day of_____
191__, and who, to avoid prosecution, fled from the jurisdiction of this state, and, as I am informed is now within the jurisdiction of the said state of _____.

"I HEREBY CERTIFY, That in my opinion the ends of public justice require that the alleged criminal be brought to this state for trial; that I have, as I verily believe, sufficient evidence to secure h__ conviction; that there has not been. so far as I am aware, any former application for a requisi-

tion for the same person, for the same offense which is the basis of this application_____
_____
_____

"I FURTHER CERTIFY, That this application is not made for the purpose of enforcing the collection of a debt, or for any other private purpose whatever, and that if the requisition applied for be granted, the criminal proceedings shall not be used for any of said objects.

"AND I FURTHER CERTIFY, That the offense with which the said alleged fugitive is charged is a felony / misdemeanor and is defined by section_____ of the General Code of Ohio.

"AND I FURTHER CERTIFY, That the reputation of the person asking the requisition is good.

"The delay in presenting this application was unavoidable, for the reason that_____
_____

"I present herewith a copy of said *_____, duly authenticated; affidavit as to the purpose for which the extradition of the fugitive is desired; and affidavit__ to the facts constituting the offense, by _____person_____having actual knowledge thereof.

"Said alleged fugitive is now, as I verily believe under either civil or criminal arrest in the city of_____in said State of_____.

"I designate_____as the proper person to be appointed agent of this state, and certify that he has no personal interest in the arrest and return of said fugitive other than proper compensation for his services.

"Very respectfully,

"_____

"Prosecuting Attorney.

"*Here insert 'indictment' or 'affidavit' as the case may be.

THE STATE OF OHIO, }
_____County, } ss:

"I, _____, having been duly sworn, depose and say that I am the prosecuting attorney of said county; that the person charged by_____
(a duly authenticated copy of which is attached hereto) with the crime of _____is a fugitive from justice; and that the foregoing application to the governor of Ohio for a requisition for h__ rendition is made in good faith, with the sole intent to prosecute h___ for said offense, and not to secure h___ return to said county to afford opportunity to serve h___ with civil process, nor for any other private purpose.

"_____

"Sworn to before me, and subscribed in my presence, the_____ day of_____, 191__.

"(SEAL)

"_____

"Clerk of the Court of Common Pleas

"_____County, Ohio.

"Second. Accompanying the foregoing application there should be:

"(a) When based upon an indictment by a grand jury:

"1. A copy of the indictment duly certified by the clerk of the common pleas court of the county.

"2. A copy of the capias issued thereon with the return of the proper officer endorsed thereon duly certified by the clerk of the common pleas court of the county.

"3. There should be if possible included with the application an affidavit of at least one person that the accused was present in the county at the time the crime was committed and that efforts had been made to locate him within the state of Ohio without avail.

"4. In all cases of forgery, embezzlement, fraud and false pretenses an affidavit of the complaining witness should accompany the application which should be sworn to before the clerk of the common pleas court and for which the following form is suggested:

"AFFIDAVIT BY COMPLAINING WITNESS

(To be made in all cases of forgery, embezzlement, fraud, and false pretenses.)

"THE STATE OF OHIO, }
} ss.
_____County, }

"_____being duly sworn, deposes that he is the complaining witness in the case of the state of Ohio against_____
_____
the person named in the following application; that the said_____
_____is a fugitive from justice, and is now, as he believes, in the state of_____; that he desires h___ return for the sole purpose of punishing the accused, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt or for any other private purpose, and will not directly, or indirectly, use the same for any of said purposes.

"_____
"_____

"Sworn to before me, and subscribed in my presence this_____ day of_____, 191__.

"(SEAL.)

"_____
"Clerk of the Court of Common Pleas,
"_____County, Ohio."

The signature of the clerk of the common pleas court to the foregoing copies should be authenticated by the certificate of a judge of the common pleas court of the county, and the signature of the judge should be authenticated by the certificate of the clerk of the common pleas court. The following form is suggested for the certificates above mentioned:

"CERTIFICATE TO COPIES.

"THE STATE OF OHIO, }
} ss: "COMMON PLEAS COURT
_____County, }

"I,_____clerk of the common pleas court, within and for said county, having the custody of the files, journals and

records of said court, do hereby certify that the foregoing is a true copy of

---

---

as the same appear___ upon the records of said court, and I further certify, that I have carefully compared the foregoing copy with the original record, and that the same is a full and correct transcript thereof.

"IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court, at_____, Ohio.

"This_____day of_____, A. D., 191__.

"_____

"(SEAL.) Clerk of said Court.

"THE STATE OF OHIO, }
_____County, } ss:

"I,_____, one of the judges of the court of common pleas of_____County, State of Ohio, do hereby certify that said_____was, at the date of the above certificate, and now is clerk of said court of common pleas, within and for said county of_____and State of Ohio, and that said clerk is the officer in whose custody said original record___ is / are required by the laws of the State of Ohio, to be kept, and is authorized by the laws of said state to certify as aforesaid, and that said attestation and certificate are in due form of law.

"Signed by me and dated at_____County, Ohio, this _____day of_____A. D., 191__.

"_____

"Judge as aforesaid.

"THE STATE OF OHIO, }
_____County, } ss:

"I,_____, clerk of the court of common pleas, within and for the county and state aforesaid, hereby vertify that _____is one of the judges of the court of common pleas of_____County, State of Ohio, duly commissioned and qualified, and now acting as such.

"WITNESS my hand and the seal of said court, at_____, this_____day of_____, A. D., 191__.

"_____

"(SEAL.) "Clerk."

The certificate of the clerk should be made by him personally and not by a deputy.

(b.) When based upon an affidavit or complaint filed with a magistrate:

1. A copy of the affidavit or complaint duly certified by the magistrate.

2. A copy of the warrant with the return of the officer endorsed thereon duly certified by the magistrate.

3. Affidavits from persons having knowledge of the facts substantiating the material allegations of the affidavit or complaint, which affidavits should be sworn to before the magistrate. Said affidavits should contain, if possible, allegations of

the presence of the accused in the county at the time the crime was committed and his subsequent absence from the state as suggested above.

4. In all cases of forgery, embezzlement, fraud and false pretenses, an affidavit of the complaining witness should accompany the application which should be sworn to before the clerk of the common pleas court. The form for this affidavit has been hereinbefore suggested.

The signature of the magistrate to the foregoing copies and affidavits should be authenticated by the certificate of the clerk of the common pleas court. The certificate of the magistrate to the copies and the certificate of the clerk of the common pleas court should be in substantially the following form:

"THE STATE OF OHIO, } "IN THE COURT OF_____,
} ss: "JUSTICE OF THE PEACE.
_____County,}

"I,_____, a justice of the peace, within and for said county, do hereby certify that the foregoing is a true copy of an affidavit filed in my office and of a warrant issued in pursuance thereof, with the return of the officer thereon as the same appear on the records of my office, and I further certify that I have carefully compared the foregoing copies with the original record, and that the same are full and correct copies thereof.

"IN WITNESS WHEREOF, I have hereunto set my hand at_____ _____this_____day of_____, A. D., 191__.

"_____
"Justice of the Peace."

"THE STATE OF OHIO, }
} ss:
_____County,}

"I,_____, clerk of the court of common pleas, which is a court of record of said county and state aforesaid, do hereby certify that_____, whose signature, as justice of the peace is attached to the within writing was, at the date thereof, a duly commissioned and qualified justice of the peace in and for said county; that I am acquainted with his handwriting, and believe that the signature to the within writing is genuine.

"IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court at_____, this_____day of_____, A. D., 191__.

"(SEAL.) _____Clerk."

If the affidavit or complaint be filed in a municipal court which has jurisdiction, and having a clerk, the above mentioned copies may be certified to by such clerk, and in such case the signature of the clerk should be authenticated by the certificate of a judge of such court, and the signature of the judge should be authenticated by the certificate of the clerk of such court in the same manner as above outlined for the clerk and judge of the common pleas court, proper changes therein being made to conform with the facts.

I have not attempted to prescribe herein forms for all of the writings, affidavits, etc., for the reason that some of them would be materially different in each case, and it is impracticable to attempt to prescribe a form, but I believe if the forms herein

prescribed are furnished to prosecuting attorneys with the suggestions herein contained as to additional papers which must be filed therewith, that substantial uniformity can be secured.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1549.

BOARD OF EDUCATION—ADOPTION OF TEXT BOOKS—NOT MANDATORY TO READOPT AFTER FIVE YEARS HAVE ELAPSED SINCE BOOKS FIRST ADOPTED.

It does not become the mandatory duty of a board of education under the provisions of section 7713, G. C., to determine or redetermine what text books shall be used in the schools under its control, solely by reason of the fact that five years have elapsed since such book or books were first adopted.

No other officer or authority may determine what text books shall be used in the schools of any district except in case of failure of the board of education to make available to all the youth of school age of the district lawful text books as required by sections 7714 and 7715, G. C.

After a text book or text books are lawfully adopted, so long as the same are made available to all the youth of school age of the district according to the provisions of sections 7714 and 7715, G. C., they continue to be the lawful text books to be used in the schools of such district.

When five years or more have elapsed since the last preceding adoption of a text book, the board of education of the district may, at a regular meeting held between the first Monday of February and the first Monday of August of any year, by a majority vote of the members elected thereto, adopt another text book on the same subject to be used in the schools of the district.

COLUMBUS, OHIO, May 8, 1916.

HON. FRANK B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Yours under date of May 1, 1916, requesting my opinion, is as follows:

> "The department of public instruction respectfully requests your answer to the following questions in regard to the adoption of text books.
>
> "1. When five years have elapsed since the adoption of text books, is the immediate adoption of a text in each branch of study a mandatory duty of the board of education?
>
> "2. If the first question is answered in the affirmative, then an answer to the following is requested:
>
> "May any other authority make an adoption of texts in case of the failure of the board of education to act? Is there no penalty prescribed for neglecting this duty?
>
> "3. If for any reason the board of education should fail to adopt texts in certain subjects, would the present texts be the legally adopted texts in such subjects until a new adoption or readoption was made?
>
> "4. When a text has been in use for more than five years since its last adoption, may the board of education adopt another text any year for a term of five years by a majority vote of the elected membership of the board of education?"

Your inquiry involves first a consideration of section 7713, G. C., which provides as follows:

> "At a regular meeting held between the first Monday in February and the first Monday in August each board of education shall determine by a majority vote of all the members elected the studies to be pursued and which of such text books so filed shall be used in the schools under its control. But no text books now in use or hereafter adopted shall be changed, nor any part thereof altered or revised, nor any other text book be substituted therefor for five years after the date of the selection and adoption thereof, as shown by the official records of such boards, except by the consent at a regular meeting of five-sixths of all members elected thereto. Books so substituted shall be adopted for the full term of five years."

Sections 7709, 7710 and 7711, G. C., provides for the filing with the superintendent of public instruction of all school books proposed to be sold for use in the public schools of the state by the publisher or publishers thereof, and that no such book not so filed may be legally adopted and purchased by any school board, and it is to the books so filed, pursuant to the provisions of said sections, that the phrase "such text books" as found in section 7713, G. C., supra, has reference.

It will be observed that it is by the first sentence of said section 7713, G. C., supra, that the general power is conferred or duties imposed, as the case may be, upon each board of education of determining which of the text books filed with the superintendent of public instruction, as theretofore provided, shall be used in the schools under its control. While this general grant of authority, or imposition of duty, is subject to certain limitations hereinafter to be noted, it will not be overlooked that this general provision is not limited or restricted in its operative force to any prescribed period of time, that is to say, there is found no limitation upon the continuation of the use of a text book once adopted in accordance with this general provision, and it is only by reason of the limitation thereafter placed upon the power of the boards to change from a text book once adopted that confusion arises. If, therefore, it is borne in mind that the subsequent provisions of said section 7713, G. C., are solely restrictive of the power to change or modify actions taken pursuant to the general provisions of the first sentence thereof, and in no sense enabling or impose any positive duty, it would at least tend to obviate the difficulty of determining the legislative intent. No provision with reference to the five year period has any direct application to the performance of the duty imposed by the first sentence of the section in question in the first instance, or, stated in another way, it is only after the duty imposed by the first sentence has been performed that any provision as to the five year period becomes operative. After the board has made an original determination of the text books to be used, as required by the first sentence, the subsequent provisions of this section operate to restrain the board from making any change therein within the period of five years, except upon the vote of five-sixths of the members electd thereto at a regular meeting.

Since, therefore, there is in the provision requiring the original adoption of text books no reference to the five year period, and the subsequent provisions are purely negative in character, imposing no positive duty, I am clearly of the opinion that under the statutes it does not become the mandatory duty of the board of education to determine or re-determine what text books shall be used in schools under their control, solely by reason of the fact that five years have elapsed since such book or books were first adopted. That is to say, so far as the provisions of said section with reference to the five year period have any operative force the action of the board pursuant to the provisions of the first sentence will continue in operation.

An examination of the history of section 7713, G. C., will disclose that it was

originally enacted as a part of section 5 of an act in 92 O. L., 282, which began as follows:

> "Each board of education on receiving the statements above mentioned from said commissioner, shall, on the third Monday of August thereafter meet, etc."

From the provisions of section 3 of that act, it appears that the commissioner was required to furnish to each board of education the "statements" so referred to in section 5 thereof, within the first half of June each year.

Reading the above provision of section 5 of the act in the light of these provisions, it may be asserted that in the original enactment of section 7713, G. C., each board of education was, by clear implication at least, required to determine by a majority vote, at the time prescribed, the text books to be used each year. This, of course, was subject to the specific limitation of the power to change an original adoption within a five-year period, except by a three-fourths (now five-sixths) vote of the members elected.

Section 5 of said act in 92 O. L., 282, was amended in 99 O. L., 460, and there given substantially the form in which a part thereof was carried into the General Code as section 7713. It will be noted that it was provided by section 7713, G. C., supra, that:

> "At a regular meeting, held between the first Monday in February and the first Monday in August, each board of education shall determine, by a majority vote, etc."

In the absence of other provisions as to the frequency with which this action is required to be taken, the above language is susceptible of an interpretation which, in effect, would constitute a direction, at least, that such action be taken each year. If such interpretation be adopted, it would, of course, be subject, as above pointed out, to the provision that no change of an adopted text book may be made within five years of its adoption, except by a five-sixths vote of the elected members, so that after the adoption of a text book by a majority vote the power of the board to change the same between the first Monday in February and the first Monday in August, though action be required to be taken thereon each year, within five years, would not be different from the authority of the board in this respect at any regular meeting thereof. That is to say, would require a five-sixth vote.

In reference to your second inquiry, attention is called to the provision of section 7610, G. C., as follows:

> "If the board of education in a district fails in any year to estimate and certify the levy for a contingent fund as required by this chapter, or if the amount so certified is deemed insufficient for school purposes, or if it fails to provide sufficient school privileges for all the youth of school age in the district or to provide for the continuance of any school in the district for at least thirty-two weeks in the year, or to provide for each school an equitable share of school advantages as required by this title, * * * the commissioners of the county to which such district belongs, upon being advised and satisfied thereof, shall perform any or all of such duties and acts, in the same manner as the board of education by this title is authorized to perform them. * * *"

If, then, there has been no adoption of text-books whatever, so that as a result there is no provision made for supplying lawful books for the schools under the control

of the board, that would, in my opinion, constitute a failure to provide sufficient schoo privileges for all the youth of school age in the district and hence confer upon the county commissioners power to provide a proper supply of text books, pursuant to the provisions of sections 7713 and 7714, G. C. The provisions of said section 7714, G. C. to which reference is here made, are in part as follows:

> "Each board of education shall cause it to be ascertained, and at a regular meeting determine which, and the number of each of such books the schools under its charge require, and cause an order to be drawn for the amount in favor of the clerk of the board of education, payable out of the contingent fund."

In view of the purpose, importance and necessity of this provision, I am inclined to the view that it imposes upon the board a mandatory duty to be performed each year, that there may be available at all times to the youth of school age a proper supply of text books to be used in the school. If no further action were to be taken by the board than that required by the above provision, it seems that in itself would constitute a substantial determination of the text books to be used, as required by the provisions of section 7713, G. C., supra, and that therefore the books determined, pursuant to section 7714, to be required for the schools by the board, would constitute the lawful text books of the school under the control of the board of education until some change or substitution therefor is effected, pursuant to the provision of section 7713, G. C., and that if a supply of such books is made available, as is required by section 7714, G. C., there is then no authority in any other officer to take action in respect thereto.

If a board of education wholly fails to make available proper text books, as required by the provisions of section 7714, thus failing to provide sufficient school privileges for all the youth of school age in the school district, under the provisions of section 7610, G. C., I am of the opinion that the members of such board responsible for such failure would be subject to the provisions of section 7611, G. C., as follows:

> "The members of a board who cause such failure shall be each severally liable, in a penalty not to exceed fifty dollars nor less than twenty-five dollars, to be recovered in a civil action in the name of the state upon complaint of any elector of the district, which sum must be collected by the prosecuting attorney of the county and when collected, be paid into the treasury of the county, for the benefit of the school or schools of the district."

In view of the foregoing, it is only necessary to say, in reference to your third inquiry, that in my opinion, after text books are once lawfully adopted and a proper supply thereof made available at all times, in accordance with the requirements of sections 7714 and 7715, G. C., to all the youth of school age in the district, such text books will continue to be the lawful text books of the schools of such district until changed pursuant to the provision of section 7713, G. C., by a five-sixth vote, if within five years of the last preceding adoption thereof, or by a majority vote of the members elected if subsequent to five years from the last preceding adoption of such text books.

I am further of opinion, in answer to your fourth question, that, after the expiration of a period of five years from the adoption of a text book, a board of education may then, by a majority vote of the members elected thereto, at a regular meeting held between the first Monday of February and the first Monday of August, of any year, adopt another text book on that subject, to be used in the schools of the district.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1550.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, SPENCER TOWNSHIP, RURAL SCHOOL DISTRICT, MEDINA COUNTY, OHIO.

COLUMBUS, OHIO, May 8, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Spencer township rural school district of Medina county, Ohio, in the sum of $16,000.00 issued to secure funds for the purpose of erecting, equipping and furnishing *a school building, being* 32 *bonds,* $500 *each.*"

I have examined the transcript of the proceedings of the board of education and other officers of Spencer township rural school district relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the requirements of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of Spencer township rural school district.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1551.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, LEESBURG VILLAGE SCHOOL DISTRICT.

COLUMBUS, OHIO, May 8, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Leesburg village school district, in the sum of $45,000.00 for the erection and equipment of a new grade and high school building, being ninety bonds of five hundred dollars each."

I have examined the transcript of the proceedings of the board of education of Leesburg village school district in connection with the issuance of the above bonds, also the bond and coupon form attached, and I find the same regular and in conformity with the requirements of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted, signed by the proper officers, will, upon delivery, constitute valid and binding obligations of Leesburg village school district.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1552.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, VILLAGE OF MARBLE CLIFF, OHIO.

COLUMBUS, OHIO, May 8, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the village of Marble Cliff, Ohio, in the sum of $1,600.00 in anticipation of the collection of special assessments for the improvement of Cambridge Place, being eight bonds of two hundred dollars each."

I have examined the transcript of the proceedings of the council and other officers of Marble Cliff, relative to the above bond issue; also the bond and coupon form attached, and I find the same regular and in conformity with the requirements of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of the village of Marble Cliff, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1553.

"RESTAURANT" INCLUDES DINING ROOM OF HOTEL CONDUCTED ON EUROPEAN PLAN—SECTION 1008, G. C., LIMITS EMPLOYMENT OF FEMALES FOR SUCH WORK TO TEN HOURS IN ANY ONE DAY AND FIFTY-FOUR HOURS IN ANY ONE WEEK.

The dining room of a hotel, conducted on the European plan is a restaurant within the meaning of section 1008, *G. C.*, 103 *O. L.*, 555, *and it is unlawful for females to be employed therein more than ten hours in any one day or more than fifty-four hours in any one week.*

COLUMBUS, OHIO, May 9, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your letter of March 1, 1916, requesting my opinion, received. Your question is as follows:

"Section 1008 of the General Code reads in part as follows:

" 'Females over 18 years of age shall not be employed, permitted or suffered to work in or in connection with any factory, workshop, telephone or telegraph office, millinery, or dress-making establishment, restaurant or in the distribution or transmission of messages, or in any mercantile establishment located in any city, more than ten hours in any one day, or more than fifty-four hours in any one week, but meal times shall not be included as a part of the work hours of the week or day, provided, however, that no restrictions as to the hours of labor shall apply to canneries or establishments engaged in preparing for use, perishable goods.'

"The question arises: Are the female employes working in the dining

room and kitchen of a hotel operating under the European plan, where meals are served a la carte, subject to the provisions of this law?

"In other words, can we legally order the management of such hotels to provide a working schedule for such female employes of not more than ten hours in any one day or fifty-four hours in any one week?"

Section 1008, G. C. (103 O. L., 555), quoted in your letter, specifies the establishments which are subject to its provisions and includes restaurants, but does not include hotels. As was said by the court in the case of Lewis v. Hitchcock, et al., 10 Fed., 6:

"The word 'restaurant' has no fixed and certain legal meaning, and a place known by that name may or may not be an inn, i. e., to provide lodgings as well as food for guests."

Webster defines a restaurant as:

"An eating house."

and a hotel as:

"A house for the entertainment of strangers or travelers, an inn or public house."

One of the definitions of "restaurant" given in the Standard Dictionary is:

"The dining room of a hotel conducted on the European plan."

"But the keeper of a mere restaurant is not an innkeeper if he only furnishes meals to his guests."

Carpenter v. Taylor, 1 Hilt (N. Y. 193).

In Schouler's Bailments & Carriers, 3d Ed., section 280, it is said:

"One who keeps a public house may not inconsistently carry on a restaurant * * * and as to strangers who avail themselves of such extraneous service, he is no innkeeper at all."

As a matter of fact, a restaurant is an eating place, and it can make no difference whether the eating place is conducted under the auspices of a hotel or otherwise. The statute makes no reference in distinct terms to a hotel except in so far as it may be applied to such hotels as conduct eating places for their patrons. Your question is limited to female employes working in the dining room and kitchen of a hotel operating under the European plan, which, for the purpose of this discussion, would differ from a hotel conducted on the American plan, principally in that the latter, as a general rule, has fixed and stated hours for the serving of meals, whereas the former, in most cases, affords continuous service. The purpose of the law is to prevent the working of females over ten hours in any one day in the lines of work enumerated, regardless of the place or by whom conducted.

It is my opinion therefore, that the term "restaurant," being used in a broad and general sense, is intended to include any eating place where females are employed, and that section 1008, G. C., as amended 103 O. L. 555, applies and controls in the employment of females in the dining room and kitchen of a hotel operating under the European plan.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1554.

CIVIL SERVICE—SECTION 486-31 G. C., 106 O. L., 418, WHEREBY CERTAIN PERSONS ARE RETAINED IN THE PUBLIC SERVICE BY REASON OF CONTINUOUS SERVICE FOR SEVEN YEARS IS CONSTITUTIONAL.

The provisions of section 486-31 *G. C., as amended,* 106 *O. L.,* 418, *whereby certain persons are retained as appointees under the civil service law by reason of continuous service for seven or more years, and the provisions of said section authorizing, without examination, the certification as eligible of certain persons holding public positions or employments, do not contravene the constitutional requirements of section* 10 *of article XV of the constitution.*

COLUMBUS, OHIO, May 9, 1916.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—I have your letter of March 29, 1916, to which you attach certain correspondence addressed to you which attacks the constitutionality of section 486-31 G. C., as amended 106 O. L., 418. This correspondence suggests to your commission the advisability of ignoring the provisions of said section and of requiring competitive examinations in every case as a requisite for holding any position in the classified service or of receiving any appointment thereto. You also state in your letter that in certain cities of the state the provisions of said section are not being recognized, and you request my opinion upon the constitutional question involved and also as to the proper procedure to be taken by you to bring about a uniform enforcement of the law. The correspondence submitted seems to be inspired by a recent decision of the common pleas court of Ross county, Ohio, in which it was determined that the provisions of said section were unconstitutional whereby persons who had served the state or some political subdivision thereof continuously and satisfactorily for seven years prior to January 1, 1915, should be deemed appointees within the meaning of the civil service law. It may also be said in this connection that there seems to be a popular idea that civil service and competitive examinations are synonymous terms and mean one and the same thing, and that there may be no civil service without competitive examinations. While entertaining the greatest respect for the ability and learning of the court aforesaid, I am unable to concur in said decision, which I am compelled to conclude was reached without a full opportunity to examine the authorities of other states and particularly those of the state of New York from whose constitutional and statutory law our constitutional and statutory provisions with reference to civil service have been largely drawn.

The provisions of said section 486-31, supra, attacked in this correspondence are commonly known as the "experience and non-competitive exemptions," and provide as follows:

> "All officers, employes and subordinates in the classified service of the state, the several counties, cities and city school districts thereof, holding their positions under existing civil service laws, and who are holding such positions by virtue of having taken a regular competitive examination as provided by law, shall, when this act takes effect, be deemed appointees within the provisions of this act; but no person holding a position in the classified service by virtue of having taken a non-competitive examination shall be deemed to have been appointed or to be an appointee in conformity with the provisions of this act; provided, however, that all persons who have served the state or any political subdivision thereof continuously and satisfactorily for a period of not less than seven years next preceding January 1, 1915, shall be deemed appointees within the provisions of this act."

It is further provided in said section that all persons holding positions in the classified service at the time said law takes effect, who have not passed a regular competitive examination and who have not been in the service seven years, shall be reported by the appointing authority to the civil service commission within ten days after said act takes effect. Any person so reported to the commission shall be certified back to the appointing authority in addition to three candidates who have passed a competitive examination for permanent appointment to the position he holds. If such person is thereupon reappointed he shall be deemed to have been appointed under the provisions of said act. If no eligible list exists for the position at the time he is reported to the commission he may be retained as a provisional employee until an eligible list may be procured.

The contention now made to your commission is that the provisions aforesaid violate the requirements of section 10 of article XV of the constitution. This section provides as follows:

> "Appointments and promotions in the civil service of the state, the several counties and cities, shall be made according to merit and fitness; to be ascertained, as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision."

It seems to be the conclusion of those attacking the constitutionality of the statute aforesaid, that the provisions of said section of the constitution permit of only one method and manner of ascertaining the merit and fitness of candidates under any civil service law, and that one method must be by competitive examination. In other words, if any test is to be made it must be by competitive examination. If a competitive examination is not found to be practicable, no test may be required at all. Such interpretation of said constitutional provisions aforesaid is wholly foreign to their real intent and purpose, and is as repugnant to said provisions as the making of an appointment in the classified service without any test whatever. The fundamental purpose or object of all civil service laws is the procurement of competent, trustworthy and efficient public servants, who may serve the public free from any and all influences that might affect either their efficiency or the good of the public service. To accomplish this purpose the people of this state have ordained, through the constitutional provisions aforesaid, that *merit and fitness* shall constitute the basis of appointments in their service. So far as the provisions of said constitutional section may be said to be mandatory, they apply only to this one single requirement that all appointments and promotions shall be based upon merit and fitness.

It is material to determine in the outset of this discussion what is meant by the terms merit and fitness as employed in the constitutional provision aforesaid. The courts of New York recognized under similar constitutional provisions long prior to its adoption here that these terms are not synonymous. This conclusion may be due to some extent to a statutory law which at one time required a dual competitive examination in that state, one for merit and one for fitness. But regardless of the causes which impelled this conclusion, these terms may be said to have an adjudicated meaning in that state, which, under well settled rules of construction, may not be ignored, in interpreting the later and similar constitutional provisions in this state.

In the case of Tobin v. Knauber, 27 N. Y. Misc. Reports, 253, judge Wright, in referring to the terms merit and fitness, as used in the constitution and civil service laws of the state of New York, says:

> "Merit means the quality of deserving the office because of excellence and worth. This obviously comprises competency, intelligence and education with special reference to an understanding and knowledge of the duties of the office.

"Fitness means the quality of being suitable and adapted to the performance of those duties. This, in some cases, obviously includes habits, industry, energy, ambition, tact, disposition, knowledge of human nature, discretion, shrewdness, suitable physical presence, etc., matters which require an examination of a very different character from that which may test the competency, excellence and worth of a candidate."

While the conclusion reached by the court in the foregoing case as to some points was overruled in the case of Drake v. Knauber, 43 N. Y. App. Div. 342-346, yet the distinction between merit and fitness was clearly recognized by the court in the later opinion in the following language:

"In saying this, it is not necessary to assert that the terms merit and fitness are synonymous. Indeed, it is by no means impossible to conceive of cases where they would not, and could not be so considered. For instance, the relator, by reason of his faithful service in the army, and his good citizenship since his discharge therefrom, can very properly be said to merit any appointment in the civil service for which he is fitted, but if he were blind or deaf or dumb, he doubtless would in a certain sense be unfit for the particular position he seeks."

It is manifest that an examination which seeks to test the merit of an applicant must of necessity be very different from an examination which tests his fitness. It is equally apparent that the ordinary competitive examination, in so far as it attempts to test the "fitness" of a candidate, is of necessity greatly limited in results. This has been the common experience of all jurisdictions in the administration of civil service laws long prior to the adoption of the constitutional provisions here considered. These facts, doubtless, were well known to the framers of said section and unquestionably furnish the only reason for the qualification written into said constitutional provision that said qualities are "to be ascertained as far as practicable by competitive examination." It follows, therefore, that instead of the provision "to be ascertained as far as practicable by competitive examination" being mandatory and wholly controlling, it is a qualification only, whose purpose is to provide a method not to be exclusive in any case, but to be applied whenever it may be considered practicable. It is a matter of common knowledge that a person may possess the requisite educational qualifications and intellectual ability to pass the most rigid competitive examination as to merit with the highest honors, and yet by reason of some infirmity of disposition from a lack of some other quality which enters into the element of fitness he is wholly unfit to hold a public position. These facts were recognized so early in the administration of civil service laws that long prior to the adoption of the present civil service provisions in the constitution of New York, which provisions will be hereinafter noted, it was found necessary in that state to adopt a rule whereby no permanent appointment could be made in the classified service until the appointee should serve a probationary term and subject himself to the test of conduct, capacity and fitness for the position before his appointment was made permanent. Similar provisions have been written into section 486-13, G. C., 106 O. L., 409, in which it is provided:

"All original and promotional appointments shall be for a probationary period of not to exceed three months, to be fixed by the rules of the commission, and no appointment or promotion shall be deemed finally made until the appointee has satisfactorily served his probationary period. At the end of the probationary period the appointing officer shall transmit to the commission a record of the employe's service, and if such service is unsatisfac-

tory, the employe may, with the approval of the commission, be removed or reduced without restriction."

Doubtless, those who are contending that the competitive examination provision of the constitution is exclusive, and that when it applies it is mandatory and must be followed, would also contend that the additional test provided by the section just quoted is also in contravention of said constitutional provision. The constitutionality, however, of such requirement had been fully sustained by the courts of New York under their constitution, which provides:

"Article V, section 9. Appointments and promotions in the civil service of the state and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness, to be ascertained as far as practicable by examination, which so far as practicable shall be competitive. * * *"

As before observed, the probationary term provided by the laws of said state was in force prior to the adoption of the aforesaid constitutional provisions, and after the adoption of said constitutional provisions it was claimed that the probationary requirement was repealed because inconsistent with that provision of said constitution, which requires that merit and fitness shall be ascertained so far as practicable by examination.

In the case of Sweet v. Lyman, 157 N. Y., 368, this proposition was before the court and commented upon as follows:

"The declaration of the constitution is that appointments and promotions shall be made according to merit and fitness. The obvious purpose of this provision was to declare the principle upon which promotions and appointments in the public service should be made, to recognize in that instrument the principle of the existing statutes upon the subject and to establish merit and fitness as the basis of such appointments and promotions in place of their being made upon partisan or political grounds. * * * It then declares that merit and fitness shall be ascertained by examinations, and also the extent to which they shall be thus determined. The extent to which examinations are to control is declared to be only so far as practicable. This language clearly implies that it is not entirely practicable to fully determine them in that way. It was the purpose of its framers to declare those two principles and leave their application to the direction of the legislature. As was said by the chairman of the committee to which this amendment was referred, 'it seemed best to the committee, after very careful and repeated consideration, to leave the application of the principle of merit and fitness to the good sense of the legislature.' Thus it is apparent, not only upon the face of the provision itself, but from the debates in the constitutional convention, that the framers of this amendment did not intend to absolutely determine how the merit and fitness of appointees were to be ascertained and determined. * * *

"Assuming then, that the framers of the constitution contemplated that other methods might also be employed, surely it cannot be properly said that the trial of an applicant for a probationary period is not an appropriate method of testing, and thus correctly ascertaining, his merit and fitness; besides, it is a reasonable method. Indeed, it is the usual one. What good business man would employ an assistant, a clerk or even a laborer, for a period which he could not limit or control, without adopting that method of ascertaining his qualifications for the place? There can be but one answer

therefore, that the method provided by the statute and the rules of the civil service commission is appropriate and well calculated to materially aid an officer or department in determining the merit and fitness of an employe, cannot be successfully denied."

It must be understood that it is not contended here that appointments may be made in the classified service and comply with the constitutional provisions under consideration without being made after some test of the applicant that may be said to fairly determine his merit and fitness. As before observed these qualities have been established as the basis of all appointments, but when we undertake to say that in any case in which they are required to be established we have but one method of determining them and that is by competitive examination, we are ignoring not only the controlling principles of civil service, but the construction by the courts of similar constitutional provisions in other states.

Coming now to consider the statutory provisions in question, it would seem apparent without argument that seven or more years of acceptable and satisfactory service to the state, county, city or city school district, furnishes the best and most conclusive evidence of the merit and fitness of any person holding a public position or employment in any of said subdivisions. By no other means or method can the qualities of merit and fitness be more accurately determined than by actual service for that length of time. What purpose, therefore, would a competitive examination serve in such cases, either as a means of determining the merit and fitness of the candidate or of improving the public service? The legislature in the enactment of this section has said in effect that it is not practicable by competitive examination to determine the merit and fitness of one who has served the public efficiently and successfully for seven years. The question of the practicability of a competitive examination where the facts are admitted is a question of law (Chamberlain v. Knox, 45 App. Div., N. Y., 518), which must be determined largely with regard to the question as to whether it would prove an advantage or disadvantage to the service. (Chittenden v. Wurster, 14 App. Div., N. Y., 483). (Reversed on another point.)

In view of the foregoing considerations I am of the opinion that the legislature in the enactment of the experience clause aforesaid transcended no constitutional limitation on its power, and what is said of said provision applies with equal force to the noncompetitive clause of said section. By the latter clause the incumbent receives only the benefit of a certification for appointment with three other persons. He is thus subjected to the test of competition. It is not to be presumed that his appointment in the first instance was made without full inquiry, and in most instances at least he has been subjected to the test of a noncompetitive examination, which by law was required to conform to the character of a competitive examination. His conduct, habits, industry and capacity have been under the observation of his superiors during his occupancy of the position or employment involved, which, as before observed, furnishes the most dependable method of ascertaining his merit and fitness. Under this test his name is presented for appointment, and his availability, therefore is not a matter either of conjecture or experiment. If he has proven his worth he may be permanently appointed. If he has been found wanting another may be selected in his stead.

I am, therefore, of the opinion that in both provisions of said section there has been a test fully and fairly meeting the requirements of the constitution, and that said section 486-31, G. C., does not violate any constitutional requirement and should be enforced by your commission in accordance with its terms and provisions.

You state that in certain cities its provisions are being ignored. It may be that the cities to which you refer are operating under home rule charters which provide for a system of civil service, in which event, as has been stated to you in a former opinion, the state civil service law is discontinued. As to other municipalities without a state-

ment of the specific facts in each case it would be impossible to advise you under what particular provisions of the civil service law you should proceed. However, it may be stated in a general way that in all municipalities the municipal civil service commission is primarily responsible for the enforcement in its municipality of the civil service law. In the event of a wilful failure upon the part of such municipal civil service commissions to enforce the law, you have authority under the provisions of said section 486-19, G. C., 106 O. L., 414, upon proof to make a report thereof in writing to the chief executive authority of said city, who is empowered to remove any municipal civil service commissioner for inefficiency, neglect of duty, or malfeasance in office.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1555.

ROADS AND HIGHWAYS—BIDS RECEIVED BY STATE HIGHWAY COMMISSIONER FOR ROAD IMPROVEMENT—NO CONTRACT AWARDED—WHERE DESIRED TO IMPROVE SHORTER SECTION OF HIGHWAY THAN THAT COVERED BY BIDS—MUST REJECT ALL BIDS—MAKE NEW ESTIMATE AND READVERTISE—ELECTRIC RAILWAY COMPANY MAY BE COMPELLED TO MOVE TRACKS FROM CENTER TO SIDE OF ROAD—HOW INTERURBAN COMPANY CAN BE COMPELLED TO PAY FOR PAVING BETWEEN RAILS—OHIO ELECTRIC RAILWAY COMPANY.

Where bids have been received by the state highway commissioner for a road improvement, but no contract has as yet been awarded, and it is desired to omit a part of the work and improve a shorter section of highway than that covered by the bids, the state highway commissioner should reject all bids, make a new estimate covering that part of the highway which it is desired to improve, and readvertise the same.

Where the conditions prescribed in section 7204 G. C., obtain, an electric railway company may be compelled to move its tracks from the center to the side of the road.

Where the track of an electric railway company is located within the roadbed of an inter-county highway or main market road, the state highway commissioner, in co-operation with the county commissioners of the county, may, after giving to the electric railway company notice, and a reasonable opportunity to improve that portion of the highway lying between the ends of its ties, and upon a failure of such company to make such improvement in accordance with the plans and specifications of the state highway commissioner, proceed to improve the same in accordance with such plans and specifications, and the cost of such improvement may be assessed against the property of the company and collected in the manner provided in section 1231-4 G. C.

COLUMBUS, OHIO, May 10, 1916.

HON. C. C. CRABBE, *Prosecuting Attorney, London, Ohio.*

DEAR SIR:—I acknowledge the receipt of your request for an opinion under date of April 22, 1916, which request reads as follows:

> "I desire your opinion concerning a condition that has arisen in the Urbana-London road improvement, being inter-county highway No. 194, in Madison County.
>
> "In December the county commissioners made application to the state highway department for state aid in said improvement, and the applica-

tion was granted, surveys, profiles, etc., were made by the state highway commissioner and approved by the county commissioners.

"The proposed improvement is 3.20 miles in length, extending from London to Somerford, and passing the farm recently purchased for the new state prison.

"The tracks of the Ohio Electric Railway Company extend down the center of this road for a distance of 1135 feet, commencing at the corporation line of the village of London, and at this point the property owners petitioned the county commissioners to widen this portion of the road to a width of 36 feet, which has been granted, and approved by the state highway department.

"During the progress of the proceedings, the engineer of the Ohio Electric Railway Company appeared before the county commissioners and expressed a willingness for the county and state to pave that portion of the road between the rails and ends of the ties, issue bonds for the same and assess the cost against the company. Working under this theory, a resolution was passed to issue bonds to cover the county, township, abutting property owners and Ohio Electric Railroad's share of the improvement. The highway commissioner advertised for bids, the same have been opened and the lowest responsible bidder has been determined, although the contract has not yet been awarded for the reason that the O. E. Company now refuses to pay its share of the improvement.

"Under the plans and specifications the 1135 feet was to be paved with brick the full width of 36 feet, and the remainder of the road which would be a little over three miles is to be of concrete construction. The franchise of the O. E. Company granted in 1901 for 25 years does not provide that the company shall pave.

"Rather than to delay the entire improvement while we are working the matter out with the railroad company, we are very anxious to let the contract under the bid already received, and therefore desire to know:

"First. Can the highway department let the contract for the entire improvement, and then by a supplemental agreement withhold the 1135 feet to be paved with brick until the matter can be adjusted with the O. E. Company?

"Second. Can the highway department let the contract for the entire improvement exclusive of that portion between the rails and ends of the ties, the contractor to make a proper allowance for the work omitted?

"Third. Can we compel this company to move its tracks to the side of the road?

"Fourth. Can an Interurban Railroad Company under above conditions be compelled to pay for paving between the rails and ends of the ties?

"I have gone over this matter carefully with Mr. Cowen, the highway commissioner, and if either the first or second inquiry is in the affirmative, we can proceed without re-advertising."

Your first and second questions may be considered together. It should first be observed that the bids for this work are in such form that it is impossible to tell what portion of the amount bid by each contractor represents the work to be done on the 1135 feet of highway occupied by the tracks of the Ohio Electric Railway Company, and what portion of the amount bid represents the work on the remaining portion of the road proposed to be improved. The legislature has made adequate provision for the letting of a contract for extra work resulting from unforeseen contingencies not included in the original contract. This matter is covered by section 1210, G. C., 106 O. L., 635, which section reads as follows:

"The foregoing provision relating to advertising for bids shall apply to the letting of a contract for extra work, resulting from unforeseen contingencies, not included in the original contract, provided the estimate of the cost and expense of such work amount to one thousand dollars or more. If the estimate is less than one thousand dollars, and more than two hundred dollars, fifteen days' notice of the letting of the work shall be given by posting it on a bulletin board, or writing it on a black-board in a conspicuous place in the office of the county highway superintendent and the county commissioners of the county where the proposed work is located, stating the nature of the work, and when and where proposals in writing will be received. Plans and specifications for such extra work shall be kept on file at the office of the county highway superintendent during the fifteen days for which the same is being advertised and be open to public inspection. If the estimated cost and expense of the extra work does not exceed two hundred dollars, it may be let by the state highway commissioner at private contract without publication or notice thereof. If the state highway commissioner decides and the county commissioners by resolution adopted by majority vote and entered upon their journal, declare that an emergency exists, which in their judgment will not permit of the delay necessary to advertise said extra work either by posting or newspaper publication, and the chief highway engineer shall in writing declare that an emergency exists, such a declaration shall be entered on the journal of the department, and such contract for extra work may then be let without any advertising whatever, but such contract so let shall be absolutely void unless the provisions hereof shall be strictly followed."

It will be noted, however, that under the provisions of this and the related sections, plans, specifications and estimates for extra work must be made and the benefits of competitive bidding are preserved to the public in all cases of extra work where the estimate of the cost of such work is more than $200.00, unless the state highway commissioner decides, and the county commissioners, by resolution adopted by majority vote and entered upon their journal, declare, that an emergency exists which will not permit of the delay necessary to advertise the extra work, and unless the chief highway engineer also declares in writing that an emergency exists. In other words, where it is necessary to let a contract for extra work resulting from unforeseen contingencies and not included in the original contract, the state highway commissioner is required to let such contract at competitive bidding, unless the amount thereof is not more than $200.00, or unless an emergency exists.

The situation presented by your first and second questions is not one where it is proposed to let a contract for extra work, however. These questions present a situation where it is proposed, on account of doubt as to the law, to reduce substantially the amount of work to be required of the contractor, and I find no provision of law authorizing such a procedure. It is worthy of substantial note that no contract for this improvement has as yet been awarded, and under the provisions of section 1208, G. C., the state highway commissioner is authorized to reject all bids. If he were to enter into a contract for the entire work and then attempt to make a supplemental contract excusing the contractor from building the 1135 feet of roadway occupied by the tracks of the railway company, there would be no way of determining from the bid of the contractor the amount of reduction that should be made in his compensation, and this matter would be subject to arrangement between the state highway commissioner and the contractor, in which arrangement the public would be deprived of the benefits of competitive bidding. The same situation would exist if the state highway department should attempt to enter into a contract for the improvement of that part of the highway not occupied by the tracks of the Ohio Electric Railway Company.

I am not herein passing upon the rights of the state highway commissioner in the premises, if, as a matter of fact, the contract had already been awarded and entered into. In this particular case no contract has been made, as yet, and in view of the extremely doubtful authority on the part of the state highway commissioner to modify a contract after it has been made by agreeing with the contractor for a reduction in the amount of work and a reduction in the amount of compensation, I am of the opinion that if, in this particular case, it is desired to change the plans and specifications for the 1135 feet of roadway occupied by the tracks of the electric railway company, and proceed immediately to improve only that part of the highway in question not occupied by the company, the only safe course for the state highway commissioner to pursue is to reject all bids under authority of section 1208, G. C., make a new estimate covering that part of the highway not occupied by the tracks of the Ohio Electric Railway Company and which it is desired to at once improve, and readvertise the work. I therefore advise you, in answer to your first and second questions, that in view of the fact that no contract has as yet been let, and in view of the further fact that there is no method by which competitive bidding may be preserved in the reduction of the amount of work, the state highway commissioner should not proceed to let a contract for the entire improvement and then make a supplemental agreement to the effect that the contractor shall not pave a portion of the roadway until and unless a certain condition arises, the contractor to suffer an agreed reduction in his compensation, and, further, the state highway commissioner should not proceed to let a contract for a part of the work at a price below the amount bid and to be agreed upon between him and the bidder.

Your third question is answered by opinion No. 855, of this department, to Hon. Clinton Cowen, state highway commissioner, on September 22, 1915, and found at page 1822 of the attorney-general's report for that year. It appears from a reference to the franchise of the Ohio Electric Railway Company, a copy of which franchise you forwarded to this office under date of April 27, 1916, that in so far as the terms of such franchise are concerned, the tracks of the railway company are now located as provided in the franchise. The opinion rendered to the state highway commissioner and referred to above related to the right of the state highway department to force the Columbus, Delaware & Marion Railway Company to move its tracks from the side to the center line of a road, but the same principles would apply where it is desired to require a railway company to move its tracks from the center to the side of the road.

The following is quoted from opinion 855:

> "It appears from the correspondence above quoted that the tracks of said company are now located as provided by the terms of its franchise. Referring to your first question, you inquire if you can force said company to move its tracks under any existing law, it being your desire to have said tracks located on the center line of said new road, as appears from your correspondence. The law applying to such cases is now found in section 161 of amended senate bill No. 125, 106 O. L., 619, section 7204, G. C., as follows:
>
> " 'It shall be the duty of the owners or occupants of lands situated along the highways to remove all obstructions within the bounds of the highways which have been placed there either by themselves or their agents, or with their consent. It shall be the duty of all telephone, telegraph, steam or electrical railway, or other electrical companies, oil, gas, water or public service companies of any kind, to remove their poles and wires, connected therewith or any tracks, switches, spurs, or oil, gas or water pipes, mains, conduits or other objects when the same, in the opinion of the county high-

way superintendent, constitute obstructions in the highway or interfere with the construction, improvement, maintenance or repair of the highway or use thereof, by the traveling public, subject however, to the rights of any such company to be or remain in such highway, by virtue of any grant or franchise to said company. If, in the opinion of the county highway superintendent, such companies have obstructed said highway, said highway superintendent shall forthwith notify the county commissioners, who shall cause notice to be served on said owner, occupant or company, directing the removal of said obstructions, and if said owner, occupant or company shall not within five days proceed to remove said obstruction and complete the same within a reasonable time, the county highway superintendent, upon order of the county commissioners, may remove said obstructions. The expense thereby incurred shall be paid in the first instance out of money levied and collected and available for highway purposes, and the amount thereof shall be certified to the proper officials to be placed upon the tax duplicate against the property of such owner, occupant or company, as provided by law, to be collected as other taxes, and the proper fund shall be reimbursed out of the money so collected, or the cost of removing such obstructions may be collected from the owner, occupant or company by civil action by the county commissioners or township trustees.

" 'All such persons, firms or corporations shall be required to reconstruct or relocate their properties or any part thereof upon such public highway, upon the order of the proper authorities if in the opinion of such authorities the same constitute an obstruction in such public highway.'

"The above section defines the policy of the state which now controls its relation to railway companies occupying public roads with tracks which may constitute an obstruction to any improvement of said roads, and said section places the entire cost of removing and relocating said tracks upon the companies which own the same.

"It may be, and doubtless will be contended, however, by the company in question, that the enforcement of the provisions of the section just quoted is that it would be an unconstitutional application thereof, in that it would contravene the provisions of section 28, article II, of the constitution, providing against the enactment of any laws impairing the obligations of contracts. A franchise such as the one under which this company is now located upon this highway and operating its railroad thereon, is frequently denominated and termed a contract, and is commonly so regarded, but in a strictly legal sense it is only a right or privilege, granted in this instance by the state, through its duly constituted agents, the board of county commissioners of Franklin county, upon such terms and conditions as were fixed by said commissioners, and it is a right which can only be exercised by reason of the grant thus made. Sections 9101 and 9113, G. C.

"The terms and conditions, however, of this franchise, as fixed by said county commissioners, are subject to the limitation that said commissioners could not in any manner or degree surrender or alienate that governmental power of the state which is required to exist for the welfare of the public, which welfare and right to use said public road is the paramount right in this case. This power so reserved and which said commissioners could not alienate, is known as the police power of the state. Referring to this reserved governmental power, Elliott on Streets and Roads, section 939, says:

" 'The general rule is well settled that no contract can be made which assumes to surrender or alienate a strictly governmental power which is required to exist for the welfare of the public. To what extent it prevails as against chartered rights which are protected as rights flowing from a con-

tract it is not possible to say with certainty and precision, but we believe that it may be fully affirmed that the power extends so far as to require the private corporation to yield to the public welfare in the matter of the reasonable regulation of roads and streets.'

"The rights and privileges granted as aforesaid, under said franchise, are subject to still further limitations, which are reserved to the state by section 2, of the bill of rights, and section 2, of article XIII, of the constitution. By the provisions of the first section noted, no special privileges or immunities shall ever be granted that may not be altered, revoked or repealed by the general assembly. Under the last quoted section it is provided that corporations may be formed under general laws, but all such laws may from time to time be altered or repealed.

"Without attempting to cite the many decisions of both federal and state courts in which the scope and effect of the foregoing constitutional provisions are considered and applied to the franchise rights of corporations, in many of which cases said rights have been set aside or additional burdens have been imposed on the owners thereof, it is sufficient to say that in my judgment they amply sustain the right of the state through its legislature to impose the provisions of said section 161, supra, upon railway and other companies occupying public roads when said conditions exist as therein prescribed.

"It further must be observed, that these constitutional reservations above noted, are as much a part of the franchises granted by the agents of the state as they would be if actually made a part thereof and written therein. Railroad Company v. Defiance, 52 O. S., 314. However, as before observed, regardless of the application of these constitutional provisions, the police power of the state cannot be alienated, and the existence of this power must be preserved for the well being of organized society, and when exercised in a reasonable manner by the state cannot be said to impair the obligation of contracts.

"While your letter does not state fully all the facts connected with the proposed improvement of the road in question, it appears from the correspondence attached thereto that this improvement is to be made by paving to a width of fifty feet, a public road, which is a continuation of High street, in the city of Columbus, and that said improvement is to begin at the corporation line of said city and extend thence north 3810 feet. It is a matter of common knowledge that said High street is the main traffic thoroughfare of a great and growing city of more than 200,000 people, upon which street it is necessary to enforce, under police supervision, strict rules of traffic to protect the lives and the property of those who must go upon it. One of the rules of traffic so in force requires of travelers to use and keep upon the right-hand side of said street. Any other method of travel, if permitted thereon, would result in interminable confusion and danger. The improvement you contemplate requires the railway company to move its tracks to the center of said highway to permit the sides thereof to be open for travel in the same manner immediately outside of the city limits as within. This requirement undoubtedly is one of urgent and imperative public necessity, and as necessary and essential to the safety of the public generally as a system which provides it with pure water or sanitary sewerage.

"To require a relocation of the tracks of the company in question in view of the great necessity of this improvement and the increased travel on said public highway, is not in my opinion an arbitrary or unreasonable exercise of the police power of the state as effected through the provisions of section 161, supra. That is to say, in view of the imperative necessity of this im-

provement, if the tracks of said company in their present location constitute an obstruction to travel in such public highway, or interfere with the improvement you contemplate, said company may be required by you to relocate the same as provided under said section 161, and such limitation upon said company's rights under its franchise would not be unreasonable.

"I am, therefore, of the opinion that under the provisions of said section 161, supra, if the conditions therein prescribed obtain in the case of this company, it may be compelled by you to relocate its tracks and move them to the center of the highway."

It was further held in the opinion in question that state or county funds could not be used in paying any part of the cost of moving the tracks, and that the entire cost must be paid by the railway company. In conformity with the opinion expressed to the state highway commissioner, I advise you, in answer to your third question, that if the conditions prescribed in section 7204, G. C., obtain, the Ohio Electric Railway Company may be compelled to move its tracks from the center to the side of the road and to pay the cost thereof.

Your fourth question depends upon the proper construction to be given section 6956, G. C., 106 O. L., 611, and section 1231-4, G. C., 103 O. L., 461.

Section 6956, G. C., reads as follows:

"Any person, firm or corporation operating a railway for the transportation of passengers, freight or express crossing any street or road, shall improve, maintain and repair that portion of the highway at such crossing and lying between the outside ends of the ties, and also that portion lying between the tracks in the case of two or more tracks, and the cost and expense of this improvement, maintenance and repair shall be borne by said individual, firm or corporation. Such improvement, maintenance or repair shall be made whenever in the opinion of the authorities having charge of such road the public necessity requires, and shall be made in accordance with plans and specifications approved by the county surveyor.

"In case the said person, firm or corporation operating said railway, fails to improve, maintain or repair the same as required by the proper authorities, as provided in this section, then such authorities shall proceed to improve, maintain and repair the same, and the cost thereof shall be charged against said property and collected in the manner hereinafter provided. Whenever a road or street is improved where a street or interurban or other railroad or railway lies within the improved portion of the roadway, such railroad or railway grade shall in all respects be changed to meet the approval of the county surveyor, unless otherwise provided for in the grant or franchise, by virtue of which such railway operates on or occupies said highway, and costs of such change of grade be paid by such company under the law or by the terms of its franchise or grant, shall be a lien upon the property of such company, and the proper authorities may provide for the payment of the amount chargeable against said company under the law or by the terms of its franchise or grant, in installments, as in the case of other property owners, and such installments as shall bear interest as in other cases, and the board of county commissioners or other authorities may issue bonds in anticipation of the collection of said installments."

It will be noted that this section, in so far as it relates to improvement, maintenance or repair of highways, applies where railway tracks *cross* any street or road. There is no doubt that under the terms of this section the proper authorities, in case a

railway company fails to make the improvement, maintenance or repair referred to in the section, may proceed to do such work themselves, and assess against and collect from the company the cost of such improvement. The case presented by your inquiry is not one, however, where the tracks *cross* a road. It is a case where the tracks are located within and along the road, and reference must, therefore, be had to section 1231-4 G. C. This section was a part of amended senate bill No. 31, 103 O. L., 449, which act amended a number of the sections of the General Code relating to the state highway department, and is one of the few sections of the General Code relating to highways not repealed by the Cass highway law, amended senate bill No. 125, 106 O. L., 574.

The section in question reads as follows:

> "Wherever one or more tracks of an individual, firm or corporation, used for the purpose of transporting freight, express or passengers, are or may be located, in whole or in part, within the roadbed of an improved intercounty highway or main market road, or one which it is proposed to be improved, it shall be the duty of the said individual, firm or corporation to improve, maintain and repair that portion of the highway lying between the ends of the ties and also that portion lying between tracks in case of two or more tracks, and the cost and expense of this improvement, maintenance and repair shall be borne by the said individual, firm or corporation. Such improvement, maintenance or repair shall be made whenever, in the opinion of the highway commissioner, the public needs require, and shall be made in accordance with plans and specifications approved by them.
>
> "The township trustees shall certify the assessment to the county auditor who shall place it upon the tax duplicate against the property of such individual, firm or corporation. The county treasurer shall collect such assessments in the manner as other taxes are collected, and in such payments as may be approved by the county auditor."

There is no doubt that under this section it is the duty of the Ohio Electric Railway Company to improve, in accordance with the plans and specifications of the state highway commissioner, that portion of the highway referred to by you and lying between the ends of the ties. There is not found in this section, however, a provision such as is found in section 6956, G. C., supra, to the effect that in case the railway company fails to improve the portion of highway occupied by it, as required by the proper authorities, then such authorities may proceed to improve the same and charge against said property the cost of the improvement and collect the same from the company. Such, however, must have been the intention of the legislature, and I think the right of the authorities to make the improvement and assess the same against the property of the company and collect the same is sufficiently established by the last paragraph of section 1231-4, G. C., to the effect that the township trustees shall certify the assessment to the county auditor, who shall place it upon the tax duplicate against the property of such individual, firm or corporation, and that the county treasurer shall collect such assessments in the manner as other taxes are collected, and in such payments as may be approved by the county auditor.

In view of the foregoing, it is my opinion that the state highway commissioner, in co-operation with the county commissioners of Madison County, may, after giving to the Ohio Electric Railway Company notice, and a reasonable opportunity to improve that portion of the highway lying between the ends of its ties, and upon a failure of such company to make such improvement in accordance with the plans and specifications of the state highway commissioner, proceed to improve the same in accordance with such plans and specifications, and that the cost of such improvement may be

assessed against the property of the company and collected in the manner provided in the section in question. In view, however, of the omission from section 1231-4, G. C., of the provision found in section 6956, G. C., and referred to above, the question is not entirely free from doubt, and inasmuch as the loss would fall upon the county in case an attempted assessment should be enjoined by the courts, I suggest the advisability of proceeding as to a small section of roadway in the first instance, to the end that in the event of an unfavorable court decision the loss to the county by way of uncollected assessments may be minimized.

Respectfully,
EDWARD C. TURNER,
Attorney-General

1556.

COUNTY CHILDREN'S HOME—SCHOOL OF SUCH INSTITUTION NOT UNDER SUPERVISION OF COUNTY BOARD OF EDUCATION UNLESS REQUESTED BY BOARD OF TRUSTEES OF ORPHANS' ASYLUM, OTHERWISE CONTROL OF SCHOOL IS IN BOARD OF TRUSTEES—PUBLIC SCHOOL.

Where the board of trustees of an orphans' asylum, established and maintained by a county, have not requested the board of education of the school district in which such asylum is located, in the exercise of the authority conferred by sections 7676 *and* 7677, *G. C.*, 103 *O. L.*, 896, *to take charge of the school located at said asylum, established by the county and maintained for the education of the inmates of said institution, and to manage and control said school in the manner provided by section* 7677, *G. C., said school remains under the management and control of said board of trustees and is subject to the provisions of sections* 3085 and 3088, *G. C. Said school as managed and controlled by said board of trustees ir not a "public school" within the meaning of the statutes relating to public schools and governing the administration of the same and is not therefore under the supervision of the county board of education.*

COLUMBUS, OHIO, May 10, 1916.

HON. GEORGE W. PORTER, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—In your letter under date of April 28th, you request my opinion as follows:

> "We have in this county an orphan asylum maintained by the county.
>
> "This orphan asylum has maintained for a number of years, separate and independent from any township or county supervision, a school for the education of the inmates of said asylum; and they have in no way been under county or township supervision, and have not, as provided by section 7676 of the General Code, requested that the board of education establish any school for them.
>
> "The question now arises as to whether or not the board of trustees of said asylum have the control and management of said school, and the right to employ teachers for said school, or whether the employment of teachers, control and management of said school should be under the board of education of said township.
>
> "Does this school come under the supervision of the county board of education?"

Sections 7676 and 7677 of the General Code (103 O. L., 896), provides as follows:

"Sec. 7676. The board of education in any district in which a children's home or orphan's asylum is established by law, when requested by the board of trustees of such children's home or orphans' asylum when no public school is situated reasonably near such home or asylum, shall establish a separate school in such home or asylum, so as to afford to the children therein, as far as practicable, the advantages and privileges of a common school education. Such schools must be continued in operation for such period as is provided by law for public schools. If the distributive share of school funds to which the school at such home or asylum is entitled by the enumeration of children in the institution is not sufficient to continue the schools for that length of time, the deficiency shall be paid out of the funds of the institution or by the county commissioners.

"Section 7677. All schools so established in any such home or asylum shall be under the control and management of the respective boards of education of the school districts in which such homes and institutions are located, and courses of study, length of school term, and all other school matters shall be uniform in the respective school districts. Teachers employed in such homes or institutions must have a teacher's elementary school certificate as provided by section seven thousand eight hundred and twenty-nine of the General Code."

You will observe that only such schools as are established in the manner provided by section 7676, G. C., in any such home or asylum designated in said section, shall be under the control and management of the boards of education of the respective school districts in which said homes or asylums are located, as provided in section 7677 G. C.

It seems clear, therefore, in view of your statement of facts with reference to the establishment and maintenance of the school mentioned in your inquiry that said school is not under the control and management of the board of education of the township rural school district in which the orphans' asylum in question is located unless there is some other provision of the statute authorizing said board of education to take charge of said school.

It might be argued that section 7690 G. C., provides this authority. The first part of said section reads as follows:

"Each board of education shall have the management and control of all of the *public schools* of whatever name or character in the district. It may appoint a superintendent of the public schools, truant officers and janitors, and fix their salaries."

It will be noted, however, that the above provision of section 7690 G. C., applies only to public schools, and it cannot be said that the school in question is a public school within the meaning of said provision of the statute for the reason that said school, as established and maintained by your county, is for the exclusive use of the children living in said orphans' asylum and is not open to the public generally. Nor can it be said that said school is a school of the district in which the orphans' asylum is located within the meaning of that part of section 7681 G. C., which provides that:

"The schools of each district shall be free to all youth between six and twenty-one years of age, who are children, wards or apprentices of actual residents of the district, * * *"

Section 3085 G. C. (103 O. L., 889), as found in the chapter of the General Code relating to orphans' asylums and children's homes, provides as follows:

"Subject to such rules and regulations as the trustees prescribe, the superintendent shall have entire charge and control of such home and the inmates therein. Upon the recommendation of the superintendent, the trustees may appoint a matron, assistant matron, teacher or teachers whose duties shall be the care of the inmates of the home, and to direct their employment, giving suitable physical, mental and moral training to them. Under the direction of the superintendent, the matron shall have the control, general management and supervision of the household duties of the home, and the matron, assistant matron, teacher or teachers, shall perform such other duties, and receive for their services such compensation as the trustees may by by-laws from time to time direct. They may be removed by the superintendent or at the pleasure of the trustees, or a majority of them. A licensed physician may be employed, who shall at least quarterly make a physical and mental examination of all the inmates of such home, and a record of such examination shall be kept. When necessary, experts may be employed to give the proper treatment, or a child may be sent to a suitable institution for treatment at the expense of the county."

Section 3088 G. C. (103 O. L., 889), as found in said chapter provides:

"During the two weeks ending on the fourth Saturday in July, the clerk of the board of trustees shall take and return to the county auditor the names and ages of all youth of school age in such home. The state common school fund, not otherwise appropriated by law, shall be apportioned in proportion to the enumeration of youth, to such home and other districts, subdistricts and joint subdistricts within the county. The amount of money due such home under such apportionment shall be set apart by the auditor of the county, and shall become a party of the children's home fund and used to maintain a common school in such home, and shall be paid out on certificate of the trustees, stating in the certificate, the amount and the purposes thereof. Thereupon the county auditor shall issue his warrant on the treasurer for the amount so certified. This section shall not apply to children's homes in counties where such children attend the public schools. When in their judgment advisable, the trustees may employ a teacher to teach the school in any such home, as provided by law, but such teacher must have a 'teacher's elementary school certificate' as provided for by section seven thousand eight hundred and twenty-nine of the General Code."

The above provisions of sections 3085 and 3088 G. C., vest the control of a school located at a county children's home or orphans' asylum, in the board of trustees of such home or asylum, and such board of trustees has the management and control of said school until such time as said school comes within the control of the board of education of the school district in which such home or asylum is located, in the manner as provided in sections 7676 and 7677 G. C., as above quoted.

I am of the opinion therefore, in answer to your first question that, inasmuch as the board of trustees of the orphans' asylum referred to in your inquiry has not requested the board of education of the school district in which said asylum is located, to assume control of the school located at said asylum, as provided in said sections 7676 and 7677 G. C., said school is still under the management and control of said board of trustees, and is subject to the above provisions of section 3085, G. C.

In view of the foregoing provisions of the statutes and the conclusions reached

in answer to your first question, and in the absence of any provision of the statutes, relating to the powers and duties of the county board of education bringing said school under the supervision and control of said board of education, I am of the opinion that your second question must be answered in the negative.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1557.

BANKS AND BANKING—DEPOSITORIES OF PUBLIC FUNDS—HYPOTHECATED SECURITIES IN LIEU OF BOND—DEFAULT OF DEPOSITORY—TO WHAT EXTENT SAID SECURITIES MAY BE SOLD BY POLITICAL SUBDIVISION.

Banks and other institutions authorized by the laws of this state to become depositaries of public money may not prefer creditors, but when securities are hypothecated by a depositary to secure public funds in lieu of a bond, upon default of such depositary, said securities may be sold by the subdivision with which they are hypothecated to the extent of covering all its claims against said depositary, regardless of the financial condition of the latter and the claims of its other creditors.

COLUMBUS, OHIO, May 10, 1916.

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

GENTLEMEN:—I have your letter of May 5, 1916, submitting the following inquiries:

> "(1) Do the respective laws of their incorporation authorize Ohio state banks, savings banks, and trust companies to constitute a preferred-creditor class of patrons?
>
> "(2) Under present laws, does a depositary contract (secured by bond) between a political subdivision of Ohio, and a banking institution doing business in this state, constitute that political subdivision a preferred creditor of that institution?
>
> "(3) Does the securing of a depositary contract by a surety bond, the premium of which has been paid, or by a deposit of bonds that are owned, by the depositary institution, create a creditor-debtor relation that is different from the relation created when personal security has been given?
>
> "(4) In the points above mentioned as to 'Preferred creditor' and 'Security,' do the powers of national banks differ from the powers of Ohio state banks, savings banks, and trust companies? If so, in what respect?"

My answer to your first and second inquiries is no.

The same answer is also made to your third inquiry with this qualification: that when securities are hypothecated in lieu of a bond upon default of the depositary bank, such securities may be sold by the subdivision with which they are hypothecated, to the extent of covering all its claims against said depositary bank regardless of the financial condition of said bank and the claims of its other creditors.

Your fourth inquiry is also answered in the negative.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1558.

APPROVAL CONTRACTS AND BONDS FOR CONSTRUCTION OF FIVE DORMITORY BUILDINGS—INSTITUTION FOR FEEBLE MINDED—COLUMBUS STATE HOSPITAL—OHIO HOSPITAL FOR EPILEPTICS, GALLIPOLIS, OHIO.

COLUMBUS, OHIO, May 10, 1916.

Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—You have submitted to me five separate contracts and bonds calling, respectively, for the construction of dormitory buildings, which you have designated as design B-2a, B-2b, B-2c, B-2d and B-2e.

> "Dormitory building design B-2a to be located at the Institution for Feeble Minded;
> "Dormitory building design B-2b to be located at the Institution for Feeble Minded at the custodial farm;
> "Dormitory building design B-2c to be located at the Columbus State Hospital;
> "Dormitory building design B-2d to be located at the Ohio Hospital for Epileptics, Gallipolis, Ohio, and
> "Dormitory building design B-2e to be located at the Ohio Hospital for Epileptics, Gallipolis, Ohio."

I have before me the minutes of your board, wherein it appears that your architects have reported that one Bert F. Smith, of Columbus, Ohio, was the lowest bidder for dormitory buildings B-2a, B-2b and B-2c, his bid for

> "Dormitory building B-2a, with the addition of alternate No. 27, and exclusive of face or common brick, excavation, concrete footings and foundation, amounting to the sum of $62,338.00;
> "Dormitory building B-2b, with the addition of alternate No. 27, and exclusive of face or common brick, excavation, concrete footings and foundation, amounting to the sum of $63,400.00; and
> "Dormitory building B-2c, with the addition of alternate No. 27, and exclusive of face or common brick, excavation, concrete footings and foundation, amounting to the sum of $62,338.00;"

and that the partnership of S. Q. Henke & Sons, of Lancaster, Ohio, was the lowest bidder for dormitory buildings B-2d and B-2e, the bid of said partnership for

> "Dormitory building B-2d, with the addition of alternate No. 27, and exclusive of face or common brick, being in the sum of $62,856.00; and
> "Dormitory building B-2e, with the addition of alternate No. 27, and exclusive of face or common brick, being in the sum of $62,856.00."

It appears that your board has let the contracts to the above named parties, at their respective bids.

I have examined the advertisement calling for bids in this matter, and find that the same has been in all respects in accordance with law.

I have examined the contracts made and entered into by your board with Bert F. Smith, of Columbus, Ohio, for dormitory buildings B-2a, B-2b and B-2c and the bonds accompanying said contracts, and find the same to be in all respects in accordance with law; and have likewise examined the contracts between your board and the

partnership of S. Q. Henke & Sons for dormitory buildings B-2d and B-2e and the bonds accompanying said contracts, and find the same to be in all respects in accordance with law.

In regard to the bonds accompanying the contracts with S. Q. Henke & Sons, I note that said bonds are personal bonds, and since under section 2318 G. C., it is provided that no proposal shall be considered unless accompanied by a bond of the bidder with sufficient sureties, and you have not only considered the proposal of S. Q. Henke & Sons but have also awarded the contract to them, I assume that your board is satisfied that the sureties on the bonds accompanying the two contracts are sufficient.

I have the certificate of the auditor of state that there are sufficient funds in each of the various appropriations to cover the amounts to be paid under the contract, and have this day filed with the auditor of state the five several contracts and bonds, and have returned to your architects the papers, other than those filed with the auditor of state, which were submitted to me.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1559.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, MERCER COUNTY, OHIO.

COLUMBUS, OHIO, May 10, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Mercer County, Ohio, in the sum of $4,600.00 for Rutschilling road improvement in Granville Township, being eight *bonds of* $500.00 *each and one bond of* $600.00."

I have examined the transcript of the proceedings of the county commissioners of Mercer County, Ohio, in connection with the above bond issue; also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted, and executed by the proper officers will, upon delivery, constitute valid and binding obligations of Mercer County, Ohio.

Respectfully.
EDWARD C. TURNER,
Attorney-General.

1560.

APPROVAL, TRANSCRIPT OF PROCEEDINGS, BOND ISSUE, MERCER COUNTY, OHIO.

COLUMBUS, OHIO, May 10, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Mercer county, Ohio, in the sum of $10,500.00, for Sloan road improvement in Washington township, being twenty-one bonds of five hundred dollars each."

I have examined the transcript of the proceedings of the county commissioners of Mercer county, Ohio, in connection with the above bond issue; also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted, and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of Mercer county, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1561.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE MERCER COUNTY, OHIO.

COLUMBUS, OHIO, May 10, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Mercer county, Ohio, in the sum of $2,500.00 for Cummins road improvement in Washington township, being five bonds of five hundred dollars each."

I have examined the transcript of the proceedings of the county commissioners of Mercer county, Ohio, in connection with the above bond issue; also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted, and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of Mercer county, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1562.

APPROVAL, TRANSCRIPT OF PROCEEDINGS, BOND ISSUE, MERCER COUNTY, OHIO.

COLUMBUS, OHIO, May 10, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Mercer county, Ohio, in the sum of $20,500.00 for Addy No. 2 road improvement, Dublin township, being forty-one bonds of five hundred dollars each."

I have examined the transcript of the proceedings of the county commissioners of Mercer county, Ohio, in connection with the above bond issue; also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted, and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of Mercer county, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1563.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, MERCER COUNTY, OHIO.

COLUMBUS, OHIO, May 10, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Mercer county, Ohio, in the sum of $3,600.00 for Weitzel road improvement, being five bonds of $720.00 each."

I have examined the transcript of the proceedings of the county commissioners of Mercer county, Ohio, in connection with the above bond issue; also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of Mercer county, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1564.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, MERCER COUNTY, OHIO.

COLUMBUS, OHIO, May 10, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Mercer county, Ohio, as follows: (a) Romel joint road improvement, east, $2,000.00, being five bonds of four hundred dollars each. (b) Romel joint road improvement, west, $2,400.00, being five bonds of four hundred and eighty dollars each."

I have examined the transcript of the proceedings of the county commissioners of Mercer and Darke counties, relative to the issuance of the above bonds, and also the bond and coupon forms attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of Mercer county, Ohio. Respectfully,

EDWARD C. TURNER,
Attorney-General.

1565.

ATTORNEY'S FEES ALLOWED BY COURT UNDER PROVISIONS OF SECTION 2923 G. C., 106 O. L., 105, FINAL—WHEN PROPERLY CERTIFIED AUDITOR MAY ISSUE WARRANT—ALLOWANCE NOT REQUIRED BY COUNTY COMMISSIONERS.

The allowance by a court of reasonable compensation to a taxpayer's attorney, under the provisions of section 2923 *G. C., as amended* 106 *O. L.,* 105, *is final and conclusive, and requires no further allowance by the board of county commissioners. When the amount so allowed by a court is properly certified to the auditor he may issue a warrant therefor.*

COLUMBUS, OHIO, May 10, 1916.

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

GENTLEMEN:—I have your letter of May 8, 1916, submitting the following inquiry:

"Is it necessary for the county commissioners to make an allowance before payment by the auditor of an allowance made by the court for attorney fees under section 2923 General Code, as amended 106 O. L., page 105?"

Section 2923 G. C., as amended 106 O. L., 105, under which your foregoing inquiry arises, provides as follows:

"Section 2923. If the court hearing such case is satisfied that such taxpayer is entitled to the relief prayed for in his petition, and judgment is ordered in his favor, he shall be allowed his costs, including a reasonable compensation to his attorney."

By virtue of the provisions of this section when a taxpayer is successful in his action it is provided that he shal e allowed his costs including a reasonable compensation to his attorney. That is to say, when the court renders a judgment in favor of the taxpayer it is required by the provisions of the foregoing section to also allow said taxpayer his costs, including a reasonable compensation to his attorney. When this is done you inquire if such compensation so allowed by the court must also have the allowance of the county commissioners before a warrant is issued for its payment. Undoubtedly such action by the county commissioners is necessary, unless, as provided in section 2460, G. C., it is within the exceptions named in said section and may be considered to be an amount "fixed" by the court, in which event it may be paid upon the proper certificate to the auditor without allowance by the county commissioners.

The determination of the question involved, therefore, depends upon what construction shall be given the term "allowed" as employed in said section 2923, G. C. I am of the opinion that said word as employed in this section is intended to be interpreted in the sense of "fixed," and that the court is authorized by said section to finally determine the amount to be paid counsel for a taxpayer without the intervention of any other authority. This conclusion is based to some extent upon the significance of the term "allow" as recognized in the case of Long v. Commissioners, 75 O. S., 539. This was an action in which the court construed the provisions of section 7246, R. S., now section 13618, G. C., which provides in substance that attorneys appointed by the court to defend indigent prisoners shall receive such compensation as the court approves. Commenting upon the meaning of the term "approves" as used in said section the court in this case said:

> "The talismanic words, 'examined' and 'allowed' are absent. The word 'approves' is not the equivalent of 'allowed' or of the word 'fixed,' which is sometimes used to express a similar sense. The word 'approve' seems to relate for its object to something made, done or said by another. If the legislature intended by this section, so worded, to invest the trial court with exclusive power to determine what compensation should be paid by the county in such cases, it has been unfortunate in the use of our common language. It rather appears to us that the trial court is authorized to suggest the amount which should be paid—to approve of a certain sum that should be paid, relying on the commissioners to respect and give proper weight to the opinion of the court."

The court by inference plainly indicates in this case that if the word "allowed" had been used instead of the word "approves" in the section then under consideration a different effect might be given the statute. In the present case, if the word "allowed" as used in said section 2923 G. C., is not taken in the sense of concluding the amounts to be paid, then it is given no more effect in said statute than would be given said provisions had the word "approves" been used in its stead. This interpretation would be in direct conflict with the distinction made by the court in the case above cited in the meaning of the two words.

But there are other very patent reasons why the legislature intended the court's action to be final under said section. In very many, perhaps the majority, of cases in which suit may be brought by a taxpayer, as provided in sections 2921 and 2922 G. C., the board of county commissioners are involved either directly or indirectly. It would be manifestly improper and unfair that the payment of counsel fees for plaintiff in cases in which county commissioners were interested as defendants should depend upon the latter's allowance.

Independent of the foregoing considerations it may be further urged with great reason that the allowance of said compensation is a judgment rendered by the court for the amount so fixed. This certainly is the effect of an allowance of costs to the

plaintiff and I assume that it would not be contended that the amount allowed for costs was not a judgment and could not be collected as such. The statute requires that the court shall allow costs including compensation. No distinction may therefore be made in the character of the court's action as applied to costs and as applied to compensation. If the allowance of costs is a judgment it is also a judgment as to compensation and may only be changed or modified by a court of higher jurisdiction.

I am, therefore, of the opinion that the action of the court under section 2923 G. C., as amended 106 O. L., 105, in allowing reasonable compensation to a taxpayer's attorney, is final and conclusive and that the amount so allowed by the court does not require the allowance of the county commissioners and upon the proper certificate the county auditor may issue his warrant therefor.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1566.

APPROVAL, RESOLUTIONS FOR ROAD IMPROVEMENTS IN ROSS AND LAKE COUNTIES.

COLUMBUS, OHIO, May 10, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of May 4 and May 5, 1916, transmitting to me for examination final resolutions relating to the following roads:

"Ross County—Cincinnati-Chillicothe road, Sec. 'A,' Pet. No. 1669, I. C. H. No. 8.

"Lake County—Painesville-Warren road, Pet. No. 2559, Sec. No. 'G,' I. C. H. No. 153."

I find these resolutions to be in regular form, and am, therefore, returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1567.

STATE HIGHWAY DEPARTMENT—APPROVAL OF BONDS OF CERTAIN EMPLOYES.

COLUMBUS, OHIO, May 10, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of May 6, 1916, transmitting to me for approval bonds of the following employes of the State highway department:

W. H. Smith, Division-Engineer	$4,000 00
E. W. Davis, Division-Engineer	4,000 00
D. W. Seitz, Division-Engineer	4,000 00
T. T. Richards, Division-Engineer	4,000 00

A. S. Rea, Test-Engineer	2,000 00
R. E. Lowther, Bookkeeper	1,000 00
F. E. Withgott, Engineer	3,000 00
J. W. Graham, Engineer	3,000 00
G. R. Logue, Engineer	2,000 00

I find these bonds to be properly drawn and executed, and am therefore returning the same with my approval as to form endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1568.

BOARD OF HEALTH—TRANSPORTATION AND MAINTENANCE OF LEPER —CITY OF NORWALK IS AUTHORIZED TO PROVIDE NECESSARY FUNDS.

Pursuant to an order of the board of health relative to the transportation of a leper to a leprosorium in the Philippine Islands and his maintenance therein, the city of Norwalk is authorized and empowered to provide the funds necessary to carry such order into effect.

COLUMBUS, OHIO, May 11, 1916.

HON. IRVING CARPENTER, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—Your letter of April 29, 1916, asking my opinion received and is as follows:

> "Have just been informed that through your efforts the case of Edward Newsbaumer, leper, was finally determined yesterday, with an arrangement for Mr. Newsbaumer to go to the Philippine Islands for treatment there, and not to come to Norwalk.
>
> "It will certainly be a great help to Mr. Newsbaumer and very much in his interest to go there, rather than to come here and be isolated, as he would have to have been.
>
> "Our city board of health and Mr. Wickham, the solicitor, and I, have not been able to determine by whom the expense of transporting and maintaining Mr. Newsbaumer should be paid, whether by the county, township or city, any one of which is willing to pay it, but we want the payments to meet the approval of the bureau of inspection. Mr. Wickham and I have agreed to submit the question to you and follow your advice in the matter. If you will tell us how you think this should be done, we will appreciate it very much."

No power to regulate public health matters as such is vested in the county commissioners, and in order for them to have any part in the matter under consideration it would necessarily have to be done upon the theory of poor relief, i. e., caring for those who are unable to support themselves. No facts appear here to justify relief on this theory, and even if such facts existed the method of administering such relief is fully set out in the statute, and the provisions of law pertaining thereto lead to but one result, namely, the support and maintenance of the recipient thereof within the county and do not contemplate nor authorize the incurring of expenditures such as those involved in your inquiry, and no general powers are conferred upon the county commissioners under which such action as is desired in this case could be justified.

The same is true of the township trustees as such, and the powers of the township trustees when acting as a board of health under sections 3391 to 3394 G. C., both inclusive, are limited to cases which arise outside of a municipality. So that authority for the contemplated action must be found if at all in some provision of law relative to municipalities.

Section 3646 G. C., found in the chapter of the General Code containing the enumeration of powers of municipalities, provides as follows:

> "To provide for the public health, to secure the inhabitants of the corporation from the evils of contagious, malignant and infectious diseases. * * *"

Chapter II of subdivision II, division V, title XII of the General Code vests in the municipal board of health or health officer the power to regulate matters pertaining to public health in the municipality, and section 4413 of the General Code provides:

> "The board of health of a municipality may make such orders and regulations as it deems necessary * * * for the public health, the prevention or restriction of disease * * *"

I see no reason why under the provisions of this section the board of health of the city of Norwalk should not make an order that a person afflicted with leprosy should at the expense of the municipality be transported to and maintained in any leprosorium to which he can be admitted.

I am therefore of the opinion that neither the county nor the township is authorized to pay the expense of transporting the person in question to the Philippine Islands, but that the city of Norwalk is authorized to pay the expense of the transportation to and the maintenance of such person in a leprosorium in the Philippine Islands pursuant to an order of the board of health of such municipality.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1569.

MUNICIPAL CORPORATION—NOT ENTITLED TO PART OF COUNTY BRIDGE FUND—COUNTY COMMISSIONERS—NOT AUTHORIZED TO EXPEND COUNTY FUNDS UPON BRIDGES WITHIN MUNICIPALITIES UNLESS SUCH BRIDGES ARE ON STATE OR COUNTY ROADS.

No city or village now has a right to demand and receive from the county any part of the bridge fund produced by a levy upon property within the municipality.

County commissioners are not authorized to expend county funds upon bridges within municipalities unless such bridges are on state or county roads, or roads of the classes referred to in sections 2421 and 7551 G. C.

COLUMBUS, OHIO, May 11, 1916.

HON. GEORGE THORNBURG, *Prosecuting Attorney, St. Clairsville, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication of March 28, 1916, which communication reads as follows:

> "In 1903 a bridge was built from the south end of West street, in the village of Bridgeport, Belmont county, Ohio, across Wheeling creek and the

valley through which the creek flows, a distance of about eight hundred feet, connecting with Howard street on the south.

"This bridge is a steel structure, constructed at a cost of $25,000; $12,000 was contributed by the village of Bridgeport, $10,000 by the county commissioners of Belmont county, and $3,000 by some of the citizens of Bridgeport. At the time the bridge was erected the village of Bridgeport agreed to keep it in repair.

"The bridge is now in a very bad state of repair, and has been closed from public travel for a little more than a year. Responsible architects have estimated the cost of necessary repairs to place it in a safe condition for public travel at about $9,000.

"The village of Bridgeport has some money, but not near enough to make this improvement. They want the county commissioners to assist them by giving them at least the portion of the bridge fund that is levied upon the village of Bridgeport, or to the extent of such other amount as the commissioners are authorized to do.

"Prior to the time this bridge was erected there was no street or road across the creek and valley at the place where the bridge was erected.

"Section 2421 G. C., is not clear as to whether a village or city has a right to demand and receive its portion of the bridge fund. We have some decisions that prevent commissioners from expending money on bridges in municipalities that are not on state or county roads.

"The county really has an investment of $10,000 in this bridge, yet we are not clear as to the right of the county commissioners to contribute towards the repair of the bridge.

"The village of Bridgeport has its tax rate at the present time as high as it can be made under the law.

"This bridge is of great public importance, as it connects two populous districts in which there is no other bridge within about a mile.

"Your predecessor, in opinion 1007 in vol. I, 1914 Reports, at page 864, decided under section 2421, villages did not have a right to demand and receive a part of the bridge fund.

"The question we desire specifically answered is: Can the county commissioners assist in the repair of this bridge? If so, under what authority of law are they given that right?

"Since the village of Bridgeport is now levying fifteen mills, what can it do to raise more money for the bridge?"

Referring first to the question of the right of the village of Bridgeport to demand and receive any part of the bridge fund levied by the county commissioners upon the property within the village, I beg to state that this question was first passed upon by my predecessor, Hon. U. G. Denman, in an opinion rendered to Hon. E. E. Sayles, prosecuting attorney of Sandusky county, on October 28, 1910, and found at page 781 of the attorney-general's report for 1910-1911, in which opinion it was held in effect that no city or village now has a right to demand and receive any part of the bridge fund levied upon property therein. As stated by you, the same conclusion was expressed by my predecessor, Hon. Timothy S. Hogan, in an opinion rendered to Hon. H. B. Emerson, city solicitor of Bellefontaine, on June 26, 1914, and found at page 864 of the attorney-general's report for that year.

I fully concur in the views expressed in the two opinions referred to above, and have expressed a similar conclusion in opinion No. 1331, rendered to Hon. Ortha O. Barr, prosecuting attorney of Allen county, on March 8, 1916. I therefore advise you that the village of Bridgeport is not entitled, under the statutes, to demand and

receive any part of the bridge tax levied by the county commissioners upon the property within the village.

As suggested by you, the decisions of the courts indicate that county commissioners are not authorized to expend county funds upon bridges within municipalities unless such bridges are on state or county roads, or roads of the several classes referred to in sections 2421 and 7557 G. C.

The following is quoted from the opinion of the court in the case of city of New ark v. Jones, 16 O. C. C., 563; 9 O. C. D., 196:

> "There is no direct authority anywhere that county commissioners have the right to build a bridge on a street, as such. If it is a state or county road, or any of those denominated in those statutes, passing through a city, then they have that right under the statute; but not because it is a street, as such, that they have the right to construct these bridges."

To the same effect see the following cases:

> City of Newark v. McDowell, 16 O. C. C., 556; 9 O. C. D., 260.
> Jones v. Commissioners, 2 O. C. C. (n. s.) 14; 15 O. C. D., 510.

In view of the foregoing, and since it appears that the bridge in question is not situated upon a state or county road, or any road falling within the classifications named in sections 2421 and 7557 G. C., I advise you that the county commissioners are not authorized to assist in repairing the bridge in question. The duty of repairing the bridge rests upon the village of Bridgeport, and the authority and duty of the village is exclusive.

I understand the last paragraph of your letter to mean that the present aggregate tax rate in the village of Bridgeport is 15 mills, and if all the items going to make up this rate fall within the provision of section 5649-5b, G. C., then it follows that an increased rate of taxes cannot be levied in the village for the purpose of repairing the bridge in question, since there is no statute under which the repair of this bridge may be regarded as an emergency, in view of the circumstances set forth in your communication. The only relief that I am able to suggest is to be obtained by a reduction of expenditures by the village for other purposes, in order to produce a surplus which might be applied to the repair of the bridge.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1570.

OFFICES INCOMPATIBLE—TOWNSHIP OR RURAL ASSESSOR—MEMBER OF BOARD OF TRUSTEES OF OHIO SOLDIERS' AND SAILORS' ORPHANS' HOME AT XENIA, OHIO.

An assessor of a township or ward is not eligible to act as a member of the board of trustees of the Ohio Soldiers' and Sailors' Orphans' Home at Xenia during his term of office as assessor.

COLUMBUS, OHIO, May 11, 1916.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Your request for an opinion is as follows:

> "Can a citizen of Ohio, otherwise qualified, act as a member of the board of trustees of the Ohio Soldiers' and Sailors' Orphans' Home at Xenia, Ohio, and at the same time act as assessor for the township or ward in which he resides?"

Section 5590 of the General Code, which is section 95 of the Parrett-Whittemore bill, so-called (106 O. L., 270), is as follows:

> "An assessor, member of a county board of revision or an assistant, * * * or other employe of a county board of revision, shall not, during the term of office, or period of public service, * * * hold any other public office of trust or profit, except offices in the state militia or the office of notary public."

In view of the express provisions contained in the section quoted above, it is my opinion that an assessor for the township or ward in which he resides may not act as a member of the board of trustees of the Ohio Soldiers' and Sailors' Orphans' Home at Xenia, Ohio.

In this connection permit me to invite your attention to opinion No. 1415, rendered your office under date of March 24, 1916, which relates to the same subject matter, and deals with the question of a member of the board of revision holding office as a member of the board of trustees of the Ohio Soldiers' and Sailors' Orphans' Home at Xenia, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1571.

CHATTEL MORTGAGE OR LOAN BROKERS—ANY SUCH BROKER WHO OBTAINS STATE LICENSE IS NOT REQUIRED TO PAY ANY ADDITIONAL LICENSE FEE TO A MUNICIPALITY:

Any "chattel mortgage or loan broker" who is required under the provisions of section 6346-1, G. C., et seq., known as the Lloyd act, to obtain a state license, may not be required by a municipality to pay any further or additional license fee.

COLUMBUS, OHIO, May 12, 1916.

HON. HARRY T. HALL, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of April 17th as follows:

> "Some of the municipalities of the state are passing ordinances requiring persons engaged in business under the Lloyd act to take out a municipal license in addition to that required by the statute.
>
> "I doubt very much whether a municipality has the power in the face of the Lloyd act to legislate upon the subject of chattel loans or to exact from licensees of the state an additional fee to do business.
>
> "Will you please hand us your opinion upon this subject so that it may be promulgated before considerable legislation is had by the municipalities upon this subject?"

Before considering the direct question submitted in your foregoing inquiry, it must be determined first, independent of the provisions of the Lloyd act, to what extent the authority of a municipality goes in the matter of licensing the various persons, firms, partnerships, associations and corporations named in section 6346-1 G. C., as amended 106 O. L., 281, which is one of the sections of said act. The only authority that may be exercised by a municipality in this respect is conferred by the provisions of section 3670 G. C., which provides as follows:

> "Section 3670. To regulate and license manufacturers and dealers in explosives, pawnbrokers, chattel mortgage and salary loan brokers, * * *. In the granting of any license a municipal corporation may exact and receive such sums of money as the council shall deem proper and expedient."

It was held in the case of French v. City of Toledo, 81 O. S., 160, that this section authorizing municipal corporations to license and regulate chattel mortgage and salary loan brokers, does not authorize the exaction of a license from persons engaged, otherwise than as brokers, in the business of loaning money upon loans secured by mortgages on personal property.

Commenting upon the scope of the authority conferred in this section, Summers, J., said in this case:

> "The affidavit charges that he engaged in the business of loaning money upon loans secured by a mortgage on personal property without first having obtained a license. The statute does not authorize municipalities to require a license to transact such business, or to regulate it. No general authority is referred to, under which, in the absence of the specific provision, the ordinance may be upheld. And if there was a general welfare clause this special provision would be construed to contain all the power in that respect granted, and to exclude any such power under the general grant."

In view of the interpretation of this section by the court in the foregoing case, it is clear that the power of a municipality to license in the matters involved here is very limited and confined to the specific persons named in said section and may not be extended by implication. In other words, in so far as that authority may be involved in this inquiry, it may be said to extend to and include only "chattel mortgage and salary loan brokers."

The provisions of the Lloyd act, as found in section 6346-1, supra, are much more comprehensive. This section provides:

> "Section 6346-1. It shall be unlawful for any person, firm, partnership, association or corporation, to engage, or continue, in the business of making loans, on plain, endorsed, or guaranteed notes, or due bills, or otherwise, or upon the mortgage or pledge of chattels or personal property of any kind, or of purchasing or making loans on salaries or wage earnings, or of furnishing guarantee or security in connection with any loan or purchase, as aforesaid, at a charge or rate of interest in excess of eight per centum per annum, including all charges, without first having obtained a license so to do from the superintendent of banks and otherwise complying with the provisions of this act."

It is further provided in section 6346-5 G. C., also a part of said act, that:

> "Nothing in this act shall apply to pawn brokers who obtain a municipal license as provided in sections 6337 to 6346, inclusive, of the General Code or to national banks or to state banks or any person, partnership, association or corporation whose business now comes under the supervision of the superintendent of banks."

The state, therefore, in the enactment of this law has included within its provisions a much greater diversity of persons, companies and corporations than is included in its delegation of power to a municipality as expressed in section 3670, supra, and further the state has based its classification upon entirely different grounds from those named in said section. The thing which determines whether a license is required by the state is the rate of interest charged. In the case of a municipality, under section 3670, supra, it is the business only which fixes the status of the parties. A municipality may require a license in the cases specified in said section regardless of the rate of interest charged in the operation of said business. In other words, it may require a license upon the sole ground that the person involved is a chattel mortgage and salary loan broker. While it is very probable that all "chattel mortgage and salary loan brokers" by reason of the rate of interest charged may be brought within the provisions of the state law aforesaid, such is not necessarily the case and it therefore follows that such persons may not be within the operation of said Lloyd act, in which event no question could be raised as to the right of a municipality to require a license and to charge therefor.

I have referred to these matters because in case such persons are required to obtain a state license the Lloyd act expressly prohibits any further demands against them either by the state or a municipality, and I am therefore unable to understand how any question may be raised as to any rights of a municipality to exact any additional license fee from any person within the operation of said state law. It is provided in section 6346-2 G. C., as amended 106 O. L., 282, among other things that:

> "No other or further license fee shall be required from any such licensee by the state or any municipality."

This provision aforesaid furnishes a complete answer to your inquiry as applied to licensees under said state law. As to such persons a municipality is wholly without power to require additional license fees. The effect of said provision is to expressly repeal all delegation of power under section 3670, supra, "to exact and receive such sums of money as the council shall deem proper and expedient" for licenses to chattel mortgage and loan brokers who by the terms of the state law aforesaid are required to obtain a state license. This conclusion is further strengthened by the provisions of the repealing clause of said Lloyd act, being section 3 of section 6346-10, G. C., as amended 106 O. L., 285, which provides as follows:

> "That original sections 6346-1, 6346-2, 6346-3, 6346-4, 6346-5, 6346-6 and 6346-7 of the General Code, inclusive, and all other acts or parts of acts inconsistent with this act be, and the same are hereby repealed."

Some question may be made as to the applicability of this conclusion to municipalities which are operating under home rule charters. As to such municipalities, section 3 of article XVIII of the constitution only delegates such powers to enforce regulations in police, sanitary and other similar matters as are not in conflict with general laws. The license required by the state under said Lloyd act being a police regulation, such municipalities are therefore within the inhibitions of said section 6346-2, quoted above, and under its provisions no distinction may be made in their favor.

I must advise, therefore, in answer to your inquiry, which I understand from you is confined to the question of the right to demand and exact additional fees, that municipalities may not require an additional license fee from any "chattel mortgage or loan broker" who is required under said section 6346-1, G. C., et seq., to obtain a state license.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1572.

COUNTY AND DISTRICT SUPERINTENDENTS OF SCHOOLS—WHO ARE ELIGIBLE UNDER SECTIONS 4744-4, G. C., and 4744-5, G. C., TO SERVE AS SUCH SUPERINTENDENTS.

Section 4744-4, G. C., subdivisions (1), (2) and (3) and section 4744-5, G. C., subdivision (1), 104 O. L., 143, require that county and district superintendents shall have been engaged or employed for the prescribed length of time in the management, control, supervision and superintendence of schools and teachers and their conduct of the same in a similar manner and to a like degree to that required of them in the performance of the duties imposed upon them as such superintendents by law.

COLUMBUS, OHIO, May 12, 1916.

HON. F. B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Yours under date of May 1, 1916, is as follows:

> "According to section 4744-4, only such persons are eligible to serve as county superintendents who may qualify according to one of the five clauses of said section.

"According to section 4744-5, only such persons are eligible to serve as district superintendent who may qualify according to one of the three clauses of section 4744-5.

"In (1) and (3) of section 4744-4, the phrase 'experience as superintendent' is used; in (2) section 4744-4 and (2) section 4744-5 'experience in supervision' and in (1) section 4744-5 the phrase 'experience in school supervision' is used.

"The department of public instruction requests your official opinion as to the definition of the above mentioned phrase, which is intended to apply in the interpretation of the clauses in which they respectively occur."

Section 4744 G. C., 104 O. L., 142, provides for the election of a county superintendent of schools by the county board of education of each county.

Section 4738 G. C., 104 O. L., 140, requires the division of the county into supervision districts by the county board of education and by section 4739, G. C., 104 O. L., 140, it is provided in part that each supervision district shall be under the direction of a district superintendent, to be elected by the presidents of the village and rural boards of education within such district, with certain exceptions not material to the present consideration.

Section 4744-4 and section 4744-5 G. C., 104 O. L., 143, defining the classes of persons eligible to the positions of county superintendents and district superintendents, respectively, read in part as follows:

"*Sec.* 4744-4 *G. C.* Only such persons shall be eligible as county superintendents who shall have:

"(1) Five years' experience as superintendent and a high school life certificate; or

"(2) Six years' experience in teaching, two years' additional experience in supervision, and at least a three-year county high school certificate; or

"(3) Five years' experience as superintendent and a county high school certificate, and also be a graduate from a recognized institution of college or university rank; or * * *

"*Sec.* 4744-5, *G. C.* Only such persons shall be eligible as district superintendents who shall have:

"(1) Three years' experience in school supervision, and at least a county high school certificate; or * * *"

Your inquiry involves a determination of the meaning of three words of every day use in the ordinary affairs of men, viz., experience, superintend and supervise.

"Experience" is defined as:

"The state or fact of having made trial or proof, or of having acquired knowledge, wisdom, skill, etc., by actual trial or observation." Century dictionary.

"Practical acquaintance with any matter by personal observation or trial of it, or by feeling its effects, by living through it, or the like. Webster's dictionary."

That is to say, to have had experience in the sense in which the term "experience" is used in the statutes above quoted in a certain matter or class of work, activity or profession, means that the person in question has been actually engaged in such matter, work, activity or profession. One gains experience in teaching by being engaged in the work, profession or occupation of teaching, or, in other words, by being a teacher.

"Superintend" is defined:

"I. To have charge and direction of, especially of some work or movement regulate the conduct and progress of; be responsible for; manage; supervise;
"II. To have charge; exercise supervision. Standard dictionary."

From the same authority I quote the following:

"Supervise: To have general oversight of; especially as an officer vested with authority; superintend; inspect."

It will thus be seen that the terms "superintend" and "supervise" are, in their general sense, synonymous, and it will be seen from an examination of the act in which the provisions under consideration are found, that these terms are used as synonymous and interchangeably throughout the same, as shown by the provisions thereof, as follows:

"*Sec.* 7706 *G. C.*, 104 *O. L.* 144: A district superintendent shall visit the schools under his charge, direct and assist teachers in the performance of their duties, classify and control the promotion of pupils, and shall spend not less than three-fourths of his working time in actual class room supervision. He shall report to the county superintendent annually, and oftener if required, as to all matters under his supervision. * * *

"*Sec.* 7706-3 *G. C.*, 104 *O. L.* 144: The county superintendent shall hold monthly meetings with the district superintendents and advise with them on matters of school efficiency. He shall visit and inspect the schools under his supervision as often as possible, and with the advice of the district superintendent shall outline a schedule of school visitation for teachers of the county school district.

"*Sec.* 7706-4 *G. C.*, 104 *O. L.* 144: The county superintendent shall have direct supervision over the training of teachers in any training courses which may be given in any county school district and shall personally teach not less than one hundred nor more than two hundred periods in any one year.

"*Sec.* 4728 *G. C.* 104 *O. L.*, 133: Each county district shall be under the *supervision* and *control* of a county board of education. * * *

"*Sec* 4738 *G. C.*, 106 *O. L.*, 396: The county board of education shall divide the county school district * * * into *supervision* districts. * * * The territory of such *supervision district* shall be contiguous and compact. If in the formation of the *supervision districts* consideration shall be given to the number of teachers employed, etc. * * * The county board of education may at their discretion require the county superintendent to personally *supervise* not to exceed forty teachers. * * * This shall supersede the necessity of *district supervision.*

"*Sec.* 4739 *G. C.*, 104 *O. L.*, 133: Each *supervision district* shall be under the direction of a district *superintendent.* Such district superintendent shall be elected, etc."

Section 4740 G. C., 106 O. L., 439, provides for the continuance of a village or rural school district, which maintains a first grade school and employs a superintendent, as a separate district "under the direct *supervision* of the county superintendent. Such district shall continue to be under the direct *supervision* of the county superintendent."

In section 4742 G. C., 104 O. L., 133, there is reference to *supervision* districts in connection with the election of district *superintendent.*

In section 4743 G. C., 104 O. L., 133, the compensation of district *superintendent* is made payable by the state and by the *supervision district.*

From the above it clearly appears that the duty of both the county and district superintendent, at least in part, consists of the supervision and direction of teachers,— that is to say, their superintendence consists of the supervision of teachers and their conduct of the schools in which such teachers are employed,— and, as used in the statutes under consideration, "experience as superintendent" and "experience in supervision" may be taken to mean substantially one and the same thing.

From the foregoing it follows that for a person to have had "experience as superintendent," "experience in supervision" or "experience in school supervision," required by section 4744-4 and section 4744-5 G. C., supra, it is necessary that such person shall have been engaged in the work, business or profession of superintending managing, directing and controlling teachers in the conduct of the schools in which such teachers are employed.

It is manifestly the purpose of the provisions under consideration to require that both the county and district superintendents shall have been, prior to their election or appointment, as such, engaged in that class of work necessary to the proper performance of the duties imposed upon them by statute, as such superintendents, in the control, direction, managenent and supervision of teachers in their conduct of the schools under their charge, for the prescribed length of time. That is to say, it was intended to require that all those persons who shall be chosen to the positions of county and district superintendents shall have been actually engaged for the prescribed period of time in the management, control, supervision and superintendence of schools and teachers and their conduct of the same in a similar manner and to a like degree to that required in the performance of their duties as such superintendents. This, in my opinion, is what was contemplated in the use of the phrases referred to in your inquiry. The test in every case is the class of work in which, rather than the name under which, the person in question has theretofore been employed.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1573.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, VILLAGE OF LOGAN, OHIO.

COLUMBUS, OHIO, May 12, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

> "RE:—Bonds of the village of Logan in the sum of $3,500.00 for the purpose of purchasing a motor fire apparatus, being seven bonds of five hundred dollars each."

I have examined the transcript of the proceedings of council and other officers of the village of Logan, Ohio, in connection with the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and signed by the proper officers will, upon delivery, constitute valid and binding obligations of the village of Logan, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1574.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, VILLAGE OF LOGAN, OHIO.

COLUMBUS, OHIO, May 12, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the village of Logan, Ohio, in the sum of $13,000.00 in anticipation of the collection of special assessments for the improvement of Zanesville Avenue, from the north line of Hunter Street to the corporation line, being twenty bonds of six hundred and fifty dollars each."

I have examined the transcript of the proceedings of council and other officers of the village of Logan, in connection with the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted, and signed by the proper officers, will, upon delivery, constitute valid and binding obligations of the village of Logan, Ohio. Respectfully,

EDWARD C. TURNER,
Attorney-General.

1575.

CASS HIGHWAY LAW—INTERPRETATION OF SECTION 7199 G. C., AS TO GIVING OF NOTICE FOR LETTING OF CONTRACT FOR IMPROVING AND MAINTENANCE OF ROADS OR LETTING OF BRIDGE CONTRACTS—SECTIONS OF GENERAL CODE REPEALED BY IMPLICATION BY REASON OF ENACTMENT OF ABOVE SECTION—IN ADVERTISING SALE OF COUNTY ROAD BONDS, SECTION 6929, G. C., 106 O. L., 603, GOVERNS—SECTIONS 2343, 2344 AND 2345 G. C., ARE NOT REPEALED BY CASS HIGHWAY LAW.

Where county commissioners determine to construct, improve, maintain or repair a road or bridge by contract, the manner of giving notice of the letting of such contract is governed by the provisions of section 7199 *G. C.,* 106 *O. L.,* 616. *Sections* 2352 *and* 2353 *G. C., in so far as they relate to the letting of bridge contracts, and sections* 6252 *and* 6253 *G. C., in so far as they relate to the letting of road and bridge contracts, are repealed by implication by section* 7199 *G. C., to the extent that they are inconsistent therewith.*

A sale of county road bonds under section 6929 *G. C., is to be advertised in the manner specially provided in that section, and the provisions of section* 2294 *G. C., do not apply to the giving of notice of such sale.*

The provisions of sections 2343, 2344 *and* 2345 *G. C., providing for bridge bids on plans proposed by the bidder, are not repealed by the Cass highway law. Where, however, a bridge bid is submitted on a plan proposed by the bidder, the plan must be approved by the county highway superintendent, and where the entire cost of the bridge exceeds* $10,000.00 *the plan must be approved by the state highway commissioner. Such approval should be obtained before a contract is awarded.*

COLUMBUS, OHIO, May 15, 1916.

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

GENTLEMEN:—I have your communication of March 28, 1916, which communication reads as follows:

"We would respectfully request your written opinion upon the following questions:

"Section 7199, G. C. (Cass act 105-106, O. L., page 616), provides that where the estimated cost exceeds $200.00 and is less than $500.00, publication shall be made upon posters for ten days prior to letting; if estimated cost exceeds $500.00 same may be let after advertising *once*, not later than two weeks prior to letting, in *one newspaper*.

"Section 2353 G. C., provides that where estimated cost does not exceed $1,000.00, notice shall be given for fifteen days on a bulletin board. Section 2352 G. C., provides that notice shall be given by publication in two of the principal newspapers of the county for *four* weeks, etc.

"Section 6252 G. C., provides that notices to contractors shall be published in two newspapers of opposite politics, and section 6253, G. C., provides for a German paper.

"Question 1. What section governs in work to be let under said section 7199 (105-106 O. L., page 616)?

"Question 2. In advertising road bonds, which section governs, section 6929 (105-106 O. L., page 603), or section 2294 (105-106 O. L., page 492)?

"Question 3. Do the provisions of the Cass highway act repeal by implication sections 2343, 2344 and 2345, General Code?"

Section 7199 G. C., reads in part as follows:

"If, in the opinion of the county commissioners it is advisable to provide for the improvement, maintenance and repair of any portion of the highways of the county by contract, such contract, if the cost and expense of the improvement, maintenance or repair of any section of highways, or of any bridge or culvert, exceeds two hundred dollars, shall be let by competitive bidding. All such contracts shall be awarded by the county commissioners or township trustees on estimates, plans and specifications to be furnished by the county highway superintendent, to the lowest and best bidder. If the estimated cost of such work is less than five hundred dollars, and more than two hundred dollars, the same may be let at competitive bidding after advertising the same by posters in at least three public places in the county, for ten days prior to the letting, and if the estimated cost of such work is more than five hundred dollars the same shall be let by competitive bidding, after advertisement once not later than two weeks prior to the letting of contracts, in some newspaper published and of general circulation within the county, if there be any such newspapers published in said county, but if there be no such newspapers published in said county then in a newspaper having general circulation in said county. * * *"

This section which is a part of the Cass highway law, 106 O. L., 574, 616, is by direct language therein contained made applicable to the improvement, maintenance or repairs of bridges and culverts, and I am of the opinion that the word "improvement," as used in this sense, is broad enough to include the construction of a new bridge or culvert.

As pointed out by you the section in question allows contracts to be let without competitive bidding where the estimated cost is not more than $200.00. If the estimated cost is more than $200.00 and less than $500.00, the letting must be advertised by posters in at least three public places in the county for ten days prior to such letting. If the estimated cost of the work is more than $500.00, advertisement must be made once, not less than two weeks prior to the letting, in some newspaper published and of general circulation within the county, if there be any such newspaper

published in said county, but if there be no such newspaper published in said county, then in a newspaper having general circulation therein.

Section 2352, G. C., an older statute and which at least prior to the going into effect of the Cass Highway law related to bridges, provides that after the plans, etc., have been approved the county commissioners shall give public notice in two of the principal papers in the county having the largest circulation therein, of the time when, and the place where sealed proposals will be received for performing the labor and furnishing the material necessary to the erection of a bridge or bridge substructure, and that notice shall be published weekly for four consecutive weeks next preceding the day named for making the contract. Under the terms of this section it is permissible to publish the notice in only one paper, if there be only one paper published in the county. This section is modified by the two succeeding sections, being sections 2353 and 2354 of the General Code, which provide that when the estimated cost does not exceed $1,000.00, notice of the letting need be given for only fifteen days by posting on a bulletin board or by writing on a blackboard in a conspicuous place in the county commissioners' or auditor's office, showing the nature of the letting and when and where proposals in writing will be received; and that when the estimated cost does not exceed $200.00, the work may be let at private contract without publication or notice.

Section 6252 G. C., provides among other things that notice to contractors shall be published in two newspapers of opposite politics at the county seat, if there be such newspapers published thereat; and that in counties having cities of eight thousand inhabitants or more, not the county seat of such counties, additional publication of such notice shall be made in two newspapers of opposite politics in such cities.

Section 6253 G. C., provides that in addition to the publications provided in section 6252 G. C., the classes of notices referred to in that section, including notices to contractors, shall be published in a newspaper printed in the German language, if such newspaper be printed and of general circulation among the inhabitants speaking that language in the county within which such advertisements are intended to be made.

Sections 2352, 2353, 2354, 6252 and 6253 of the General Code were all in force at the time of the passage of the Cass highway law. The provisions of said sections, in so far as they relate to the number of publications, the time of publication and the number of newspapers in which publication must be made, are all inconsistent with the provision of section 7199 G. C., to the effect that advertisement shall be made once not less than two weeks prior to the letting of contracts in some newspaper published and of general circulation within the county, if there be any such newspaper published in said county, but if there be no such newspaper published in said county then in a newspaper having general circulation therein.

Repeals by implication are not favored and every effort must be made to make all acts stand, and a later act will not operate as a repeal of an earlier one if the two may by any reasonable construction be reconciled. In the case now under consideration, however, the provisions, in so far as they relate to the time of publication of notice, the number of publications and the number of newspapers in which publication must be made, are in my judgment wholly irreconcilable; and this is also true as to the provision of section 7199 G. C., requiring newspaper publication where the estimated cost is more than $500.00, when compared with the provision of section 2353, G. C., excusing newspaper publication where the estimated cost does not exceed $1,000.00.

It is also worthy of consideration that the repealing section of the Cass highway law, being section 305 thereof, contains the following provision:

> "This act shall supersede all acts and parts of acts not herein expressly repealed, which are inconsistent herewith * * *."

In view of the fact that Section 7199 G. C. is a later enactment than the other sections referred to by you, being Sections 2352, 2353, 6252 and 6253 G. C.; that the act in which section 7199 G. C. is found contains an express provision that such act shall supersede all acts and parts of acts not therein expressly repealed, which are inconsistent therewith, and that certain of the provisions of Section 7199 G. C. as to the publication of notices of the letting of contracts for road and bridge work are inconsistent with certain of the provisions of sections 2352, 2353, 6252 and 6253, G. C., and that this repugnancy is irreconcilable and follows necessarily from the language used in the later section, I am of the opinion that the provisions of the earlier sections, in so far as they are inconsistent with the provisions of section 7199 G. C., must be held to be repealed by implication, and that the law relating to the publication of notice of the letting of contracts for road and bridge work is now to be found in section 7199 G. C. This conclusion is further supported by the fact that section 7199 G. C., is a special statute relating to the letting of contracts for road and bridge work while sections 2352 and 2353 G. C., are general statutes found in the part of the General Code relating to county buildings and bridges, and embracing within their original scope not only bridges, but all classes of county buildings, such as court houses, jails, infirmaries and children's homes, and sections 6252 and 6253, G. C., are also general statutes relating to the publication of numerous classes of notices.

Answering your first question specifically, I advise you that where county commissioners determine to construct, improve, maintain or repair a road or bridge by contract, the manner of giving notice of the letting of such contract is governed by the provisions of section 7199, G. C.

Coming now to consider your second question, section 6929 G. C., referred to by you, and being section 108 of the Cass highway law, relating to the issuance and sale of bonds by county commissioners for road construction and improvement carried forward by the commissioners, contains the following provision:

> "The sale of such bonds shall be advertised once not later than two weeks prior to the date fixed for such sale, in a newspaper published and of general circulation within such county, if there be any such paper published in said county, but if there be no such paper published in said county, then in a newspaper having general circulation in said county."

Section 2294 G. C., 106 O. L., 492, reads as follows:

> "All bonds issued by boards of county commissioners, boards of education, township trustees, or commissioners of free turnpikes, shall be sold to the highest bidder, after being advertised once a week for three consecutive weeks, and on the same day of the week, in a newspaper having general circulation in the county where the bonds are issued, and, if the amount of bonds to be sold exceeds twenty thousand dollars, like publications shall be made in an additional newspaper having general circulation in the state. The advertisement shall state the total amount and denomination of bonds to be sold, how long they are to run, the rate of interest to be paid thereon, whether annually or semi-annually, the law or section of law authorizing the issue, the day, hour and place in the county where they are to be sold."

Amended senate bill No. 125, 106 O. L. 574, in which act section 6929, G. C., is found, was passed May 17, 1915, approved June 2, 1915, and filed in the office of the secretary of state June 5, 1915.

House Bill No. 453, 106 O. L 492, in which act, section 2294, G. C., is found, was passed May 27, 1915, approved June 3, 1915, and filed in the office of the secretary of state June 4, 1915.

It therefore appears that the act containing section 2294, G. C., was passed after the act containing section 6929, G. C., was passed, and the later act was first approved by the governor, but the former act was first filed in the office of the secretary of state. If it were necessary to answer your question by an application of the doctrine of implied repeal, the situation would indeed be most difficult of solution.

In the recent case of State of Ohio v. James H. Lathrop, 93 O. S., page 79, decided November 16, 1915, and reported in the Ohio Law Reporter of the date of May 8, 1916, volume XIV, No. 6, the court was called upon to consider certain conflicting provisions of the agricultural commission act, 103 O. L., 304, 340, and the so-called Duffy narcotic act, 103 O. L., 505. The agricultural commission act and the Duffy narcotic act both assumed to amend section 12672, G. C. The agricultural commission act was passed April 15, 1913, approved May 3, 1913, and filed with the secretary of state May 7, 1913. The other act in question was passed April 17, 1913, approved May 2, 1913, and filed with the Secretary of State May 8, 1913.

Section 12672, G. C., as it appeared in the two acts was substantially different in its provisions, and the court held that in determining which act was to be regarded as the law of the state, in so far as the two acts might be in conflict, the date of the approval of the governor was immaterial, and that the act found in 103 O. L., 505, was to be regarded as the law for two reasons:

First:—because it was passed by the legislature after the agricultural commission act was passed; and

Second:—because it was filed with the Secretary of State after the agricultural commission act was so filed.

It will be seen that this decision sheds no light whatever upon the rule that would have applied to the facts now under consideration, for the reason that the act containing section 6929 is the later act in point of filing, while the act containing section 2294 G. C., is the later in point of passage by the legislature. In other words, while the Supreme Court of Ohio has held that, of two repugnant acts of the general assembly, the later, both in point of passage and of filing, repeals by implication the former, yet the decision of the court in that case sheds no light upon the question arising where one act is the later in point of passage and the other is the later in point of filing. I am of the opinion, however, that your question is not to be determined by invoking the doctrine of implied repeal, but that the two acts may be harmonized and effect given to both upon the well established principle of statutory construction, that where, of two inconsistent acts, one is general in its nature, while the other is special and limited in its application, the special and limited provision is to be given effect as to the class of persons or things embraced within its terms, and is to be regarded as an exception to the general rule. See State ex rel. v. Perrysburg, 14 O. S., 472.

I therefore advise you that section 2294 G. C., 106 O. L. 492, while general and sweeping in its terms, does not apply to a sale of county road bonds under section 6929 G. C., for the reason that the latter section provides a special method of advertising such bonds for sale, and that in the sale of road bonds under the section in question, such sale is to be advertised once not less than two weeks prior to the date fixed therefor, in a newspaper published and of general circulation within the county, if there be any such paper published in said county, but if there be no such paper published in said county, then in a newspaper having general circulation in said county.

Section 2343 G. C., to which you refer in your third question, reads as follows:

> "When it becomes necessary for the commissioners of a county to erect or cause to be erected a public building, or substructure for a bridge, or an addition to or alteration thereof, before entering into any contract therefor or repair thereof or for the supply of any material therefor, they shall cause to be made by a competent architect or civil engineer the following full and

accurate plans, showing all necessary details of the work and materials required, with working plans suitable for the use of mechanics or other builders in the construction thereof, so drawn as to be easily understood; accurate bills, showing the exact amount of the different kinds of material necessary to the construction, to accompany the plans; full and complete specifications of the work to be performed, showing the manner and style required to be done, with such directions as will enable a competent builder to carry them out, and afford to bidders all needful information; a full and accurate estimate of each item of expense, and of the aggregate cost thereof.

"Nothing in this section shall prevent the commissioners from receiving from bidders on iron or reinforced concrete substructures for bridges the necessary plans and specifications therefor."

Section 2344 G. C., reads as follows:

"When it becomes necessary to erect a bridge, the county commissioners shall determine the length and width of the superstructure, whether it shall be single or double track, and advertise for proposals for performing the labor and furnishing the materials necessary to the erection thereof. In their discretion, the commissioners may cause to be prepared plans, descriptions and specifications for such superstructure, which shall be kept on file in the auditor's office for inspection by bidders and persons interested, and invite bids or proposals in accordance therewith."

Section 2345 G. C., reads as follows:

"They shall also invite, receive and consider proposals on any other plan at the option of bidders, and shall require that all proposals on such plan shall be accompanied with plans and specifications showing the number of spans, the length of each, the nature, quality and size of the materials to be used, the strength of the structure when completed, and whether there is any patent on the proposed plan, or on any, and if any, what part thereof."

Section 7199 G. C., being section 156 of the Cass highway law, provides among other things that all contracts for the improvement, maintenance or repair of any bridge to be awarded by the county commissioners shall be awarded on estimates, plans and specifications to be furnished by the county highway superintendent.

I understand that by your third question you mean only to inquire whether the provision of section 7199 G. C., referred to above, repeals by implication the provisions of the above quoted sections of the General Code, allowing the commissioners to receive from bidders on iron or reinforced concrete substructures for bridges the necessary plans and specifications therefor, rendering it discretionary with the commissioners in the erection of a bridge as to whether they will cause to be prepared plans, descriptions and specifications for the superstructure, and further providing that the commissioners shall also invite, receive and consider proposals on any other plan at the option of bidders, provided the other plan be accompanied with plans and specifications showing the number of spans, the length of each, the nature, quality and size of the materials to be used, the strength of the structure when completed, and whether there is any patent on the proposed plan, or on any, and if any, what part thereof.

This question was passed upon by me in opinion No. 832, rendered to Hon. Homer E. Johnson, prosecuting attorney, Marion County, on September 16, 1915, and found at page 1765 of the attorney-general's report for that year, and in conformity with that opinion I advise you that the provisions of sections 2343, 2344 and 2345 of the General Code, referred to above, are not repealed by the Cass high way law, either expressly or by implication.

As pointed out in that opinion, section 7187 G. C., being section 144 of the Cass highway law, requires the county highway superintendent to either prepare or approve all plans, specifications and estimates for the erection, maintenance and repair of bridges and culverts, and this section further provides that no contract for the construction of a bridge, the entire cost of which exceeds $10,000.00, shall be binding upon the county unless the plans are first approved by the state highway commissioner. Where, therefore, a bid for a bridge is submitted on a plan proposed by the bidder, the plan must be approved by the county highway superintendent, and in the event that the entire cost of the bridge exceeds $10,000.00 the plans must be approved by the state highway commissioner. The approval of the county highway superintendent and of the state highway commissioner when required should be obtained before the contract is awarded.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1576.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, VILLAGE OF NEW COMERSTOWN, TUSCARAWAS COUNTY, OHIO.

COLUMBUS, OHIO, May 15, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the village of New Comerstown, Tuscarawas County, Ohio, in the sum of $11,000.00, to pay the village's portion of the cost of laying sanitary sewers in certain streets, being five bonds of two thousand dollars each and one bond of one thousand."

I have examined the transcript of the proceedings of the council and other officer of the village of New Comerstown, Ohio, relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds prepared in accordance with the form submitted, and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of the village of New Comerstown, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1577.

REGULATION OF HOURS OF LABOR—FEMALES EMPLOYED IN LAUNDRY OF CITY HOSPITAL—SECTION 1008, G. C., 103 O. L., 555, CONTROLS—CINCINNATI GENERAL HOSPITAL.

Hours of labor of female employes of the laundry of a city hospital are controlled by section 1008, G. C., as amended, 103 O. L., 555, and an order of the industrial commission issued by the division of workshops, factories and public buildings in reference thereto is legal and binding.

COLUMBUS, OHIO, May 16, 1916.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your request for an opinion as to the operation of section 1008 of the General Code, as amended, 103 O. L., 555, is as follows:

> "The industrial commission of Ohio respectfully requests of you an opinion as to whether or not George H. Hamilton, chief deputy of the division of workshops, factories and public buildings, was within his legal rights when he issued an order under date of March 25, 1916, to A. C. Bachmeyer, M. D., superintendent of the Cincinnati general hospital, Cincinnati, Ohio, as follows:
>
> " 'Do not employ females over 18 years of age more than 10 hours in any one day, or more than 54 hours in any one week; to be complied with at once.'
>
> "For your fuller information with reference to the circumstances of the issuing of this order and the right of chief deputy Hamilton to issue the same, I enclose herewith a letter addressed to this commission by Mr. Hamilton and also a letter addressed to Mr. Hamilton by the assistant city solicitor of the city of Cincinnati."

With your letter you enclose a statement of the facts and circumstances leading up to the inquiry by Mr. George H. Hamilton, chief deputy of the division of workshops, factories and public buildings, which is as follows:

> "Section 1008 of the General Code reads in part as follows:
>
> " 'Females over 18 years of age shall not be employed or permitted or suffered to work in or in connection with any factory, workshop, telephone or telegraph office, millinery, or dressmaking establishment, restaurant or in the distributing or transmission of messages, or in any mercantile establishment located in any city, more than ten hours in any one day, or more than 54 hours in any one week, but meal time shall not be included as a part of the work hours of the week or day, provided, however, that no restrictions as to the hours of labor shall apply to canneries or establishments engaged in preparing for use perishable goods.'
>
> "Under date of March 15, 1916, this department issued Order No. 31 to A. C. Bachmeyer, M. D., superintendent of the Cincinnati General Hospital, Cincinnati, Ohio. This order reads as follows:
>
> " 'Do not employ females over 18 years of age more than ten hours in any one day, or more than 54 hours in any one week; to be complied with at once.'
>
> "This order was intended to cover violations of the above law in the laundry of the Cincinnati General Hospital.

"In issuing this order this department considered the laundry operated by the above institution as coming within the term factory or worshop.

"Mr. Charles Tatgenhorst, Jr., assistant city solicitor for the city of Cincinnati, takes exception to our order, since city hospitals are not specifically mentioned in the above law, and cites section 4035 of the General Code, which reads as follows:

" 'The director of public safety shall have the entire management and control of such hospitals, when completed and ready for use, and subject to the ordinances of council, shall establish such rules for its government, and the admission of persons to its privileges, as he deems expedient. Such director may also employ a superintendent, steward, physicians, nurses, and such other persons as he deems necessary, and fix the compensation, of all persons so employed, which compensation shall be subject to the approval of the council.'

"I attach hereto a copy of Mr. Tatgenhorst's letter, which is self-explanatory, and we would be pleased to have an opinion from the attorney-general covering the points of difference in this case.

"If we are wrong in our contention you can readily see what this means to the thousands of women employed in the various state and city institutions of like nature throughout this state from the standpoint of humanitarianism.'

The term "workshop" is defined in the Century dictionary as follows:

"A shop or building where a workman, mechanic or artificer, or a number of such carry on their work. A place where any work or handicraft is carried on."

The Standard dictionary defines the same term as follows:

"A building or room where any work is carried on, especially a handicraft."

The objection to the order which has been raised by the authorities in Cincinnati is based on two grounds, and is set forth in a letter from the office of the city solicitor as follows:

"Dr. A. C. Bachmeyer, general superintendent of the Cincinnati hospital, has referred to this office for an opinion, your two letters to him under date of March 15th, and 30th, and his reply dated March 27th, regarding the employment of females over 18 years of age in the laundry of the city hospital, who you claim are working more than 54 hours a week.

"I notice in your letter of March 27th, that you refer to section 1008 of the General Code. In looking over this section no reference is made to city hospitals, and hence we are of the opinion that that section of the General Code does not apply.

"We are of the opinion that section 4035 of the General Code giving the director of public safety the entire management and control of the hospital, subject to the ordinances of council, applies. This section also provides that the director, with the approval of council, shall establish such rules for its government as he deems expedient, and gives him the power to employ the necessary help.

"Might I suggest that you refer this matter to the attorney-general for an opinion as to whether or not the general hospitals of the city come under

section 1008 of the General Code? As far as I have looked into the matter I have been unable to find any case directly in point, and do not believe that the attorney-general has as yet given an opinion. We would greatly appreciate a reply from you giving us your ideas on this subject."

Granting that the management of the city hospital, under section 4035 of the General Code, supra, is in the director of public safety, subject to the ordinances of the council, it is to be noted that the hospital is to be managed in accordance with the general laws of the state, and any ordinance which might be adopted in conflict with such laws would be without force or effect. There is nothing in the law which in any manner exempts institutions owned or controlled by a municipality from the operation of the law, and hence, assuming that a laundry in the city hospital is a workshop as understood by the ordinary interpretation of the term, it is my opinion that the order referred to is valid under the powers lodged in your commission.

Coming to the second objection, namely, that no reference is made in section 1008 of the General Code, supra, to "city hospitals," it is to be observed that the order is directed not against the city hospital, as such, but that part of the hospital known as the laundry, which for the purposes of the act in question, by ordinary knowledge, is to be regarded as coming within the terms of "factory or workshop."

In view of the foregoing, it is my opinion, in answer to the second objection, that a laundry operated by a city hospital is covered by the provisions of section 1008 of the General Code, as amended, supra, and is subject to the inspection and orders of your commission, through the department of workshops and factories.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1578.

BOARD OF EDUCATION—BONDS ISSUED UNDER SECTION 4692, G. C., DO NOT BECOME AN "INDEBTEDNESS" OF A SCHOOL DISTRICT UNTIL SAID BONDS ARE ACTUALLY SOLD AND IN PROCESS OF DELIVERY.

An issue of bonds by the board of education of a school district does not become an "indebtedness" of said district within the meaning of the latter part of section 4692 G. C., 106 O. L., 397, until said bonds are actually sold and in the process of delivery.

COLUMBUS, OHIO, May 16, 1916.

HON. EARL K. SOLETHER, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—In your letter under date of April 25th, you request my opinion as follows:

"On February 15, 1916, an election was held in the Grand Rapids rural school district, which school district is under county supervision. This election was held for the purpose of voting on the question of issuing bonds in the sum of $45,000.00 for the purchase of a site, erecting a school house and furnishing the same, and resulted in a majority of the electors being in favor of the bond issue.

"On March 6, 1916, the county board of education transferred a part of the territory of the Grand Rapids rural school district to the Weston village

school district. This transfer not to take effect, however, until the beginning of the tax year for 1916, which was April 9, 1916. The electors residing in the territory transferred by the county board voted at this bond election. On March 9, 1916, the Grand Rapids rural school board passed a resolution providing for the issuance of bonds in the sum of $45,000.00, and these bonds have been advertised to be sold on the 27th of April, 1916.

"The question now presented is, when does the bond issue become a legal binding obligation upon the property in the school district, or, in other words, is the territory transferred by the county board of education from the Grand Rapids rural board of education to the Weston village board of education liable for the bond issue above referred to?"

In response to my request for additional information, I have your letter of May 1st, in which you state that the electors of the Grand Rapids rural school district did not vote on the question of centralization, either before or at the time of the election for the issuing of bonds; that the county board of education, at the time it passed the resolution transferring the territory in question, did not make a distribution of the bonded indebtedness, and that a month later, they passed a resolution making a distribution of the indebtedness, taking into consideration the bonded indebtedness referred to in your letter of April 25th; that the resolution passed by the Grand Rapids rural school district, providing for the issuance of bonds, provided for the levy of taxes on all the property of said school district sufficient to pay the interest on said bonds, and also to provide a sinking fund for their retirement at maturity.

The vote of the qualified electors of the Grand Rapids rural school district, on February 6, 1916, in favor of the bond issue referred to in your inquiry, conferred on the board of education of said district, the authority to issue said bonds. In the exercise of this authority, said board of education, on March 9, 1916, passed its resolution to issue said bonds, and it appears that in said resolution provision was made for the annual levy and collection of a tax on all the taxable property of said district sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity, as required by section 11 of article XII of the constitution.

While it appears that prior to the date of the passage of the aforesaid resolution by the board of education of the Grand Rapids rural school district, to-wit, on March 6, 1916, the board of education of Wood county school district passed its resolution to transfer a part of the territory comprising said rural school district to the Weston village school district; said resolution of said county board of education, by its terms provided that, said transfer of territory should not become effective until April 9, 1916. This provision was of course subject to the right of a majority of the qualified electors, residing in the territory sought to be transferred, to file their written remonstrance against said proposed transfer, conferred upon said electors by section 4692, G. C. (106 O. L. 397), under authority of which the county board of education made said transfer.

Even if the county board of education, in its resolution, had not fixed a definite time at which the transfer of the territory in question should become effective, such transfer could not have become effective until after the expiration of the thirty day period prescribed by said section 4692, G. C., for the reason that the right of the qualified electors to remonstrate against such transfer was not foreclosed until after the expiration of said period.

It appears that on April 6, 1916, the county board of education made an equitable division of the funds of the territory in question, either in the treasury or in the course of collection, and also an equitable division of the indebtedness of said territory, in the exercise of the authority conferred upon said board by provision of the latter part of said section 4692, G. C., and that in making a division of said indebt-

edness said county board of education took into consideration the bond issue referred to in your inquiry.

Assuming that the county board of education complied with all the requirements of said section 4692, G. C., and that no remonstance against such transfer was filed within said thirty day period, the transfer in question, by the terms of the aforesaid resolution, became effective on April 9, 1916. The question arises whether on April 6th, the time when the county board of education made a division of the indebtedness of the territory, the transfer of which became effective on April 9th, the bonds for the issue of which the board of education of the Grand Rapids rural school district passed its resolution on March 9, 1916, and in said resolution provided for the tax levy hereinbefore referred to, but which were not actually sold until April 27, 1916, were an existing indebtedness of said rural school district which the county board of education could take into consideration in making said division. It may be argued that the passing of the resolution of March 9th, by the board of education of said rural school district, determined the liability of said district and created a debt of said district as of that date. While I think that in providing for an annual tax levy on all of the taxable property of said rural school district sufficient to pay the interest on said bonds and to create a sinking fund for their final redemption at maturity, there was thereby incurred a contingent liability of said district which, upon the sale of such bonds on April 27th, became an indebtedness of the territory comprising said rural school district as it existed prior to the transfer in question, I do not think it can be said that prior to the time of the actual issuance of said bonds on April 27, 1916, the contingent liability above referred to was an indebtedness of said rural school district within the meaning of the latter part of section 4692, G. C., supra.

A sum of money which is certainly, and in all events payable, is a debt, without regard to the fact of the time of payment. A sum of money payable on a contingency is not a debt, and does not become a debt until the contingency has happened.

Kouns v. Reninger, 3 O. C. C. (N. S.), 664.
Hynicka v. Insurance Co., 4 O. N. P. (N. S.), 297.

I quote the following from the opinion of the court in the case of Peter v. Parkinson, 83 O. S., 36.

> "In Perry v. Washburn 20 Cal., 318, Field, C. J., in discussing the provision of the act of congress making United States notes 'a legal tender in payment of all debts, public and private,' says: 'Taxes are not debts within the meaning of this provision. A debt is a sum of money due by contract, express or implied. A tax is a charge upon persons or property to raise money for public purposes. It is not founded upon contract; it does not establish the relations of debtor and creditor between the taxpayer and state; it does not draw interest; it is not the subject of attachment; and it is not liable to set-off. It owes its existence to the action of the legislative power, and does not depend for its validity or enforcement upon the individual assent of the taxpayer. It operates *in invitum*. * * *' In Anderson's Dictionay of Law, a tax is defined to be: 'A charge, a pecuniary burden, for the support of government. A charge or burden for which the state may make requisition in a prescribed mode. A tax is not a "debt," that is, an obligation for the payment of money founded upon contract. It is an impost levied for the support of the government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to its enforcement: it operates *in invitum*. The form of procedure to collect, as, an action of debt, does not change its character.' "

In view of the foregoing it seems clear that while the resolution to issue the bonds in question provided for the tax levy required by the above provision of the constitution, said bonds were not an indebtedness of the rural school district referred to in your inquiry, which could properly be taken into consideration by the county board of education on April 9, 1916, the date when said board, acting under authority of the latter part of said section 4692, G. C., passed its resolution making a division of the indebtedness of said district.

Inasmuch, however, as the bonds, when duly issued, became a valid and binding obligation of the territory comprising said district as it existed prior to the transfer of a part of the territory to the adjoining village school district, I am of the opinion that said county board of education may now pass a supplemental resolution making an equitable division of said indebtedness, and in keeping with my former opinion (No. 919 of this department) rendered to you under date of October 13, 1915, I am of the further opinion that that part of said indebtedness which will be apportioned to the transferred territory by the county board of education will become the obligation of the Weston village school district as enlarged by the territory so transferred.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1579.

STATE HIGHWAY COMMISSIONER—APPROVAL OF BONDS OF THREE DEPUTY STATE HIGHWAY COMMISSIONERS.

COLUMBUS, OHIO, May 16, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of May 15, 1916, transmitting to me for approval the bonds of A. H. Hinkle, J. R. Chamberlin and H. M. Sharp, deputy state highway commissioners.

I find these bonds to be properly drawn and executed, and am therefore returning the same with my approval as to form endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1580.

APPROVAL, RESOLUTIONS FOR IMPROVEMENT OF CERTAIN ROADS IN ATHENS, AUGLAIZE, GUERNSEY, SANDUSKY, SUMMIT, WASHINGTON, WAYNE, TRUMBULL, WILLIAMS, LICKING AND KNOX COUNTIES.

COLUMBUS, OHIO, May 16, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of May 8 and May 11, 1916, transmitting to me for examination final resolutions relating to the following roads:

"Athens county—Athens-Logan road, Sec. 'I,' Pet. No. 2061, I. C. H. No. 155.

"Auglaize county—Kenton-Wapakoneta road, Sec. 'D,' Pet. No. 2075, I. C. H. No. 166.

"Auglaize county—Celina-Kossuth road, Sec. 'A,' Pet. No. 2085, I. C. H. No. 174.

"Guernsey county—McConnelsville-Cambridge road, Sec. 'A,' Pet. No. 2403, I. C. H. No. 484.

"Sandusky county—Fremont-Bowling Green road, Sec. 'A,' Pet. No. 2893, I. C. H. No. 278.

"Summit county—Akron-Canton road, Sec. 'Q,' Pet. No. 2966, I. C. H. No. 66, M. M. No. 9.

"Washington county—Marietta-McConnelsville road, Sec. 'L,' Pet. No. 3058, I. C. H. No. 393.

"Washington county—Marietta-McConnelsville road, Sec. 'L,' Pet. No. 3058, I. C. H. No. 393.

"Wayne county—Sec. 'P,' Wooster-Canal Dover road, Pet. No. 3076, I. C. H. No. 414.

"Wayne county—Sec. 'P,' Wooster-Canal Dover road, Pet. No. 3076, I. C. H. No. 414.

"Trumbull county—Sec. 'L,' Chagrin Falls-Greenville road, Pet. No. 2987, I. C. H. No. 35.

"Williams county—Bryan-West Unity and Bryan-Wauseon roads, Sec. 'B,' Pet. Nos. 3087 and 3082, I. C. H. Nos. 307 and 297.

"Williams county—Bryan-West Unity and Bryan-Wauseon roads, Sec. 'B,' Pet. Nos. 3087 and 3082, I. C. H. Nos. 307 and 297.

"Williams county—Bryan-West Unity and Bryan-Wauseon roads, Sec. 'B,' Pet. Nos. 3087 and 3082, I. C. H. Nos. 307 and 297.

"Williams county—Bryan-Edgerton road, Sec. 'A,' Pet. No. 3083, I. C. H. No. 309, M. M. No. 1.

"Williams county—Bryan-Edgerton road, Sec. 'A,' Pet. No. 3083, I. C. H. No. 309, M. M. R. No. I.

"Williams county—Bryan-Edgerton road, Sec. 'A,' Pet. No. 3083, I. C. H. No. 309, M. M. R. No. I.

"Licking county—Newark-Lancaster road, Sec. 'A,' Pet. No. 2578, I. C. H. No. 359.

"Knox county—Columbus-Wooster road, Sec. 'J,' Pet. No. 2548, I. C. H. No. 24, M. M. R. No. X.

"Knox county—Columbus-Wooster road, Sec. 'I,' Pet. No. 2548, I. C. H. No. 24, M. M. R. No. X."

I find these resolutions to be in regular form and am, therefore, returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1581.

APPROVAL, LEASES OF CANAL LANDS IN HOCKING AND ROSS COUNTIES

COLUMBUS, OHIO, May 17, 1916.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—You submitted to me for my approval leases of lands as follows:

"1. Lease to T. R. Cowell, lands in Hocking county, Green township, containing 80 acres.

"2. Lease to D. D. Flanagan, lands in Colerain township, Ross county, containing 1,280 acres.

"3. Lease to D. D. Flanagan, lands in Colerain township, Ross county, containing 160 acres.

"4. Lease to D. D. Flanagan, lands in Colerain township, Ross county, Ohio, containing 160 acres.

"5. Lease to D. D. Flanagan, lands in Colerain township, Ross county, containing 160 acres."

I have examined the above described leases and find the same to be regular and legal in form and am returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1582.

LOOKOUT MOUNTAIN MONUMENT—SOLDIERS' MEMORIAL COMMISSION IS AUTHORIZED TO PAY EXPENSES OF PERSON DESIGNATED TO UNVEIL MONUMENT AND ALSO EXPENSES OF STENOGRAPHER TO MAKE RECORD OF DEDICATORY EXERCISES.

The soldiers' memorial commission to erect Lookout mountain monument is authorized to pay from the appropriation for the erection and completion of the monument the expenses of the person designated to unveil the monument at the dedicatory exercises, as well as the expenses of a stenographer to make a record of said proceedings.

COLUMBUS, OHIO, May 17, 1916.

HON. SAMUEL H. BOLTON, *Chairman Soldiers' Memorial Commission to Erect Lookout Mountain Monument, McComb, Ohio.*

DEAR SIR:—Under date of May 15th you wrote me a letter as follows:

"Will we, as a board of commissioners, be allowed to take with us at the dedication of Lookout mountain monument, our wives, a lady to unveil the monument and a stenographer, at the state's expense, and if we run an excursion (which we expect to do) to take a physician, he to charge nothing except actual expenses for his services?

"I talked the matter over with the auditor of state. He said that it was satisfactory to him if it was with you. I think, under section 2, amended senate bill No. 100, we have that privilege, but wish to have your opinion."

The act creating your commission and appropriating money for the uses thereof is found in 106 O. L., 128.

Section 1 of said act authorizes the governor to appoint five members of such commission "to contract for and to purchase a site on the battlefield of Lookout Mountain, Tennessee, and to have erected thereon a suitable monument or memorial to commemorate the bravery of Ohio troops who participated in that battle. The commission is further given the authority to purchase land, if necessary, and to do all things necessary to carry out the purposes of the act.

Under section 2 it is provided that no member of the commission shall receive any compensation, but each member shall receive his necessary and actual traveling expenses. It is further provided therein that

> "All expenses incurred by the commission in carrying out the purposes of this act shall be paid from the state treasury upon the warrant of the auditor of state upon the presentation of itemized vouchers signed by the chairman and secretary of the commission."

Section 3 of the act carries the appropriation, and is as follows:

> "For the purpose of paying the cost and expenses of erecting such monument or memorial and defraying the expenses of such commission, there is hereby appropriated, out of any funds in the state treasury to the credit of the general revenue fund, not otherwise appropriated, the sum of $20,000.00, $3,000.00 of which shall be available upon the taking effect of this act, and $17,000.00 of which shall be available on and after September 1, 1915."

It is specifically provided that the $20,000,00 appropriated is for the purpose of paying, first, the cost and expenses of erecting such monument or memorial, and secondly, of defraying the expenses of such commission. The commission is not only authorized to contract for and purchase a site and to have erected thereon a monument, but is also given authority "to do all other things necessary to carry out the purposes of this act." It is a well known fact that dedicatory exercises are always conducted at the completion of monuments and memorials; and the legislature, having given the commission the power to do all things necessary to carry out the purposes of the act, must undoubtedly have intended that the appropriation for the purpose of the erection and completion of the monument should also extend to the payment of the proper costs of the dedicatory exercises; that is to say, to pay those costs which are necessarily incident to the exercises themselves, but not to pay the costs of transporting persons to attend the exercises as a part of the audience.

In view of such fact, I am of the opinion that the commissioners would not be authorized, at the state's expense, to take their wives to such exercises nor to take a physician on an excursion train to be run at that time for the purpose of attending the exercises. However, I believe it to be well within the purpose of the appropriation to pay the expenses of the person designated and appointed by the commission to officiate at such exercises in unveiling the monument and also the expenses of a stenographer to attend in order to make a record of the dedicatory exercises.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1583.

CIVIL SERVICE—FEES TO BE CHARGED APPLICANTS FOR EXAMINATIONS—WHEN COLLECTED—NO FEE WHERE THERE IS NO ANNUAL SALARY.

The fees for a civil service examination are not required to be collected at the time applications therefor are filed, but may be collected from applicants when such examination is held.

The incumbents of positions under civil service laws who are paid a certain amount per hour or day when employed, and who are irregularly and not continuously employed, do not receive an annual salary in the sense that term is used in section 486-11, *G. C., as amended,* 106 *O. L.,* 407, *and may not be charged an examination fee.*

Examination fees may be charged an applicant for a non-competitive examination held under section 476-14, *G. C., as amended,* 106 *O. L.,* 409, *and if said applicant thereafter takes a competitive examination, said fees may again be charged.*

A person who has successfully passed a competitive examination for any position may, in the absence of an eligible list therefor, be appointed provisionally to said position without taking the non-competitive examination as provided in section 486-14, *G. C., supra, and he does not thereby lose his standing obtained from the competitive examination. If, however, the civil service commission, in the exercise of its discretion, should require him to take a non-competitive examination, he must pay the fees therefor as prescribed by section* 486-11, *G. C., supra.*

COLUMBUS, OHIO, May 17, 1916.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—I have your letter of May 10, 1916, submitting the following inquiries:

> "1. Is it necessary to collect the required fees from all filing applications at the time the application is filed, or can these fees be collected when the examination is held, and require only those who take the examination to pay such fees?
>
> "2. On what basis must fees be charged where the pay for positions for which the applicants desire to take an examination is at an hourly or daily rate, as fixed by law, ordinance or rule of board creating the positions, and where the employment is not regular?
>
> "(a) When the examination is held for positions, the incumbents of which are paid a stipulated amount per hour, or per day, and who are employed irregularly from time to time, and whose total earnings per annum probably would amount to over $600.00 for the period employed?
>
> "(b) The same as the foregoing, the incumbent receiving the same rate of compensation, but whose total earnings per annum would probably amount to less than $600.00 for the short period of employment each year?
>
> "3. Must fees be collected for non-competitive examinations when a provisional appointment is made in the absence of an eligible list, under section 486-14?
>
> "4. If so, when a competitive examination is held for the same position, is a provisional appointee required to pay another fee should he compete in this competitive examination for the position to which he has been provisionally appointed?
>
> "5. (a) If a person whose name appears upon an incomplete eligible list, and cannot be certified owing to the fact that we have no appropriate lists from which to make certification of three names, is appointed provisionally

to a position for which he has taken a competitive examination, and from the result of which his name was placed on the incomplete eligible list referred to, and is provisionally appointed after said list is established, is such provisional appointee required to take a non-competitive examination, or can he be qualified for provisional appointment from the result of the competitive examination?

"(b) If he can be qualified for the provisional appointment from the result of the competitive examination referred to, does he lose his standing on the incomplete eligible list resulting from the competitive examination referred to?

"(c) If he cannot be qualified from the result of the competitive examination referred to, and is compelled to undergo a non-competitive examination for provisional appointment, is he required to pay an examination fee for said non-competitive examination?"

Your first two inquiries involve a consideration of that part of section 486-11, as amended in 106 O. L., 407, which provides as follows:

"The commission shall require persons applying for admission to any examination provided for by this act or by the rules of the commission prescribed thereunder, to file with the commission within a reasonable time prior to the proposed examination a formal application in which the applicant shall state under oath or affirmation:

"(1) Full name, residence and postoffice address.

"(2) Nationality, age and place and date of birth.

"(3) Health and physical capacity for the public service sought.

"(4) Business and employments and residences for five previous years.

"(5) Such other information as may be reasonably required touching the applicant's merit and fitness for the public service sought; but no inquiry shall be made as to any religious or political opinions or affiliations of the applicant.

"No fee or other assessment shall be charged for examination for positions, provided for by this act or by the rules of the commission prescribed thereunder, where the annual salary does not exceed six hundred dollars; for positions where the annual salary exceeds six hundred dollars and is less than one thousand dollars, an examination fee of fifty cents shall be charged; for positions where the annual salary is one thousand dollars or more, an examination fee of one dollar shall be charged. * * *"

This section plainly provides that the fee charged under its authority shall be charged for *examination* for positions provided for by the civil service act or by the rules of the commission thereunder. It would seem to be a necessary result from these provisions that the fee therein prescribed may be collected when the examination is held and its collection is not required upon the filing of an application for an examination. Therefore, in answer to your first inquiry, I advise that a fee for an examination prescribed by said section is not required to be paid at the time an application is filed, but such fee may be paid by the applicant at the time he takes said examination.

The provisions of said section above quoted further provide that no fee for examination shall be charged where the annual salary does not exceed $600.00. Under this requirement of the statute you ask, first, on what basis must fees be charged when the examination is held for positions, the incumbents of which are paid a certain amount per hour or per day, and who are not employed regularly and whose total earnings per annum would probably amount to over $600.00 for the time actually employed? This

inquiry is prompted by the difficulty in determining whether the term "annual salary" as used in this statute may apply to the compensation paid to the persons designated and described in this inquiry. I am of the opinion that the compensation of such persons, which is based upon service by the hour or day, which service is irregular and not continuous, may not be said to be an annual salary in the sense that term is employed in this statute, but that the term "annual salary," as used in said statute, implies a payment for services based upon a year as the unit of time employed and also upon continuity of service for that period. This conclusion, I think, is in harmony with the decision of the court in the case of Thompson v. Philips, 12 O. S., 617, and Gobrecht v. Cincinnati, 51 O. S., 68. It follows, therefore, that in neither of the cases mentioned in your second inquiry may examination fees be charged.

Your third inquiry refers to non-competitive examinations which are authorized by the provisions of section 486-14, G. C., as amended, 106 O. L., 409, as follows:

> "Whenever there are urgent reasons for filling a vacancy in any position in the classified service and the commission is unable to certify to the appointing officer, upon requisition by the latter, a list of persons eligible for appointment after a competitive examination, the appointing officer may nomiate a person to the commission for non-competitive examination, and if such nominee shall be certified by the commission as qualified after such non-competitive examination, he may be appointed provisionally to fill such vacancy until a selection and appointment can be made after competitive examination."

The non-competitive examination thus prescribed in this section is an examination for a position provided for by the civil service act and therefore is an examination within the meaning of that term as used in section 486-11, supra, for which a fee may be charged if the annual salary for the position involved exceeds $600.00. I am therefore of opinion that when a non-competitive examination is held for a position, the annual salary of which exceeds $600.00, a fee may be charged for such examination, based upon the rates prescribed by section 486-11, supra.

My answer to your fourth question is yes, because a competitive examination is entirely separate and distinct from a non-competitive examination, and the provisions of said section 486-11 make no exceptions in favor of an applicant who takes a competitive examination after he has taken a non-competitive examination.

In answer to subdivision (a) of your fifth question, I desire to say that the person described therein may be appointed provisionally without a non-competitive examination if the civil service commission, required to certify said person, is satisfied with his qualifications, as determined by the competitive examination, and certifies that he is qualified to be appointed as a provisional appointee. In other words, I am of the opinion that the provisions of section 486-14, supra, may not be construed to be mandatory in a case where there is but one person on an eligible list and the appointing authority desires to appoint said person provisionally. It is manifest that such person, having taken and passed a competitive examination, has met the requirements of the civil service law in the matter of demonstrating his merit and fitness for the position, and a non-competitive examination would add nothing to his qualifications, nor would it furnish any additional evidence of his merit and fitness for the position. In such a case I think the statute may fairly be said to be directory on the civil service commission and that said commission may exercise its judgment in determining whether a non-competitive examination should be required.

Answering subdivision (b) of said fifth inquiry, if the person in question receives a provisional appointment, he does not thereby lose his standing on the eligible list, because there is no provision of law which requires him to surrender his rights on the eligible list on account of having accepted a provisional appointment. Therefore he

still retains the position on the eligible list to which his grade in the competitive examination entitles him. That is to say, if at a subsequent competitive examination three other persons should obtain a higher standing than that held by him, he could no longer be considered on the eligible list, but if such subsequent competitive examination produces no more than two candidates whose grades are above the grade held by him, he may still retain his position on the eligible list.

Answering subdivision (c) of your fifth inquiry, if the commission, for any reason, is not willing to accept the competitive examination as proof of the applicant's qualifications, and will not certify him for a provisional appointment upon the strength of such competitive examination, he may be required to take a non-competitive examination, in which event he must pay a fee if the annual salary of the position to which he is appointed exceeds $600.00, as prescribed in section 486-11, supra.

I desire to observe in closing that the term "eligible list", is used in the foregoing opinion in the same sense in which it is employed by you in your inquiries, but that in a proper legal sense there may be no incomplete eligible list. In other words, there is no eligible list of any kind until three persons are duly qualified to be certified thereon, which three persons constitute the only eligible list recognized by the statute.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1584.

APPROVAL, RESOLUTION FOR IMPROVEMENT OF SECTION "A" SKELLY-EMPIRE ROAD IN JEFFERSON COUNTY.

COLUMBUS, OHIO, May 17, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of May 16, 1916, transmitting to me for examination final resolution relating to the following road:

> "Jefferson County—Sec. 'A' Skelly-Empire road, Pet. No. 2542, I. C. H. No. 378."

I find this resolution to be in regular form and am, therefore, returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1585.

DISAPPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, MIAMI COUNTY, OHIO, FOR CONSTRUCTION OF GRAND STAND AT MIAMI COUNTY FAIR GROUNDS—TAX DUPLICATE INSUFFICIENT TO MAKE REQUIRED LEVY.

COLUMBUS, OHIO, May 18, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

> "RE:—Bonds of Miami County, Ohio, for the construction of a grand stand at the Miami County fair grounds in the aggregate amount of $18,000.00, being 36 bonds of $500.00 each."

I have examined the transcript of the proceedings of the county commissioners and other officers of Miami county in connection with the issuance of the above bonds, and I am unable to approve the same because the amount of the bond issue, together with the interest which will accrue upon said bonds prior to their due date, is in excess of the amount which can be raised by tax levy authorized under section 9887-1 of the General Code (106 O. L., 484). The pertinent part of this section is as follows:

> "* * * The county commissioners may levy a tax upon all the taxable property of a county for the improving of such grounds *not to exceed one-twentieth of one mill in any one year and not for a period of more than five years.* and in anticipation of the collection of this tax the commissioners may issue and sell the bonds of the county bearing interest not to exceed six per cent. per annum, payable semi-annually; * * *"

The tax duplicate of Miami county for the year 1914, according to the transcript, shows the assessed value of all property subject to taxation as $72,600,000.00; the 1915 duplicate is $79,190,300.00. The tax levy authorized under the language of the above section of the General Code based upon the duplicate for said year will be insufficient to pay the bonds and interest as they fall due.

I am of the opinion that the county commissioners of Miami county, Ohio, are without authority to issue bonds to the amount of $18,000.00 under section 9887-1 of the General Code, and advise you not to accept the same.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1586.

APPROVAL, CERTAIN LEASES OF CANAL LANDS.

COLUMBUS, OHIO, May 18, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of May 8, 1916, transmitting to me for examination the following leases of canal lands:

	"Valuation.
"The Baltimore & Ohio R. R. Co., Cleveland, Ohio	$6,666 66
"The Baltimore & Ohio R. R. Co., Cleveland, Ohio	16,666 66
"The Columbus Railway Power & Light Co., Columbus, Ohio	1,666 66
"C. H. Gale, Cleveland, Ohio	3,500 00
"John Spurgeon, Kirkersville, Ohio	200 00
"Mrs. Louisa C. Hartman, Logan, Ohio	400 00
"T. J. Reilly, Akron, Ohio	2,050 00
"F. O. Davey, Logan, Ohio	600 00
"J. W. Jones, Logan, Ohio	100 00
"B. F. Sims, Sugar Grove, Ohio	416 66
"T. R. Cowell, Parkersburgh, W. Va., ⅛ Royalty and $200.00 advance payment."	

I find these leases to be in regular form and am therefore returning same with my approval endorsed upon triplicate copies thereof.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1587.

LOOKOUT MOUNTAIN MONUMENT—APPROVAL OF CONTRACT AND BOND.

COLUMBUS, OHIO, May 18, 1916.

HON. SAMUEL H. BOLTON, *Chairman Soldiers Memorial Commission to Erect Lookout Mountain Monument, McComb, Ohio.*

DEAR SIR:—I am in receipt of the four copies of the contract entered into by your commission with The Bunnell Company, of Cleveland, Ohio, for the erection of a monument on Lookout Mountain, Tennessee, and the approach thereto, and the bond given for the faithful performance thereof.

I have carefully examined the contract and bond and hereby approve the same.

I have this day filed in the office of the auditor of state one copy of the contract and the bond, have sent one copy of the contract to the contractor, The Bunnell Company, and herewith hand you two copies thereof.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1588.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY NEW ANTIOCH RURAL SCHOOL DISTRICT, CLINTON COUNTY, OHIO.

COLUMBUS, OHIO, May 18, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of New Antioch rural school district, Clinton county, Ohio, in the sum of $20,000.00, to erect and furnish a school house, being forty bonds of five hundred dollars each."

I have examined the transcript of the proceedings of the board of education and other officers of the New Antoich rural school district relative to the issuance of the above bonds; also the bond and coupon form attached, and I find the same regular and in comformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of the new Antioch rural school district.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1589.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY NORWALK CITY SCHOOL DISTRICT, HURON COUNTY, OHIO.

COLUMBUS, OHIO, May 18, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Norwalk City school district, Huron county, Ohio, in the amount of $8,500.00 for the purpose of erecting an addition of two rooms to Pleasant street school building, and for the equipment of the same, being seventeen bonds of five hundred dollars each."

I have examined the transcript of the proceedings of the board of education and other officers of the Norwalk City school district relative to the above bond issue; also the copy of bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of Norwalk City school district. Respectfully,

EDWARD C. TURNER,
Attorney-General.

1590.

APPROVAL, RESOLUTIONS FOR IMPROVEMENT OF ROADS IN GEAUGA AND DELAWARE COUNTIES.

COLUMBUS, OHIO, May 19, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communications of May 17, 1916, transmitting to me for examination final resolutions relating to the following roads:

"Geauga County—Sec. 'J' Chagrin Falls-Greenville road, Pet. No. 2377, I. C. H. No. 35.

"Delaware County—Sec. 'J' Delaware-Mt. Gilead road, Pet. No. 2300, I. C. H. No. 332.

"Delaware County—Sec. 'J' Delaware-Mt. Gilead road, Pet. No. 2300, I. C. H. No. 332.

"Delaware County—Sec. 'I' Columbus-Sandusky road, Pet. No. 2294-A, I. C. H. No. 4, M. M. VIII.

"Delaware County—Sec. 'I' Columbus-Sandusky road, Pet. No. 2294-A, I. C. H. No. 4, M. M. VIII.

"Delaware County—Sec. 'F' Columbus-Sandusky road, Pet. No. 2294-A, I. C. H. No. 4.

"Delaware County—Sec. 'F' Columbus-Sandusky road, Pet. No. 2294-A, I. C. H. No. 4."

I find these resolutions to be in regular form and am, therefore, returning the same with my approval endorsed thereon. Respectfully,

EDWARD C. TURNER,
Attorney-General.

1591.

MUNICIPAL CORPORATION—WITHOUT AUTHORITY TO DONATE, TO BOARD OF EDUCATION OF VILLAGE OR CITY SCHOOL DISTRICT, SITE UPON WHICH TO ERECT A SCHOOL BUILDING.

A village or city is without authority in law to donate, to the board of education of the village or city school district, a site upon which to erect a school building.

COLUMBUS, OHIO, May 19, 1915.

HON. ADDISON P. MINSHALL, *Prosecuting Attorney, Chillicothe, Ohio.*

DEAR SIR:—Your letter of April 28, 1916, is as follows:

> "I am desirous of having your opinion on the following proposition:
> "The Kingston village school district of Ross county, Ohio, is not co-extensive with the corporation boundaries of Kingston village, the school district comprising much more territory than the village. At the recent general election the electors of the Kingston village school district voted in favor of the issuance of bonds in the sum of $30,000.00 for the purpose of purchasing a site and erecting a building thereon. The village owns a suitable site and has offered to donate tha site to the school district for the purpose of erecting a school building thereon. Can this be legally done?"

A municipal corporation has special power to sell or lease real estate belonging to the corporation, when such property is not needed for any municipal purpose, under authority of and in the manner provided by section 3698 et seq., of the General Code.

The general grant of power to a municipal corporation to dispose of property to which it has the title in fee simple is found in section 3631, G. C., which section vests in the municipal corporation the power.

> "To hold and improve public grounds, parks, park entrances, free recreation centers and boulevards, and to protect and preserve them. To acquire by purchase, lease, or lease with privilege of purchase, gift, devise, condemnation or otherwise and to hold real estate or any interest therein and other property for the use of the corporation and to sell or lease it, or to donate the same by deed in fee sinple to the state of Ohio as a site for the erection of an armory."

While the latter part of section 3631, G. C., as above quoted, provides that a municipal corporation may donate real estate held by it for corporate purposes "by deed in fee simple to the state of Ohio as a site for the erection of an armory," I have already held that this provision of said section is unconstitutional in view of the decisions of the supreme court in the cases of Wasson v. Commissioners, 49 O. S., 622, and Hubbard v. Fitzsimmons, 57 O. S., 436 (See opinion No. 1002 of this department rendered to the Ohio state armory board under date of November 9, 1915, as found in the annual report of the attorney general for said year at page 2183 of said report.)

While it was held in the case of Newton v. Commissioners of Mahoning county, 26 O. S., 618, that a deed by a municipal corporation for the conveyance of property passes a legal title to the purchaser although the consideration expressed is far below the value of the property or merely nominal, the court did not attempt to say that under

the statutes as then in force the municipal corporation had power to donate to the commissioners of the county land held by it for corporate purposes.

In the case of Kerlin Bros. Company v. City of Toledo, 20 C. C. 603, the court held in the seventh branch of the syllabus:

> "Where the sale of property is to be made by a municipality, certain formalities required by statute must be strictly and carefully observed in order to insure the validity of the transaction;"

and in the eighteenth branch of the syllabus that

> "To authorize a court to interfere upon the mere ground that the price is not sufficient, the price should be so much less than would probably be obtained by again offering the property, that it might be said by all men of fair judgment that the acceptance of the bid was a reckless and improvident act."

From your statement of facts it appears that the territory within the corporate limits of the village of Kingston is only a part of the territory comprising the Kingston village school district, and it must be borne in mind that said village and said village school district are independent taxing districts.

I call your attention to the provisions of section 7624-1, G. C., taken in connection with the provisions of section 7624, G. C., relating to the power of a board of education to appropriate land for school purposes where said board is unable to agree with the owner upon the sale and purchase thereof, as said sections are found in 103 O. L., 466. Said sections provide as follows:

> "Sec. 7624. When it is necessary to procure or enlarge a school site, or to purchase real estate to be used for agricultural purposes, athletic field or play ground for children, and the board of education and the owner of the property needed for such purposes are unable to agree upon the sale and purchase thereof, the board shall make an accurate plat and description of the parcel of land which it desires for such purpose, and file them with the probate judge, or court of insolvency, of the proper county. Thereupon the same proceedings of appropriation shall be had which are provided for the appropriation of private property by municipal corporations.
>
> "Sec. 7624-1. A municipal corporation may by ordinance duly passed, authorize the transfer and conveyance by deed, of any real property owned by it and not needed for municipal purposes, to the board of education of any such municipality, to be used by said board of education as an athletic field, a play ground for children or for school sites, upon such terms and conditions as are agreed to between the municipal corporation and the board of education, and when such property is so conveyed, the same shall be under the control and supervision of such board of education."

It will be observed, however, that under the provisions of section 7624 G. C. as above quoted, a site for the purposes therein mentioned may only be acquired upon a valuable consideration. As I view it, the effect of the provisions of the supplemental section is to give to a village or city the authority to transfer and convey to the board of education of the village or city school district, in the manner provided in said section, and upon a valuable consideration, the title to any real property owned by such village or city and not needed for municipal purposes, to be used by such board of education for the purposes mentioned in said section, and I am of the opin-

ion that said village or city has no authority under said section to donate said site to said board of education.

In view of the foregoing, I am of the opinion that your question must be answered in the negative. It is evident, however, that there is ample authority in law for the sale of the site referred to in your inquiry, by the village of Kingston, and for the purchase of the same by the board of education of the village school district.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1592.

SCHOOLS—A TEACHER EMPLOYED BY ANY BOARD OF EDUCATION MAY NOT BE EMPLOYED BY PUBLISHERS OF TEXT BOOKS, WHICH ARE LISTED WITH SUPERINTENDENT OF PUBLIC INSTRUCTION, TO DEMONSTRATE METHODS OF SUCH TEXT BOOKS IN SUMMER NORMAL SCHOOLS—SEE SECTION 7718 G. C., 106 O. L., 447.

A teacher, superintendent, supervisor or principal employed by any board of education in the state, who is employed by a publisher of books listed with the superintendent of public instruction, according to the provisions of section 7712 G. C., as a demonstator of a method reader of such publisher for sale for use in the public schools of this state, in a summer normal school within the state, is acting indirectly as a sales agent for such publisher within the terms of section 7718 G. C., 106 O. L., 447, and is subject to the provisions thereof.

COLUMBUS, OHIO, May 19, 1916.

HON. FRANK B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Your inquiry under date of May 6, 1916, in response to my request for further information on yours of May 4, 1916, is as follows:

> "We respectfully request your opinion on the following question:
> "A teacher has been employed by a publishing company as a demonstrator of a method reader at one of the summer normal schools. Her work will consist of teaching according to the methods of the texts published by the company. These text books are listed with the superintendent of public instruction according to the provisions of section 7712 G. C., and are for sale in the state of Ohio.
> "The work of this teacher will be observed by the students of the summer school. The publishing company will pay her for the work. She will use as the basis of her instruction the text published by the company which employs her.
> "Question. Will such work as that described above make a teacher liable to a penalty prescribed by section 7718 Ohio Laws?"

Section 7718 G. C., 106 O. L., 447, to which it is assumed you refer, provides as follows:

> "A superintendent, supervisor, principal or teacher employed by any board of education in the state shall not act as sales agent, either directly or indirectly, for any person, firm or corporation whose school text books are filed with the superintendent of public instruction as provided by law, or

for school apparatus or equipment of any kind for use in the public schools of the state. A violation of this provision shall work a forfeiture of their certificates to teach in the public schools of Ohio."

The manifest purpose of the enactment of the provisions of the above mentioned section was to prohibit superintendents, supervisors and teachers employed by boards of education throughout the state from assuming such relationship to any publisher or publishers of any books offered for sale in this state, or any person having for sale in this state any school apparatus or equipment as to create in any such teacher, superintendent or supervisor a direct or indirect pecuniary interest in inducing boards of education to adopt or purchase books, apparatus or equipment from any particular firm or corporation, and further to bar all teachers, superintendents and supervisors, while so employed by a board of education, from engaging in any activity, the direct purpose or ultimate end of which is the sale of the books, apparatus or equipment offered by any person, firm or corporation for the use of the public schools of the state, and to effect a like inhibition against persons, firms or corporations inducing teachers, superintendents or supervisors, either directly or indirectly, through such employment, to use their influence with boards of education in securing the sale and adoption of the books, apparatus and equipment of the particular employer of such teacher, supervisor or superintendent, and to effect the full accomplishment of this purpose it is provided that such teacher, superintendent or supervisor shall not act, either directly or indirectly, as a sales agent for any such person, firm or corporation.

A sales agent is one the purpose of whose employment is to effect sales of the property, goods, wares or merchandise of the principal or employer. That is, to act directly as a sales agent would necessarily involve the bringing about by direct effort the perfecting of contracts of sale as between the principal and a third person or persons. To act indirectly as a sales agent is a comprehensive expression indeed. Many schemes and devices are adopted by enterprising business men to both directly and indirectly induce the purchase of their wares. Advertising methods of inconceivable variety are prosecuted on every hand, the sole purpose of which is the ultimate sale of goods of some class which constitute their subject matter. The dissemination or promulgation of any class of such advertising matter, the sole purpose of which is to induce the purchase of goods by one in the employ of another having such goods for sale, would make such one at least an indirect sales agent. The promulgation of information in regard to any article of merchandise by those whose business it is to make sale of the same, by whatever method or in whatever form, is actuated by the sole purpose to induce such sales and is therefore only a method of advertisement, and, as stated above, it must be conceded, I take it, that a person engaged in the advertisement of the sale of an article is at least indirectly a sales agent of that article. With these general observations we may examine the facts before us. It may be first pointed out that the employer in question is the publisher of books which are listed with the superintendent of public instruction, for sale for use in all the public schools of the state.

This fact suggests the question: Is it at all probable that any publisher of books which may not be permitted to be sold in this state will engage in an expensive scheme of demonstrating the merits of those books within the state? The answer to this question is conclusive of the sole purpose of such demonstration.

Some significance may also be attached to the further fact that the demonstrations in question are to be given in summer normal schools. At such normal schools are collected great numbers of teachers and students who are preparing to engage in that profession. Now it requires no far stretch of imagination to fathom the design of those prosecuting this palpable scheme of advertising. If the teachers before whom these demonstrations are made are favorably impressed with the method of such

readers and text books, it follows not only as a natural but in the very nature of things a necessary result, in view of the relationship of those teachers both personal and otherwise to the boards of education throughout the state, that these teachers will render invaluable services, and I do not say improperly so in any sense whatever, in securing the adoption and purchase of those books in those schools in which they shall be employed to teach and this is palpably the end sought by an adroit and effective scheme of advertising—an agency designed to effect the sale of the books, the methods of which are sought to be demonstrated.

It therefore follows, and I am of the opinion, in answer to your inquiry, that a teacher who is employed by any board of education may not be employed by the publishers of text books which are listed with the superintendent of public instruction for sale in this state, to demonstrate the methods of such text books in summer normal schools within this state without being subject to the provisions of section 7718, G. C., supra.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1593.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, PRAIRIE TOWNSHIP RURAL SCHOOL DISTRICT, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, May 19, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Prairie township rural school district, Franklin county, Ohio, in the amount of $42,000.00, for the purpose of purchasing sites for and the erection and equipment of three elementary grade school buildings, being 42 bonds of one thousand dollars each."

I have examined the transcript of the proceedings of the board of education and other officers of Prairie township rural school district relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of said school district.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1594.

SHERIFFS—MAY CHARGE POUNDAGE ON *ALL* MONEYS ACTUALLY MADE AND PAID TO THEM ON SALE OF CHATTEL PROPERTY ON EXECUTION—SEE SECTION 2845, G. C.

Under the provisions of section 2845, G. C., sheriffs may charge poundage on all moneys actually made and paid to them on the sale of chattel property on execution.

COLUMBUS, OHIO, May 19, 1916.

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

GENTLEMEN:—I have your letter of May 13, 1916, submitting the following inquiry:

"Do the poundage fees of the sheriff, as provided in section 2845 G. C., apply to sales of chattel property, or are they limited to sales of real estate?"

The provisions of section 2845 G. C., pertinent to your inquiry, are as follows:

"* * * poundage on all moneys actually made and paid to the sheriff on execution, decree or sale of real estate, on the first ten thousand dollars, one per centum; on all sums over ten thousand dollars, one-half of one per centum; but when such real estate is bid off and purchased by a party entitled to a part of the proceeds, the sheriff shall not be entitled to any poundage except on the amount over and above the claim of such party, except in writs of sale in partition he shall receive one per cent. on the first two thousand dollars, and one-third of one per cent. on all above that amount coming into his hands."

The foregoing provisions of said section have not been materially changed except as to the rate allowed since their original enactment in 1837, as found in Vol. XXXV, Ohio Laws, page 54. It was provided in said original act as follows:

"Poundage on all money actually made and paid to the sheriff, on execution, decree, or sale of real estate, except on writs of partition for the sale of real estate, two per cent. on the first thousand dollars, and one per cent. on all sums over one thousand dollars: Provided, That where such real estate shall be bid off and purchased by the plaintiff in execution, or the complainant in chancery, the sheriff shall not be entitled to any poundage, except on the amount paid over and above the claim of the plaintiff or complainant."

The exact question presented by you appears never to have been presented in any case to any of the courts of this state, although our courts have frequently been called upon to determine the rights of sheriffs to poundage in the matter of real estate sales. It would seem from earlier cases that poundage on money paid to the sheriff on execution applied to the sale of personal property as well as real estate.

Perhaps the nearest approach to an adjudication of this question is to be found in the case of Farrin v. Creager, reported in the 3rd Weekly Law Gazette, page 267, and decided by Judge Gholson, of the superior court of Cincinnati, from whose opinion I quote as follows:

"In this case, the plaintiff held a mortgage executed by the defendant, Creager, upon a leasehold estate, having connected with it, a right or privilege to purchase the fee. The lease was only for five years, and the inference is, though not stated in the pleading, that the privilege to purchase only continued with the lease. The plaintiff brought his action to realize upon his security. He obtained an order for the sale of the lease, with the right to purchase, it being the object to assign both to the purchaser, and such a course having obviously been within the intention and contemplation of the parties in giving and taking the security.

"A sale is made by the sheriff under the order of the court, and the plaintiff is himself the purchaser. The only question now made is as to the fees or poundage of the sheriff. He claims that there was a sale merely of personal property, and that the law governing sales of real estate, where the plaintiff is the purchaser, does not apply. I do not think so, but, on the contrary, that this case, if not within the letter strictly, is within the spirit and intent of the statute, and that its provisions must apply and govern."

It appears to be conceded by the parties in the foregoing case that the provision, of the statute applied to the sale of personal property. Considering this question however, upon the language of the statute itself, I am unable to perceive why its provisions do not include personal property as well as real estate. It plainly provides that all moneys paid to the sheriff on execution shall be subject to the charge of poundage. No execution may issue that is not directed first against the personal property of the debtor. It is only when there is no personal property subject to levy that an execution may be levied upon real estate. This being so, and the statute plainly providing that money received on execution shall be subject to the charge, I am unable to see upon what ground it may be held to exclude an execution levied upon personal property and the money received by the sheriff from the sale thereof.

I am therefore of the opinion that the provisions of section 2845 G. C., hereinbefore quoted, include money received from sales on execution levied upon personal property, and when such money is actually made and paid to the sheriff from the sale of said property, he is entitled to charge the fees therein prescribed as poundage.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1595.

FEES OF SHERIFF—PERSON SENTENCED BY COMMANDING OFFICER OF MILITIA TO COUNTY JAIL—FEES FOR COMMITTING AND DISCHARGING DEFENDENT IN BASTARDY PROCEEDING—FEES IN CONTEMPT PROCEEDINGS—NO JAIL FEES WHERE WITNESSES ARE COMMITTED BY CORONER.

Fees of the sheriff, including the board of a military prisoner committed by order of a commanding officer of the Ohio National Guard, under authority of section 5251 *G. C., as amended 106 O. L., 472, must be paid by the officer ordering such commitment.*

The fees for committing and discharging a defendant in a bastardy proceeding follow the costs of the case and under no circumstances may become a claim against the county under section 2846 *G. C.*

When a witness is committed to the county jail in a contempt proceeding or a proceeding other than a crimnal case, the payment of the fee for committing and discharging said prisoner will depend upon the order of the court as made in each particular case. When such fees, however, are received by the sheriff, they must be turned into his fee fund in every case.

There is no provision of law covering the payment of jail fees in cases where wttnesses are committed by a corner under the authority of section 2856 *G. C.*

COLUMBUS, OHIO, May 19, 1916.

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

GENTLEMEN:—I have your letter of March 30, 1916, submitting the following inquiries:

> "First. May a sheriff tax fees for committing and discharging a military prisoner committed by an officer of the Ohio National Guard under the terms of section 5251 G. C., as amended in 106 O. L., page 472? If so, who is responsible for the payment of the same? May he charge the county under the terms of sections 2850 and 2997 G. C., for the board of such individual?

"Second. How is the sheriff to get his fees for committing and discharging of a prisoner committed by a magistrate, in bastardy proceedings, in default of bail? Is the county liable under the terms of section 2846 G. C.?

"Third. When a witness is committed to jail upon orders of the common pleas court, who pays the fee for committing and discharging, and to whom does it belong, the sheriff individually, or to the sheriff's fee fund?

"Fourth. Who pays the committing and discharging fees of witnesses committed to jail by the county coroner under the terms of section 2856, G. C.? May the sheriff in any event claim such fees for his own use under the terms of section 2846 G. C.?"

Section 5251 G. C., as amended 106 O. L., 472, to which reference is made in your first inquiry, provides as follows:

"Section 5251. The commanding officer of a regiment, battalion, company, troop or battery, may arrest any member of his command for the violation of an order, regulation or law for the government of the national guard, and may authorize in writing, any sheriff, constable or police officer of the county, city, village or township where such violation occurs, to so arrest such delinquent member. Such commanding officer may turn over, to any sheriff, constable or police officer, a member of his command so arrested by him. Such sheriff, constable or police officer shall hold such man, so arrested, in his custody, not exceeding five days, until he has been tried by the proper court-martial, or has been discharged by proper authority."

The matters for which an arrest or commitment may be made on the written order of a commanding officer under this section are limited to violations of an order, regulation or law for the government of the national guard. The effect of this statute is to make the sheriff subject to the orders of such cammanding officer in matters which are ultimately to be determined by a military court and wholly within its jurisdiction. There is no statute law by which a county may be held for any expense involved in the trial of persons charged with offenses against the military law, nor is there any statutory provision of law by which a commanding officer in matters connected with the prosecution of such military violations may in any manner bind a county for any expense involved therein. It was held in the case of McGorray v. Murphy, 80 O. S., 413, that under arrangements with a sheriff an offender against military law might be delivered to said sheriff, and held by him in the county jail. The precise question involved here was considered by my predecessor, Hon. T. S. Hogan, in an opinion under date of January 30, 1913, and reported at page 491 of Vol. I of the Attorney-General's reports for that year. Section 5251, supra, however, at that time did not include a sheriff in the list of officers to whom such commitment might be made or by whom such an arrest could be made. A sheriff was added to such list of officers by the recent amendment quoted above. However, I am of the opinion that the fact that said section now expressly empowers a commanding officer to authorize in writing a sheriff either to make the arrest or to hold the accused, does not in any manner change the effect of the statute upon the question of the expense involved in such transaction. It was held in the opinion aforesaid that county commissioners were not required to pay for the board and maintenance of an offender so held by the county sheriff, and I am of the opinion that this conclusion still obtains under the amended statute and that the commanding officer who orders the arrest and commitment must provide for all necessary expense connected therewith. This would include not only the board of the individual arrested, but would include all other costs which may legally attach to such commitment.

You inquire also whether a sheriff may tax what is known as jail fees in the case of a military prisoner committed to the county jail under this section. The provision of law which authorizes a sheriff to charge for receiving and discharging a prisoner is found in section 2845, G. C., and provides as follows:

> "Jail fees for receiving, discharging or surrendering each prisoner, to be charged but once in each case, fifty cents."

A prisoner may be said to be one who is lawfully deprived of his liberty. I am of the opinion that a person committed to a county jail under the provisions of section 5251, aforesaid, is a prisoner within the meaning of that term as used in said section 2845, aforesaid, and that the sheriff therefore may charge for receiving and discharging such prisoner fifty cents as therein specified, such charge to be made against the officer ordering such commitment, and to be collected with all other legal expense including board, from the commanding officer ordering such commitment.

In reply to your second question, all costs in a bastardy proceeding including the cost of receiving and discharging the defendant from a county jail follow the case, and, if the defendant is finally found guilty under the complaint, must be adjudged against him. If such costs including said fees are paid by said defendant, they must be paid into the sheriff's fee fund, and if not paid by the defendant may not be collected from the county under the provisions of section 2846, G. C., for the reason that said section includes only fees in criminal cases and misdemeanors and a bastardy case is not within either class.

Your third inquiry must depend upon the particular facts and circumstances of each case and the order of the common pleas court making said commitment. It may be said, however, as a general proposition, which would include the case of a witness committed to jail in a contempt proceeding, that all fees received by the sheriff are paid to him by virtue of his office and must be turned by him into his fee fund. The only circumstances under which a sheriff may claim any fees as an individual are those included in the allowance made by the county commissioners under the provisions of section 2846, G. C.

The provisions of section 2856, G. C., which are pertinent to the matters submitted in your last inquiry, are as follows:

> "If he deems it necessary, he shall cause such witnesses to enter into recognizance, in such sum as may be proper, for their appearance at the succeeding term of the court of common pleas of the county to give testimony concerning the matter. The coroner may require any and all such witnesses to give security for their attendance, and if they or any of them neglect to comply with his requirements, he shall commit such person to the prison of the county, until discharged by due course of law."

This statute empowers a coroner to commit to the county jail any witness who fails when so required to give security for his attendance at the succeeding term of court. This order by the coroner is not made in any criminal case or prosecution then pending, but it is made in anticipation of a future prosecution which will result from an investigation by the court before which said witness is required to appear at the succeeding term thereof. It follows that the costs involved in the order of the coroner may not be taxed as costs in any criminal case because, as before observed no criminal case is then pending. There is no other statutory provision under which such costs may be taxed either against the witness or the state or county. It follows, therefore, that such costs may not be recovered either from the county or from the witness.

Answering your last inquiry specifically I must advise that there is no statutory law providing for the payment of jail fees in cases where witnesses are committed by a coroner, under authority of section 2856, G. C., and that such fees may not be allowed and paid to the sheriff under section 2846, supra, because they are not made in any criminal case as required by the provisions of said last named section.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1596.

APPROVAL, LEASE OF CANAL LANDS TO THE PHARIS TIRE AND RUBBER COMPANY, NEWARK, OHIO.

COLUMBUS, OHIO, May 19, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of May 18, 1916, transmitting to me for examination a lease of certain canal lands to The Pharis Tire & Rubber Co., of Newark, Ohio.

I find this lease to be in regular form and am, therefore, returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1597.

FORT JENNINGS MEMORIAL—DISAPPROVAL OF CONTRACT FOR SAID MEMORIAL BUILDING.

The contract relating to the Fort Jennings memorial shows that it is to be made between the contractor and the building committee of the Jennings memorial, the board of trustees of Jennings township, Putnam county, Ohio, and the village of Fort Jennings. There being no authority in law for the trustees of the township or the officials of the village to build, or aid in building, such memorial, the same is not approved.

COLUMBUS, OHIO, May 20, 1916.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Under date of May 17th you wrote me as follows:

> "The enclosed contract relates to the Fort Jennings Memorial under authority of Ohio Laws 103, page 607, and Ohio Laws 105, page 843. Will you kindly give me an opinion as to the validity and form of this contract in order that I may approve same in accordance with the terms of the statute?"

Enclosed with your letter you submitted the contract in question.

The only authority for the existence of the commission for the erection of a memorial building at Fort Jennings is found in 103 O. L. 607, which reads as follows:

"To an honorary commission, appointed by the governor, appointment not requiring confirmation by the senate, to serve without compensation, except actual expenses. Said commission to enter into a contract to be approved by the governor, for the erection of a memorial building, in commemoration of the life and services of Colonel William Jennings and his company of soldiers who erected a fort at Fort Jennings, the present site of the village of Fort Jennings, Putnam county, Ohio. After appointment the commission shall organize and elect one of its members chairman. The chairman shall approve and sign all vouchers for the payment of costs in the erection of said memorial building, for which there is hereby appropriated the sum of ..... $4,000.00."

In the appropriation bill found in 106 O. L. 843, balances then existing in the former appropriation were reappropriated.

The contract submitted is a contract between the contractor and "The building committee of the Jennings memorial, the board of trustees of Jennings township, Putnam county, Ohio, and the village of Fort Jennings" for the erection of "The Jennings Memorial Hall," for the sum of $11,219.00. It is stipulated in Article 3 of said contract as follows:

"The building committee to pay $4,000.00, the village of Fort Jennings to pay $2,500.00, and the board of trustees of Jennings township to pay the balance of $4,719.00,"

the building committee having the right to do the electric wiring in said memorial building.

It appears, therefore, from the provisions of the contract, that the parties thereto are not only the building committee of the Jennings memorial (being a state commission) but also the trustees of Jennings township and the village of Fort Jennings the latter two to contribute toward the erection of the memorial.

I can find no provision in the statutes authorizing the trustees of a township or the proper officials of a village to enter into a contract for the erection of such a memorial building.

Under the provisions of sections 3410-1, et seq., of the General Code, a township is authorized to build a memorial building; but an examination of said statutes will readily disclose that the township is not proceeding, or endeavoring to proceed, under said sections.

In view of the fact that there is no authority for the trustees of the township or the proper officials of the village to enter into a contract for the erection of such a memorial as is contemplated in the contract submitted, I am of the opinion that you should not approve the same.

I am returning to you herewith the said contract.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1598.

APPROVAL, RESOLUTIONS FOR IMPROVEMENT OF CERTAIN ROADS IN FULTON COUNTY.

COLUMBUS, OHIO, May 20, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of May 19, 1916, transmitting to me for examination final resolutions relating to the following roads:

> "Fulton County. Sec. 'A,' Wauseon-Napoleon road, Pet. No. 2357, I. C. H. No. 296.
> "Fulton County. Sec. 'J,' Toledo-Angola road, Pet. No. 2360, I. C. H. No. 21."

I find these resolutions to be in regular form and am, therefore, returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1599.

STATE LIQUOR LICENSING BOARD—INSPECTORS OF SAID BOARD NOT ENTITLED TO WITNESS FEES AND MILEAGE IN ADDITION TO SALARY.

Inspectors appointed by the state liquor licensing board are not entitled to witness fees and mileage in cases of criminal prosecution of offenses against the liquor laws, where such inspectors are at the same time receiving their salaries and expenses for their time and services as such inspectors.

COLUMBUS, OHIO, May 22, 1916.

State Liquor Licensing Board, Columbus, Ohio.

Gentlemen:—Yours under date of May 12, 1916, is as follows:

> "The inspectors of this department who receive a fixed salary and traveling expenses are frequently subpoenaed into court as witnesses in cases reported by them, such inspectors receiving their salary and traveling expenses while attending court. As such witnesses, they are of course entitled to receive witness fees and mileage. It has been the custom of this department in the past to require the inspectors to turn such witness and mileage fees so received by them into the fund of this department, out of which, as stated above, they are paid their salary and traveling expenses while attending as such witnesses.
> "Some question having arisen as to the legality of this procedure, we desire that you will give us your opinion in the matter and oblige."

The facts stated by you, and the relationship of inspectors to whom you refer to the state as employes of your board, and at the same time witnesses in prosecution

of offenses based upon their investigations, are analogous to, and involve an application of the same principles of law as were considered in an opinion under date of January 4, 1916, rendered to Hon. Bert B. Buckley, state fire marshal, and found at page 2477 of the report of the attorney-general for the year 1915, relative to the right of assistant fire marshals to witness fees under circumstances substantially identical and statutory provisions in part the same and otherwise entirely similar in import and operation, a copy of which opinion is herewith enclosed.

It is a part of the duties of inspectors in the employ of your department, for which they are paid by the state a salary, together with necessary expenses incurred in the performance of their duties, to investigate violations of the liquor laws, develop the evidence in relation thereto and assist in the prosecutions of all offenses by them found to have been committed in like manner, as it is the duty of assistant fire marshals to investigate and assist in the prosecution of all the violations of the criminal laws relating to incendiary fires for which they receive a salary and their necessary expenses. In the opinion above referred to it is held that where assistant fire marshals are paid their regular salary and expenses while in attendance as witnesses in the trial of criminal cases, such services must be deemed to be in the line of their duty and they are not entitled to any further witness fees and mileage, and if such fees and mileage are sent to them they should be returned to the county from which they were drawn.

I find no ground upon which any distinction as between assistant fire marshals and liquor license inspectors, in respect to witness fees, could be based, and, therefore hold upon the reasons set forth in the opinion above referred to that the rule therein stated is equally applicable to the fees and mileage of liquor license inspectors in criminal prosecutions for the violations of the liquor laws of the state, and that they are, therefore, not entitled to witness fees and mileage in such cases while they are at the same time under salary and receiving their expenses as such liquor license inspectors.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1600.

COUNTY SURVEYOR—VACANCY—HOW OFFICE SHALL BE FILLED FOR UNEXPIRED TERM.

Where a vacancy in the office of county surveyor occured in May, 1916, there should be elected at the November election, 1916, a person to fill the unexpired term, whose tenure of office will begin upon qualification after such election and end on the day preceding the first Monday of September, 1917. There should also be elected at the same election a surveyor for the term of two years, beginning on the first Monday of September, 1917.

COLUMBUS, OHIO, May 22, 1916.

HON. JOHN M. MARKLEY, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:—Yours under date of May 16, 1916, is as follows:

> "John R. Moore, Jr., was elected county surveyor of Brown county, Ohio, in November, 1914, and entered upon the duties of his office on the first Monday of September, 1915.
>
> "On the 10th day of May, 1916, the said John R. Moore, Jr., died, and the commissioners of Brown county, on the 15th day of May, 1916, appointed Carl H. Thomas to fill the vacancy caused by the death of the said John R. Moore, Jr.

"The question now arises as to how long the person appointed by the commissioners to fill the vacancy can hold the office.

"It is my opinion that Carl H. Thomas, who has been appointed to fill this office, will hold until a successor is elected at the November election of this year, and that the successor so elected will serve for the remainder of the unexpired term of John R. Moore, Jr., that is, until the first Monday of September, 1917. It is also my opinion that as the said John R. Moore, Jr., would have been a candidate for re-election this year for the term beginning on the first Monday of September, 1917, there will have to be two persons elected this year; one to fill the unexpired term and the other for the regular term beginning on the first Monday of September, 1917.

"Kindly give me your opinion on this as soon as possible so that the prospective candidates for this office may be duly advised with reference to the matter."

Pertinent to your inquiry is the provision of section 2 of article III of the constitution of the state of Ohio, that:

"All vacancies in other elective offices (than state offices and members of the general assembly) shall be filled for the unexpired term in such manner as may be prescribed by law."

In reference to vacancies in the office of county surveyor, section 2785, G. C., provides as follows:

"If a vacancy occurs in the office of county surveyor because of death, resignation or otherwise, the county commissioners shall appoint a suitable person county surveyor, who, upon giving bond and taking the oath of office as required of the county surveyor elect, shall enter upon the discharge of the duties of the office."

It will be noted that under the provisions of the above section for filling a vacancy in the office of county surveyor, no provision is made as to the tenure of office of the person appointed to fill such vacancy. It is provided, however, with reference to the filling of vacancies in offices generally, by section 10 of the General Code as follows:

"When an elective office becomes vacant, and is filled by appointment, such appointee shall hold the office until his successor is elected and qualified. Unless otherwise provided by law, such successor shall be elected for the unexpired term at the first general election for the office which is vacant that occurs more than thirty days after the vacancy shall have occurred. This section shall not be construed to postpone the time for such election beyond that at which it would have been held had no such vacancy occurred, nor to affect the official term, or the time for the commencement thereof, of any person elected to such office before the occurrence of such vacancy."

I find that it is not otherwise provided by law with reference to the election of a successor in case of vacancy in the office of county surveyor, and the election of such successor is therefore governed by the provisions of said section 10, G. C., supra, which require that such successor shall be elected at the next general election for such office which occurs more than thirty days after the vacancy shall have occurred. The vacancy as to which you make inquiry having occurred on the 15th day of May, 1916, will have existed more than thirty days next preceding the next general election for

the office of county surveyor, which will be held on the first Tuesday after the first Monday of November next. The successor so required to be elected at the next November election will be entitled to serve for the unexpired term subsequent to his election and qualification. That is to say, the term of office of the successor to the person by reason of whose death the vacancy occurred will begin upon his qualification after his election at the November election, 1916, and will expire when the term of the officer by reason of whose death the vacancy occurred would have expired. That is to say, on the day preceding the first Monday of September, 1917. There is also required to be elected at the November election, 1916, a county surveyor, whose term of office will begin on the first Monday of September, 1917.

I therefore concur in your opinion and hold that under the facts stated by you there should, at the coming November election, be elected a county surveyor for the unexpired term ending on the day preceding the first Monday of September, 1917, and also a county surveyor elected at such election for the term of two years, beginning on the first Monday of September, 1917.

The same person may, however, be elected for both the unexpired term and the term beginning on the first Monday of September, 1917.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1601.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, VILLAGE OF CRESTLINE.

COLUMBUS, OHIO, May 22, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE:—Bonds of the village of Crestline, in the sum of $3,000.00 to secure funds for the construction of a bridge on Scott Street in said village, being six bonds *of five hundred dollars each.*"

I have examined the transcript of the proceedings of the council and other officers of the village of Crestline, Ohio, relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of the village of Crestline.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1602.

BOARD OF AGRICULTURE—COMPETITIVE BIDS MUST BE SECURED FOR LETTING PAINTING CONTRACTS AT STATE FAIR GROUNDS—OTHER FORMALITIES NOT REQUIRED.

Competitive bids must be secured by the board of agriculture for painting done at the state fair grounds to be paid for from appropriations made in house bill No. 701. No advertisement or other formalities required, but opportunity must be given to all persons desiring to compete.

COLUMBUS, OHIO. May 23, 1916.

Board of Agriculture of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your request for opinion under date of May 22, 1916, which reads as follows:

> "We must do some painting at the state fair grounds this year, and have about $350.00 or $400.00 to spend. We desire to be advised by your department how to proceed to let the contract for the painting."

On August 5, 1915, in opinion No. 681 addressed to your board, I advised you generally relative to the method of letting contracts for painting where the contract price was less than $3,000.00. In that opinion I advised you that section 6 of house bill No. 701, 106 O. L. 666, requires that if the work is to be paid for out of the current general appropriation bill, competitive bids must be secured, unless it is impracticable in the judgment of the board created by the appropriation bill for the making of transfers and divisions of appropriation accounts, and the discharge of other administrative functions in connection therewith to invite competitive bids; or unless in the judgment of such board the situation presents an instance of emergency requiring purchase without competitive bids; or unless the general provisions of the law directly require or authorize entering into a contract without competitive bids (which is not the case in this instance).

It is my opinion, therefore, that you should secure competitive bids in this work, but in the securing of competitive bids no particular formalities are required and no particular advertisement is necessary. It is sufficient if substantial compliance is secured in any proper manner, giving all persons who desire to compete a free, fair and full opportunity to bid thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1603.

COMMISSION FOR BLIND—STATE BOARD OF HEALTH—HOW CO-OPERATION IS TO BE EFFECTED UNDER PROVISION OF SECTION 1367, G. C.—PROSECUTION FOR VIOLATION OF SAID SECTION.

Questions as to the nature of co-operation of the commission for the blind with the state board of health under the provisions of section 1367, G. C., should be addressed to the board. A nurse of the commission might swear to an affidavit charging a non-compliance with the act "For the prevention of blindness from inflammation of the eyes of the new born, designating certain powers and duties and otherwise providing for the enforcement of this act" (106 O. L., 321), but the duty of prosecuting the matter is cast on the prosecuting attorney.

COLUMBUS, OHIO, May 23, 1916.

Commission for the Blind, Columbus, Ohio.

GENTLEMEN:—The request for an opinion submitted by your executive secretary is as follows:

> "Under section 4, sub-section 1 of 'An act for the prevention of blindness from inflammation of the eyes of the new born, etc.' (105 O. L., 321), it is the duty of the state board of health to enforce the provisions of said act. By sub-section 8, it is also the duty of the state board of health to assist the local police or county prosecutor in every way possible, such as by securing necessary evidence. Under section 8, $5,000.00 is appropriated annually for the use of the state board of health in enforcing and carrying out the provisions of the act, including necessary expenses incurred in prosecuting a case under the act.
>
> "By section 1367 of the General Code, the Ohio commission for the blind is required to co-operate with the state board of health in the adoption and enforcement of proper preventive measures.
>
> "The Ohio commission for the blind desires your advice and opinion on how it is to co-operate with the state board of health in the enforcement of the act before referred to; also, whether a nurse of the commission, having personal knowledge of violation of the act, could properly swear out a warrant and undertake the prosecution of a case of non-compliance with the act."

Section 1284-4 of the General Code (106 O. L., 321), which is section 4 of an act

> "For the prevention of blindness from inflammation of the eyes of the new born, designating certain powers and duties and otherwise providing for the enforcement of this act."

is as follows:

> "It shall be the duty of the state board of health:
>
> "1. To enforce the provisions of this act.
>
> "2. To promulgate such rules and regulations as shall, under this act, be necessary for the purpose of this act, and such as the state board of health may deem necessary for the further and proper guidance of local health officers.
>
> "3. To provide for the gratuitous distribution of a scientific prophylactic for inflammation of the eyes of the new born, together with proper directions

for the use and administration thereof, to all physicians and midwives as may be engaged in the practice of obstetrics or assisting at childbirth.

"4. To provide, if necessary, daily inspection and prompt and gratuitous treatment to an infant whose eyes are infected with inflammation of the eyes, provided further that the state board of health, if necessary, shall defray the expense of such treatment from such sum as may be appropriated for its use.

"5. To publish and promulgate such further advice and information concerning the dangers of inflammation of the eyes of the new born, and the necessity for prompt and effective treatment.

"6. To furnish copies of this law to all physicians and midwives as may be engaged in the practice of obstetrics or assisting at childbirth.

"7. To keep a proper record of any and all cases of inflammation of the eyes of the new born, as shall be filed in the office of the state board of health, in pursuance with this law and as may come to their attention in any way, and to constitute such records a part of the annual report to the governor and the legislature.

"8. To report any and all violations of this act as may come to its attention, to the state board of medical registration and examination, and also to the local police or county prosecutor in the county wherein said misdemeanor may have been committed, and to assist said officer in every way possible, such as by securing necessary evidence."

In section 6 of the act referred to above it is provided:

"It shall be the duty of the prosecuting attorney to prosecute all violations of the act."

Your enquiry arises by reason of the provisions of section 1367 of the General Code, which is as follows:

"The commission for the blind shall make enquiries concerning the cause of blindness to ascertain what portion of said cases are preventable and co-operate with the state board of health in the adoption and enforcement of proper preventive measures."

Under the provisions of the act referred to above, it is made the duty of the state board of health to enforce its provisions, while under the provisions of section 1367 of the General Code, supra, the commission for the blind is charged with the duty of co-operating with the state board of health in the adoption and enforcement of proper preventive measures. The act under consideration is a preventive measure and as such demands the attention of your commission.

The duties cast on the state board of health under the provisions of the act are many and varied, and the question as to how you can best co-operate with the board in the discharge of those duties should more properly be addressed to the board as the answer thereto embraces a question of fact rather than of law, and the board is doubtless in much better position to determine just what would be most helpful to it in the performance of its various functions in connection with the administration of the law.

Answering your last question specifically it is my opinion that no particular duties relative to prosecutions for violation of the provisions of the law in question are cast on a nurse of your commission. However, such nurse could swear to an affidavit charging non-compliance with the law, the same as any other person, but in the end the duty of prosecuting the case would rest on the prosecuting attorney as provided

in section 1248-6 of the General Code (106 O. L., 322). The proper course to pursue is to report all violations of the law under consideration to the state board of health for presentation to the proper official in the jurisdiction in which the offense, if any, occurred.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1604.

WORKMEN'S COMPENSATION LAW—STATE INSURANCE FUND IS TRUST FUND FOR PAYMENT OF COMPENSATION TO INJURED EMPLOYES AND DEPENDENTS OF KILLED EMPLOYES—SAID FUND SHOULD BE SAFEGUARDED—CLAIMS SHOULD BE CLEAR BUT ANY DOUBT SHOULD BE WEIGHED CAREFULLY IN FAVOR OF CLAIMANT.

The state insurance fund, created by the Ohio workmen's compensation law, 103 *O. L.,* 72 *et seq., is a trust fund, the primary purpose of which is its distribution for the payment of compensation to injured employes and the dependents of killed employes.*

Said fund should be safeguarded with every possible protection in its administration, however, said fund is created for distribution and not for the purpose of perpetuating or accumulating the same.

Claims arising under the Ohio workmen's compensation law where the proof is controlled by section 44 *of the act, section* 1465-91, *G. C., should be clear, but any doubt of a claimant to participate in said fund should be weighed carefully in favor of the claimant.*

COLUMBUS, OHIO, May 23, 1916.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Mrs. Lewis Burnside.

I am in receipt of your letter under date of May 11th, in which you request that I review the proof on file in this case and advise you as to my judgment as to whether or not a successful defense can be maintained by the commission in event an appeal is taken to the common pleas court from the finding of the commission.

The claim was presented to your commission and disallowed for the reason that the death of the husband, Lewis Burnside, was not caused by an injury sustained in the course of his employment.

In going over the proof in this case I find that Mr. Burnside was an employe of the city of Columbus, that his duty was to patrol the Scioto and Olentangy rivers, that he had been engaged in this work by the city for several years and seemed to be in normal health for a person of his age, he being sixty-two years of age.

The proof shows that he sustained an injury on December 24, 1914, and that he died on March 9, 1915. There is no proof showing that Mr. Burnside was troubled with any ailment prior to that date, but there seems to be an abundance of proof that he immediately made complaint to a number of persons, whose affidavits and testimony are on file with this claim, that he sustained the injury, and that from the time he received the alleged injury in December he continuously made complaint, and his knee, which was injured, was the seat or source of all the complaint and trouble to him after December 24th.

Dr. McKendree Smith, in the medical certificate of death, states that the cause of death was acute inflammatory rheumatism, and the contributory or secondary

cause "heart prostration from absorption of toxemia." In answer to interrogatories submitted to him he says in answer to the 17th question, Dr. Smith said:

> "I cannot answer without some doubt and reservation as to whether the swollen, painful condition of the right knee was due to latent and inactive germs which became active after his exposure or due entirely to inflammatory rheumatism I am unable to say."

In his proof of death Dr. Smith says that the remote cause of death very probably was the injury he received on December 24, 1914.

In answer to interrogatory No. 8 to Dr. George L. Saunders—"Did septicemia develop after the alleged injury?" answered, "Yes."

Dr. Saunders saw the deceased only the day before his death.

We refer to the report of your medical department under date of March 4th in which they state that at the time of Mr. Burnside's death, or immediately after, Dr. Smith was inclined to change his diagnosis to that of septicemia, and he is firmly of the belief that it was the cause of his death. It appears that the doctor's first examination led him to believe that it was a case of rheumatism, but changed his opinion because of the continued pain other than the pain complained of in the knee which was not attended with the usual swelling and discoloration which is met with in articular rheumatism.

Dr. Emerson states that from an examination of the physician's reports, whose examinations he thinks were merely cursory, there might be reason to claim that the patient died of pneumonia, but there is no evidence in the papers on file that this man was ever afflicted with pneumonia.

Dr. Emerson further states that Dr. Smith thought it was septicemia from some cause, and Dr. Emerson presumes that not having had any actual facts further than the doctor's statement upon which to base an opinion, that he should acquiesce in the opinion and take it for granted that septicemia was the exciting cause.

In Dr. Emerson's report under date of March 25, 1915, he says that he is convinced that the presumption that death was the result of injury to the decedent's knee was a logical one, in fact, the most logical that he can consider after all the statements made. He says that he can think of only one other at all logical and that is the probability of pneumonia, and that this is too far-fetched to contradict the affidavits of the laymen as to the injury and the complaint of pain in the knee, swelling etc. He also says that he could not make a recommendation for the claimant, but could not make one against the claimant.

Much of the proof on file in this case before the commission seems to be in the nature of hearsay. It does appear from the evidence before the commission that Lewis Burnside sustained an injury on December 24, 1914, that all his complaint and sickness dates from that time, and the attending physicians, while they may not have been positive at the time of the injury as to the nature of the trouble, they seem now to be satisfied that death was caused by septicemia due to the injury to the knee. If this be a fact, and if these physicians will testify to the same on the witness stand, it would appear that this case, if appealed, would be decided in favor of the plaintiff.

All the testimony before the commission points to the fact that he sustained an injury on December 24, 1914, and that all of his illness was due to that injury.

In approaching the consideration of this question it is to be observed first that the fund created under the workmen's compensation law is a trust fund, which should at all times be safeguarded with every possible protection in its administration. However, it is created for specific purposes, the primary one of which is through its distribution to compensate injured employes who come within its provisions, and any doubt as to the right of the claimant to receive compensation from the fund should, under

the provisions of the law, be weighed very carefully in favor of the claimant. This is made clear by the provisions of section 44, workmen's compensation act, or section 1465-91 of the General Code, which is as follows:

> "Such board shall not be bound by the usual common law or statutory rules of evidence, or by any technical or formal rules of procedure other than as herein provided; but may make the investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this act."

In other words, the purpose of the law is to create a fund for the distribution to employes entitled under the law to receive it rather than for the purpose of perpetuating and increasing the fund.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1605.

WORKMEN'S COMPENSATION LAW—WHEN PROBATE COURT APPROVES SETTLEMENT MADE BY GUARDIAN FOR BENEFIT OF MINOR CHILDREN IN CLAIM UNDER SECTION 27 OF SAID LAW AND BOND IS EXECUTED, WHERE FACTS CLEARLY SHOW RECOVERY COULD NOT BE HAD UPON AN ACTION TO ENFORCE COLLECTION OF AWARD, INDUSTRIAL COMMISSION HAS AUTHORITY TO APPROVE SETTLEMENT AS OUTLINED.

Where the probate court has approved and confirmed a settlement made by a guardian for the benefit of dependent minor children in a claim under section 27 of the Ohio workmen's compensation law, 103 O. L., 72, et seq., and a good and sufficient bond being given for the faithful payment of the sum approved by the probate court, and where the facts before the industrial commission clearly show that a recovery could not be had upon an action to enforce the collection of an award, the industrial commission of Ohio has authority, in the exercise of its discretion, to approve the settlement, thereby insuring to the claimants in this claim the amount agreed upon.

COLUMBUS, OHIO, May 23, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Replying to your letter of recent date, relative to the above entitled claim, the facts which I gather from your letter and the papers on file with the claim, appear to be that on April 18, 1916, an award of $3,013.92 was made by the industrial commission in favor of the dependents of Thomas J. Madison, deceased.

Among the papers on file appears a letter from attorney W. F. Lones, who represented the claimant, in which he advised your commission that the employer agreed to pay $1,700.00 in terms as follows: One hundred dollars cash and one hundred dollars each month for a period of three months, the balance to be paid at the rate of thirty-two dollars on the first day of each month until the total amount of $1,700.00 which had been agreed upon in settlement, would be paid.

It appears from the papers on file that owing to the financial condition of the employer, Mr. James J. Strabley, a settlement according to the above terms was agreed upon and approved by the probate court.

Counsel for the claimant agrees with the statements made by Mr. W. A. O'Grady, Wellsville, Ohio, who was attorney for the employer, to the effect that the financial condition of Mr. Strabley was such that he was in fact execution proof, and that no sum whatever could be realized for the purpose of making settlement of any award made by the industrial commission.

These facts doubtless contributed to the action of the probate court in approving the settlement which was made with the guardian, and it occurs to me in considering this case that the uppermost question in the minds of the commission should be the realizing of the best possible result for the claimant. A surety bond has been filed guaranteeing the payment of the $1,700.00 agreed upon in settlement of the claim, and under the wide powers vested in your commission, if deemed for the best interest of the claimant, it is my judgment that you would have authority to approve the settlement thereby insuring to the claimant the payment of the amount agreed upon, whereas a rejection of the settlement and a finding against the employe might result in a total loss to the claimant.

In view of the statements of the attorneys representing both sides to the effect that it would be impossible to realize anything on a judgment which might be secured against the employer,—assuming that the facts are true as stated by the attorneys—there is no doubt but that if only private interests were involved a speedy settlement would be made.

I am returning herewith all the claim papers in the case.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1606.

ROADS AND HIGHWAYS—ANSWERS TO NINETEEN QUESTIONS CONSTRUING PROVISIONS OF CASS HIGHWAY LAW.

1. *The levy provided for by section* 3298-18 *G. C., is to be made by the township trustees at their first meeting after the estimate of the county highway superintendent has been filed with them, and the county highway superintendent is required to file this estimate not later than April* 1*st of each year. These provisions, in so far as they relate to time, are directory rather than mandatory.*

The levies provided for by sections 3298-1, 3298-13, 3298-20 *and* 1222, *G. C., are to be made by the township trustees on or before May* 15*th of each year, and incorporated in the annual budget filed not later than the first Monday in June.*

2. *Where counties carry forward road work by force account, it is not necessary for the county commissioners or county highway superintendent to advertise for bids in the purchase or lease of road machinery, or in the purchase of materials, or in the hiring of laborers and teams.*

In so far as township work by force account is concerned, it is not necessary for the township trustees or county highway superintendent or township highway superintendent, as the case may be, to advertise for bids in the purchase or lease of road machinery, or in the purchase of materials, or in the hiring of laborers and teams.

3. *The township highway superintendent has no official connection with the construction of roads by township trustees, and the person who fills the position of township highway superintendent may, therefore, work upon an improvement carried forward by the township trustees under chapter III of the Cass highway law, either with or without his team, upon any days when his services as township highway superintendent are not needed.*

A township highway superintendent may not lawfully enter into a contract with himself for the dragging of the roads of any road dragging district under his supervision.

Township trustees, in the exercise of their discretion, may permit the township highway superintendent to use his own team in making small repairs, hauling a small amount of material or other similar work, when by so doing he can effect a saving of time and a reduction of expense to the township.

4. *The cost of cutting brush, briers, noxious weeds, etc., along the public highways, is to be paid from the township road funds, of the several townships, and this without regard to the class or character of the road on which such work is performed.*

5. *Township trustees may do maintenance and repair work either by contract or force account.*

6. *The levies provided by sections* 60 *and* 239 *of the Cass highway law are entirely separate and distinct, and township trustees may make levies under both sections.*

7. *Township trustees are charged with the duty of maintaining and repairing bridges and culverts on township roads, and county commissioners are charged with the duty of maintaining and repairing bridges on county roads. County commissioners are, however, authorized to assist trustees in maintaining and repairing bridges on township roads.*

8. *In a proceeding under chapter I of the Cass highway law for the location or establishment of a new road, the commissioners are only authorized to go so far as to remove fences, trees and other obstructions, and do such slight grading and ditching as will render the road passable, and the expense of such work may be paid from the county road funds created by levies under sections* 6926 *and* 6956-1, *G. C. If it is desired to substantially improve the new road, the proper proceeding should be had under chapter VI of the Cass highway law.*

9. *If a property owner fails to keep in repair an approach from a public road as required by section* 7212, *G. C., and by reason of such failure the approach becomes an obstruction to a side ditch along the public highway, such owner is guilty of a violation of section* 13421-7, *G. C., and may be prosecuted therefor.*

10. *County commissioners are not authorized to control the number of deputies, etc., employed by the county surveyor, aside from the general control which they exercise in fixing the aggregate compensation to be expended in any year, neither are they authorized to determine what specific work shall be performed by any particular deputy or assistant.*

11. *County commissioners are authorized to secure right-of-way for road purposes without a petition.*

12. *County commissioners are not authorized to repair roads within cities and are authorized to repair roads within villages only where the consent of council has been first obtained.*

13 *The duty of dragging and maintaining an unimproved road through a village or city rests upon such municipal corporation.*

14. *In so far as the rules and regulations of the township trustees conflict with those of the county highway superintendent, the rules of the trustees are to govern.*

15. *A township trustee may not act as township highway superintendent.*

16. *Township trustees may be compelled by mandamus to determine the number of road districts and appoint township highway superintendents therefor. Township trustees are liable criminally if they wilfully neglect, fail or refuse to perform the duties of their office.*

17. *Township trustees are not authorized to dispense with the dragging of the graveled and unimproved public roads of their township.*

18. *In the repair of roads by county commissioners, engineers, foremen, laborers and teams are to be employed by the county highway superintendent, the employment first being authorized by the county commissioners.*

In the repair of roads by township trustees, engineers, foremen, laborers and teams are to be employed by the township highway superintendent, the employment first being authorized by the township trustees.

19. *Bills for road work ordered by the township trustees are to be approved by the county highway superintendent before payment. They may be approved before allowance by the trustees, or they may be allowed by the trustees subject to the approval of the county highway superintendent. In either event the approval of the county highway superintendent is necessary before payment can lawfully be made.*

COLUMBUS, OHIO, May 23, 1916.

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

GENTLEMEN:—I acknowledge the receipt of your communication of March 30, 1916, in which you submit a number of inquiries relating to the Cass highway law.

Your first question reads as follows:

> "When should township trustees make their annual levy for road purposes?"

In answering this question it should first be observed that there are a number of different sections of the Cass highway law under which township trustees may levy taxes for road purposes.

Section 60 of the act, section 3298-1, G. C., authorizes a levy for the purpose of improving, dragging, repairing or maintaining roads. Section 72 of the act, being section 3298-13, G. C., refers to levies by the trustees for the payment of principal and interest on bonds issued for road purposes. Section 215 of the act, being section 1222, G. C., authorizes a levy by township trustees for the purpose of providing a fund for the payment of the proportion of the cost and expense of improvements carried forward by the state highway department, to be paid by a township. Section 239 of the act, being section 3298-18, G. C., authorizes a levy by township trustees for the purposes set forth in the annual estimate of the county highway superintendent. Section 257 of the act, section 3298-20, G. C., authorizes a levy by township trustees for the purpose of purchasing real property, containing stone or gravel, and the necessary machinery for operating the same when deemed necessary for the construction, improvement or repair of the public roads within the township. In only one of the sections referred to above is there any provision as to the time at which the levy shall be made.

It is provided by section 3298-18, G. C., that after the annual estimate for each township has been filed with the trustees of the township by the county highway superintendent, they may increase or reduce the amount of any of the items contained in said estimate, and that *at their first meeting after said estimate is filed* they shall make their levies for the purposes set forth in the estimate.

Under section 144 of the act, being section 7187, G. C., the county highway superintendent is required to make his annual estimate for the township trustees of each township on or before April 1st, and submit the same to the township trustees for their action. It therefore follows that the levy provided for by section 3298-18, G. C., is to be made by the township trustees at their first meeting after the estimate of the county highway superintendent has been filed with them and that the county highway superintendent is required to file this estimate not later than April 1st of each year. These statutes, in so far as they fix the dates for the filing of estimates and the making of levies, are to be regarded as directory rather than mandatory, and if these duties are not performed at the time specified, they may be performed at a later date. There being no specific provision as to the time when trustees shall make the other levies referred to above, the time is to be governed by the general provision found in section

5646, G. C., to the effect that the trustees of each township, on or before the 15th day of May, annually, shall determine the amount of taxes necessary for all township purposes and certify it to the county auditor, as modified by section 5649-3a, which permits the filing of annual budgets not later than the first Monday of June. It therefore follows that the levies provided for by sections 3298-1, 3298-13, 1222 and 3298-20, G. C., are to be made by the township trustees on or before the 15th day of May of each year, and incorporated in the annual budget filed not later than the first Monday in June in accordance with the provision referred to above.

In connection with section 1222 G. C., and the related sections, it will be noted that while the township trustees levy the taxes for the payment of the township's proportion of the cost and expense of road improvements carried forward by the state highway department, yet under section 1223 G. C., when it is determined to issue bonds in anticipation of the collection of such taxes, such bonds are to be issued by the county commissioners. Inasmuch as under section 11 of article XII of the constitution of Ohio no bonded indebtedness of any political subdivision of the state may be incurred unless in the legislation under which such indebtedness is incurred, provision is made for levying and collecting annually, by taxation, an amount sufficient to pay the interest on said bonds and to provide a sinking fund for their final redemption at maturity, it seems clear that under the sections referred to above it is necessary, before county commissioners may provide by bond issue funds necessary to pay the township's portion of the cost and expense of an improvement carried forward by the state highway department, that the township trustees should levy a tax sufficient to pay the township's portion of the interest on such bonds and to create a sinking fund sufficient to redeem the township's share of such bonds. Inasmuch as there is no requirement to the effect that bonds of this character must be issued at any particular time, it would seem clear that where township trustees act under section 1222 G. C., and levy a tax as a basis for a subsequent issue of bonds by county commissioners, they may take such action at any time.

Your second question reads as follows:

> "Can township trustees or county highway superintendents construct or repair roads or bridges by hiring teams, purchasing material and employing men, without advertising for bids? And if so, to what extent?"

This question may be better answered if its language be so changed as to require a statement of the rights of townships and counties to construct or repair roads or bridges by hiring teams, purchasing material and employing men without advertising for bids. It will then be possible, in framing an answer, to distinguish between the duties of township trustees and township highway superintendents and between the duties of county commissioners and county highway superintendents. I will refer first to the powers of counties in this particular.

In opinion No. 1093 of this department, rendered to Hon. Roger D. Hay, prosecuting attorney of Defiance County, on December 13, 1915, it was held that counties were authorized not only to maintain and repair, but also to improve highways by force account, and that the right of the county commissioners in this particular was not limited or abridged by the fact that the contemplated work might cost more than $200.00. In other words, county commissioners may improve, maintain or repair highways by force account without regard to the cost of the contemplated work. In so far as this force account work may involve the purchase of materials, the county commissioners may themselves purchase such materials under authority of section 7214, G. C., or they may, under authority of sections 7198 and 7203, G. C., authorize the county highway superintendent to make such purchase. In so far as tools and machinery may be needed, the county commissioners may purchase the same under

authority of section 7200 G. C., or they may, under authority of sections 7198 and 7201 G. C., authorize the county highway superintendent to lease or hire such machinery, or they may under authority of section 7203 G. C., authorize the county highway superintendent to purchase the same from any public institution. In so far as it may be necessary, in the prosecution of such force account work to employ laborers and teams, it is provided by section 7198 G. C., that such laborers and teams are to be employed by the county highway superintendent, the employment first being approved or authorized by the county commissioners. It is not necessary for the county commissioners or county highway superintendent to advertise for bids in the purchase or lease of road machinery, or in the purchase of materials, or in the hiring of laborers and teams. I believe the above fully answers your inquiry in so far as it relates to the activities of counties.

Coming now to consider the question of force account work by township trustees, it may be observed that chapter III of the Cass highway law, relating to road construction and improvement by township trustees, contains no express authorization for force account work. After the plans and specifications for a proposed township improvement have been adopted, it is provided that the trustees shall give public notice of the time and place for receiving bids for the construction of such improvement. The trustees are authorized to except from the public letting such part of the labor or material as shall be donated, and the contracts for labor and material may be let separately or as a whole, as the board of trustees may determine. The trustees are required to let the contract to the lowest and best bidder.

In so far as repair work by township trustees is concerned, the statute is silent as to the method to be pursued in prosecuting such work. The only provision found in the law is that of section 75 of the act, section 3370, G. C., to the effect that under the direction of the township trustees the township highway superintendent shall have control of the roads of his district (township roads) and keep them in good repair. There is no provision in the law as to whether the repair work is to be done by contract or force account; or as to whether the contracts for repair work, if such work be done by contract, shall be let by the township trustees or the township highway superintendent; or as to whether, if the work be done by force account, the purchase of material and machinery is to be made by the trustees or the township highway superintendent, or as to which of these authorities is to employ the necessary laborers and teams. An examination of other sections of the Cass highway law makes it clear, however, that township trustees are authorized to proceed by force account.

In so far as force account work by township trustees may involve the purchase of materials, the township trustees may themselves purchase such materials under the authority conferred upon them by section 7214 G. C., or they may, under authority of sections 7198 and 7203 G. C., authorize the county highway superintendent to make such purchase. The township trustees may purchase tools and machinery under authority of section 7200 G. C., but before making such purchase the suggestions of the county highway superintendent are to be considered. The language of the section does not indicate that the trustees are bound to follow the suggestions or recommendations of the county highway superintendent, but it is the duty of the trustees before making any purchase of tools or machinery, to obtain and consider the suggestions of that official. The trustees may also, under authority of sections 7198 and 7201 G. C., authorize the county highway superintendent to lease or hire machinery, or they may, under authority of section 7203 G. C., authorize the county highway superintendent to purchase the same from any public institution.

Coming now to consider the employment of such laborers and teams as may be necessary on township work, it is provided by section 7198 G. C., that the county highway superintendent may, with the approval of the township trustees, employ such laborers and teams as may be necessary in the performance of *his* duties. It is therefore apparent that in so far as the township trustees may undertake construction

work, under chapter III of the Cass highway law, by force account, the laborers and teams that may be necessary are to be employed by the county highway superintendent the employment first being authorized by the trustees. In so far as repair work by the township trustees is concerned, such work is, under the provisions of section 3370, G. C., to be carried forward by the township highway superintendent under the direction of the township trustees, and while there is no express statutory provision governing the matter, I am of the opinion that in so far as township trustees may proceed by force account to repair roads, the necessary men and teams should be employed by the township highway superintendent, the employment first being authorized by the township trustees. In so far as township work by force account is concerned, it is not necessary for the township trustees or county highway superintendent or township highway superintendent, as the case may be, to advertise for bids in the purchase or lease of road machinery, or in the purchase of materials or in the hiring of laborers and teams.

Your third question reads as follows:

> "May the township highway superintendent perform labor on construction, repair and dragging of township roads with his own team, and be paid for the same in addition to his regular per diem as fixed by the trustees? If he does not accept his per diem, may he receive pay for his team the same as other teams?"

It should first be observed that the township highway superintendent has no official connection whatever with the construction of roads by township trustees, his functions being limited to the repair and dragging of roads. In so far as road construction or improvement by township trustees is concerned, the plans and specifications are, under the provisions of section 3298-3 G. C., to be prepared by the county highway superintendent, and the work of inspection is to be performed by some competent person or persons appointed by the township trustees, under authority of section 3298-6 G. C., which person or persons are to act under the general direction of the county highway superintendent. I see no reason why the person who fills the office or position of township highway superintendent might not work upon an improvement being carried forward by the township trustees, under the provisions of Chapter III of the Cass highway law, either with or without his team, upon any days when his services as township highway superintendent are not needed, and receive for such work the same compensation paid to other persons. The township highway superintendent has no official connection, however, with the construction or improvement of roads by township trustees, as has been heretofore pointed out, and it would not, of course, be legal for him to receive compensation for his own services in connection with a township road improvement carried forward under the provisions of chapter III of the Cass highway law, for any day upon which he performed duties in connection with his work as township highway superintendent, provided he also received compensation for the performance of such duties. In other words, the township highway superintendent, being compensated upon a per diem or other similar basis, could not be permitted to receive compensation for two different services performed on the same day, either of which would require his entire time and attention.

In so far as the dragging of roads is concerned, the township highway superintendent is, by the terms of section 3377, G. C., required each year, on or before the 15th day of February, to contract with one suitable person in each dragging district to drag the roads of that district for that year, with the qualification that if no suitable person in the district will contract to drag the roads thereof, the township highway superintendent shall contract with any suitable person in the township. Competitive bidding is not required in the making of these contracts, and the only statutory restriction upon the amount to be paid is that found in section 3376, G. C., to the effect that

the sum to be paid for dragging shall not exceed the sum of fifty cents per mile for each mile traveled while dragging the road. It is ordinarily against public policy for a public official, charged with the duty of making a contract on behalf of the public, to make such contract with himself, and I am of the opinion that this principle is applicable to the matter now under consideration, and that the township highway superintendent may not lawfully enter into a contract with himself for the dragging of the roads of any road dragging district under his supervision. In so far as the use by the township highway superintendent of his own team in road repair work is concerned, the matter was covered in opinion No. 881 of this department, rendered to you on October 2, 1915, and found at page 1894 of the Attorney-General's Report for that year. The second question answered in that opinion was as follows:

> "Can a township superintendent, under the new road law, legally use his own team on the roads, the trustees fixing the compensation for all team labor and providing that he can use his own team? The question arises from this condition: In making small repair, hauling a small amount of lumber or culvert material, or other similar work, where team, or team and wagon, are necessary, the superintendent can expedite matters and reduce the cost by thus doing."

It was held, in answering the above quoted question, that under the conditions therein set forth the township trustees, in the exercise of their discretion, may permit the township highway superintendent to use his own team and compensate him therefor at the established rate, when by so doing there may be effected a saving of time and a reduction of expense to the township.

I think the above question and answer set forth the conditions under which township trustees may properly permit the township highway superintendent to use his own team in repair work and compensate him therefor. If repair work is being carried forward by township trustees, the work must be done under the supervision of the township highway superintendent, and it is my view of the law that unless the conditions set forth in your former communication referred to above obtain, the township highway superintendent, if engaged upon the work at all, should be engaged as township highway superintendent in the performance of the duties of supervision, and not as the driver of a team. The distinction made between the right of the township highway superintendent to use his own team in repair work, and in dragging may well be based on the fact that bills for dragging are paid on the approval of the township highway superintendent, whereas bills for road repairs require the approval of the county highway superintendent before the same may be paid. I think the above constitutes a substantial answer to your third question.

Your fourth question reads as follows:

> "Who pays for cutting the brush, briers, etc., on county roads and state roads? In this connection note sections 7195 and 7467, G. C."

Section 7195, G. C., referred to by you, being section 152 of the Cass highway law, reads as follows:

> "All brush, briers, burrs, vines, Russian or Canadian or common thistles or other noxious weeds growing along the public highways, shall be cut between the first and twentieth days of June and the first and twentieth days of August of each year, and if required by the county highway superintendent between the first and twentieth days of September of each year. This work shall be done by the township highway superintendents in their respective districts, who shall employ the necessary labor to carry out the provisions of this section.

All expenses incurred shall, when approved by the township trustees, be paid from the township road fund by the township treasurer upon the warrant of the township clerk. The county highway superintendent shall enforce the provisions of this section."

Section 7467 G. C., being section 244 of the Cass highway law, reads as follows:

"The state, county and township shall each maintain their respective roads as designated in the classification hereinabove set forth; provided, however, that either the county or township may, by agreement between the county commissioners and township trustees, contribute to the repair and maintenance of the roads under the control of the other. The state, county or township, or any two or more of them may by agreement expend any funds available for road construction, improvement or repair upon roads inside of a village or a village may expend any funds available for street improvement upon roads outside of the village and leading thereto."

While the section last above quoted requires the state, county and township each to maintain their respective roads, as designated in the classification established by the Cass highway law, and while it would be conceded that in the absence of a special provision the state, county and township should each bear the expense of cutting brush, noxious weeds, etc., on their respective roads, provided the cost of this work is to be paid from the public funds, yet it is apparent from a consideration of the two sections that it was the intention of the legislature to establish a special rule as to the cutting of brush, etc., and to require that this work be done by the township authorities and paid for out of township road funds.

I therefore advise you, in answer to your specific inquiry, that the cost of cutting brush, briers, noxious weeds, etc., along the public highways, is to be paid from the township road funds of the several townships, and that this rule is effective without regard to the class or character of the road on which such work is performed.

Your fifth question reads as follows:

"Have township trustees, under the Cass law, the right to sell a maintenance or repair job on a township road, or should it be done by the township highway superintendent, acting under the county highway superintendent?"

As has already been indicated in this opinion, the legislature has left this matter largely to inference. It is provided merely that under the direction of the township trustees the township highway superintendent shall have control of the roads of his district and keep them in good repair. See section 75 of the Cass highway law, section 3370 G. C. Other sections of the act authorizing the purchase of material and machinery and the employment of teams and laborers, either by the township trustees or upon their authorization, render it apparent that it was the intention of the legislature to authorize the township trustees to proceed by force account. In so far as road construction and improvement by township trustees are concerned, the doing of such work by contract is expressly authorized. Inasmuch as the duty of maintaining and repairing township roads is cast upon the township trustees without any legislative provision as to the method of procedure to be followed, it is my view that the trustees may, if they choose, let a contract for repair work or they may proceed by force account, in which case the work is to be done under the supervision of the township highway superintendent. I suggest that if the trustees elect to do work of this character by contract, the contracting should be let in the manner provided by section 63 of the act, section 3298-4 G. C., relating to road construction and improvement by township trustees.

The sixth question submitted by you reads as follows:

> "Is there not a conflict between Sec. 60 and Sec. 239 of the Cass highway law, in that the levy is stated as three mills in one case and two mills in the other?"

Section 60 of the act, section 3298-1 G. C, authorizes the levying of a tax not exceeding three mills in any one year upon all the taxable property of the township, lincluding any municipality therein situated for the purpose of improving, dragging, repairing or maintaining roads. Section 239 of the act authorizes township trustees to levy a tax of not more than two mills in any one year upon the property of the township situated outside of any incorporated village or city for the purposes set forth in the annual estimate of the county highway superintendent. This levy is primarily a maintenance and repair levy, and must amount to at least $20.00 for each mile of township road within a township.

Your question as to a conflict between these two sections must be answered in the negative. There is no conflict between the two sections for the reason that the levies therein provided for are entirely separate and distinct. Township trustees may therefore make levies under both sections.

Your seventh question is as follows:

> "What bridges and culverts are to be taken care of by the county, and what ones by the townships?"

This question was substantially answered in opinion No. 1279, rendered by this department to Hon. E. E. Lindsay, prosecuting attorney of Tuscarawas county, on February 16, 1916, in which opinion it was held that township trustees are charged with the duty of maintaining and repairing bridges and culverts on township roads. The natural inference from the opinion in question was that county commissioners are charged with the duty of maintaining and repairing bridges and culverts on county roads, and such, in my opinion, is the law. It was also pointed out in the opinion to Mr. Lindsay, that while the duty of maintaining and repairing bridges and culverts on township roads is cast in the first instance on the township trustees, yet in view of the fact that county commissioners have full power and authority to assist the township trustees in maintaining all township roads, it follows that the commissioners are also authorized to repair or maintain a bridge or culvert on a township road.

The eighth question set forth in your inquiry reads as follows:

> "Section 7 of the Cass highway law provides for the establishing of a new road. What further steps are necessary toward the opening of the new road and the grading and ditching of the same, and who shall order the same opened, graded and ditched? Who pays for the same?"

It will be noted that chapter I of the Cass highway law, in which section 7 of the act, section 6866, G. C., is found, relates only to locating, establishing,altering widening, straightening, vacating or changing the direction of the road and does not relate in any way to road construction or improvement by county commissioners, the latter matters being covered by chapter VI of the act. The establishing of new roads by county commissioners is governed by the first 19 sections of the act, and the sections refer to and provide for the payment only of compensation and damages and do not make any provision for the grading and ditching of the road after the same is established. It is provided by section 10 of the act, section 6869, G. C., that after the commissioners have caused a record of the proceedings for the establishment of

a new road to be entered in the proper road records of the county, the commissioners shall cause the road to be opened up as established, but the statutes are silent as to just what is meant by the direction to the commissioners to open up the road and as to the fund from which the expenses of opening up the road are to be paid. I am of the opinion that if the proceeding be merely one for the location or establishment of a new road, then the commissioners are only authorized to go so far as to remove fences, trees and other obstructions and do such slight grading and ditching as will render the road passable, and that the expense of such work may be paid from the county road funds created by levies under sections 105 or 238 of the act, sections 6926 or 6956-1 G. C. If it is desired to substantially improve the new road by grading, paving, draining, graveling or macadamizing the same, the proper proceedings should be had under chapter VI of the Cass highway law, and the cost and expense of such work may be paid in any one of several ways provided by that chapter.

Your ninth question is as follows:

> "Can a property owner, who fails to maintain an approach to his land, be prosecuted for obstructing a ditch if the failure to repair the approach becomes an obstruction to the ditch?"

Section 284 of the act, section 13421-7 G. C., provides in part as follows:

> "Whoever wrongfully obstructs any ditch, drain or water course along, upon, or across a public highway, or wrongfully diverts any water from adjacent lands to, or upon a public highway, shall be fined not more than one hundred dollars, nor less than five dollars; * * *"

Section 169 of the act, section 7212 G. C., reads as follows:

> "The owners or occupants of land shall construct and keep in repair all approaches or driveways from the public roads under the direction of the county highway superintendent, provided, however, that if, in the construction or improvement, maintenance and repair of any road, the approach or driveway of an abutting property owner is destroyed, the county comissioners or township trustees, shall compensate such abutting property owner or occupant of said lands for the destruction of such approach or driveway, or in lieu thereof, authorize the county highway superintendent to reconstruct the same."

Under the provisions of section 13421-7 G. C., it is a misdemeanor for any person to wrongfully obstruct any ditch along a public highway and this is true without reference to the character of the obstruction. Under section 7212 G. C., it is the duty of the owners or occupants of land to keep in repair all approaches from the public roads. If a property owner fails to keep in repair an approach from a public road, as required by section 7212 G. C., and by reason of his failure to keep such approach in repair, the same becomes an obstruction to a side ditch along the public highway, it is my opinion that such owner is guilty of a violation of the provisions of section 13421-7 G. C., and that he may be prosecuted for such violation.

The tenth inquiry contained in your communication is as follows:

> "After the county commissioners have fixed the appropriation for the county surveyor (Section 2788 G. C.), or have fixed the aggregate compensation to be expended for assistants by the county highway superintendent (Section 138, Cass highway law), have the commissioners any control of the number of men he employs or what work he spends it for so long as he is doing work prescribed by law?"

Section 2787 G. C., must also be considered in connection with this inquiry. The section in question reads as follows:

> "On or before the first Monday of June of each year, the county surveyor shall file with the commissioners of such county a statement of the number of all necessary assistants, deputies, draughtsmen, inspectors, clerks or employes in his office for the year beginning September first next succeeding their aggregate compensation. The county commissioners shall examine such statement and, after making such alterations therein as are just and reasonable, fix an aggregate compensation to be expensed therefor for such year."

Section 2788 G. C., referred to by you, reads as follows:

> "The county surveyor shall appoint such assistants, deputies, draughtsmen, inspectors, clerks or employes, as he deems necessary for the proper performance of the duties of his office and fix their compensation, but compensation shall not exceed in the aggregate the amount fixed therefor by the county commissioners. After being so fixed, such compensation shall be paid to such persons in monthly installments from the general fund of the county upon the warrant of the county auditor."

It is true that section 2787 G. C., requires the county surveyor to file with the commissioners a statement of the number of all necessary assistants, deputies, draughtsmen, inspectors, clerks or employes in his office for the year beginning September 1st next succeeding and a statement of their aggregate compensation, this statement being required to be filed on or before the first Monday of June of each year. It is also true that the county commissioners are required to examine this statement and are authorized to make alterations therein as may be just and reasonable; but the only thing which the commissioners are required or authorized to fix is the aggregate compensation to be expended for assistants, deputies, draughtsmen, inspectors, clerks and employes. Under section 2788 G. C., the surveyor is authorized to appoint such assistants, deputies, draughtsmen, inspectors, clerks or employes as he deems necessary for the proper performance of the duties of his office and fix their compensation, and the only limitation on his authority in this particular is that their compensation shall not exceed in the aggregate the amount fixed therefor by the commissioners. Under section 138 of the Cass highway law, section 7181 G. C., the only authority of the commissioners is to fix the aggregate compensation to be expended for assistants by the county highway superintendent during the year, in the event that the county highway superintendent cannot properly perform all the duties of his office and assistants are required. There is nothing in the sections of the General Code referred to above which indicates that it was the intention of the legislature that the county commissioners should have control of the number of assistants, deputies and other employes of the county surveyor other than the general control which they exercise by virtue of their power to fix the aggregate compensation to be expended. Indeed, the fair inference from the language used is that the authority of the county commissioners is limited to the fixing of the aggregate compensation to be paid assistants, deputies and other employes, and that the determination of the number of employes rests with the county surveyor. As an illustration: If the county commissioners, acting under sections 2787 and 7181 G. C., should fix the aggregate compensation of deputies and assistants for any given year at $6,000.00, it is not made by the statute the duty of the commissioners to determine whether the county surveyor employs four assistants at a compensation of $1,500.00 per year each or whether he employs five assistants at a compensation of $1,200.00 per year each. I, therefore, advise you that the county

commissioners are not authorized to exercise any control over the number of men employed as deputies, assistants or employes by the county surveyor other than to fix the aggregate compensation to be expended, and that this matter rests with the county surveyor, subject to the qualification that the aggregate compensation expended cannot exceed the amount fixed by the county commissioners. I know of no statutory provision which gives the county commissioners any direct control over the question of what particular work is to be performed by the deputies and assistants of the surveyor. It cannot be assumed that the county commissioners will fix an inadequate aggregate compensation for deputies and assistants, and it is the duty of the county surveyor, with the assistance of such deputies, assistants and employes as he is able to employ for the sum allowed by the commissioners, to perform all the duties enjoined upon him by statute. As to whether a particular piece of work is to be done by the county surveyor himself, or by one or another of his deputies or assistants, rests ordinarily in the discretion of the county surveyor himself, with the qualification that there are certain official acts which he must perform in person, or by a deputy duly appointed and qualified as such, and authorized under the provision of section 9, G. C., to perform all and singular the duties of his principal. I am of the opinion, therefore, that the second branch of your tenth question, in so far as it is susceptible of a definite answer, must be answered in the negative.

Your eleventh question reads as follows:

> "May the county commissioners purchase right-of-way for road purposes without petition, and if so what is the proper procedure?"

If this inquiry relates to right-of-way for a new road, the answer thereto is to be found in the provisions of chapter I of the Cass highway law, relating to the locating, establishing, altering, widening, straightening, vacating or changing the direction of the road. The procedure for acquiring right-of-way is fully outlined in the first nineteen sections of this chapter, being sections 6830 to 6878 G. C., inclusive, and the commissioners are authorized to act in the premises, without a petition, by the provisions of the last section of the group referred to above, section 6878 G. C., which section reads as follows:

> "The commissioners of any county or any joint board of commissioners of two or more counties, at a meeting had for that purpose, may by resolution declare by unanimous vote their intention to locate, establish, alter, widen, straighten, vacate or change the direction of any road, and such notice shall thereupon be given as is provided for upon the filing of a petition for such improvement, and like proceedings shall be had by such commissioners or joint board thereof as in the case of the filing of a petition before them asking for such improvement."

A reference to the other sections of the group referred to above will, I think, sufficiently indicate the proper procedure without any further discussion on my part.

If the right-of-way desired is to be used in connection with the improvement of an existing road, the pertinent provisions of the General Code are to be found in Chapter VI of the Cass highway law, relating to road construction and improvement by county commissioners. It is provided by section 6906 G. C., that the county commissioners shall have power to alter, vacate or widen any part of a road in connection with the proceedings for the improvement thereof, and section 6910 G. C., authorizes county commissioners to take the necessary steps to construct or improve a public road or part thereof without the presentation of a petition upon the passage of a resolution by unanimous vote declaring the necessity therefor. In the event that land is to be taken for such an improvement, notice must be given in the manner provided

by section 6913 G. C., and claims for compensation are to be determined in the manner pointed out in sections 6914 to 6916 G. C., inclusive. I think a reference to these sections will furnish a guide for the proper procedure in the premises without further discussion herein.

Your question as to whether county commissioners may purchase right-of-way for road purposes without petition is, therefore, to be answered in the affirmative, and for the proper procedure in securing such right-of-way reference is to be had to the sections of the General Code referred to above.

Your twelfth question reads as follows:

> "Where the county, by a vote of the people, under the general turnpike law, and by a general levy and bond issue has, prior to 1915, constructed roads through a village or city, can the county commissioners without an agreement with the council of the village or city repair or maintain such roads under the Cass law?"

I assume that you refer to roads constructed under old section 7181, G. C., et seq., but the proper answer is not determined by the law under which the roads were constructed, and is necessarily the same without regard to the law under which the roads were originally built.

It is provided by section 6949 G. C., that the board of county commissioners may extend a proposed road improvement into or through a municipality when the consent of the council of said municipality has been first obtained, but as pointed out in opinion No. 847, rendered to you on September 21, 1915, the term "municipality" as used in this and the succeeding sections is by the provisions of section 6954 G. C., so limited that it must be read "village." County commissioners are not, therefore, authorized to repair a road within a city, either with or without the consent of council. It is very clear that under the authority of this section county commissioners are not authorized to improve a road within a village without the consent of the council thereof, and if they have authority to improve such a road without the consent of council, such authority must be found in some other section of the act.

A reference to section 6949 G. C., and the succeeding sections might, at first glance, indicate that they were intended to apply only in the case of improvements as distinguished from maintenance or repair operations and yet upon a more careful consideration of the sections, and in view of the frequent use in the act of the word "improvement" for the purpose of denoting any operation upon a road, whether it be in the nature of construction, reconstruction, improvement, maintenance or repair, it might be urged with force that the proper view of the matter is that the provisions of section 6949 G. C., in so far as they require the consent of the council of the village, are applicable under all circumstances without regard to the nature of the operation planned by the county commissioners. It is true that section 7467 G. C., provides that

> "The state, county or township, or any two or more of them, may by agreement expend any funds available for road construction, improvement or repair upon roads inside of a village."

but the language of this section is not as clear as might be desired. It might be argued that the language means that the state or the county or a township, or any two or or more of them, may expend funds inside a village by agreement with the village, or it might be argued that the phrase "by agreement" was inserted for the purpose of authorizing an agreement between the state, county and township, or any two of them, looking toward the expenditure of funds within a village. It is worthy of note in this connection, that, in so far as the state is concerned, it cannot extend a proposed

improvement into or through a village without the consent of the council thereof, this being made very clear by the provisions of sections 1193 and 1231-3 G. C.

Section 1193 provides in substance, among other things, that county commissioners or township trustees may apply for state aid on a highway within a village, when the same is a continuation of a proposed improvement and the consent of the village has been first obtained.

Section 1231-3, G. C., provides, among other things, that the state highway commissioner may extend a proposed improvement into or through a village, when the consent of the council thereof has been first obtained.

If it be conceded that the statutory provisions, relating to the activities of county commissioners within villages in the way of repair work, are not clear upon the proposition of whether or not the council of a village must first give its consent, then the fact that in all cases of state work the consent of the council of the village must be first obtained is entitled to some weight in the solution of the question.

A consideration of all of the provisions referred to above discloses that in a general way the state, counties and townships are limited in all their highway work to roads located outside municipalities. Those cases in which a county may engage in road work inside a village constitute exceptions to the general rule and in view of the positive provisions of section 6949, G. C., to the effect that a board of county commissioners may not extend a proposed road improvement into or through a municipality unless the consent of the council thereof has been first obtained, and in view of the fact that there is no affirmative provision in the act that a county may do repair work upon a road inside a village without the consent of the council, I am of the opinion that your question must be answered in the negative and that county commissioners are now without authority to carry forward road work of any character within a village, unless the consent of the council thereof be first obtained.

Your thirteenth question is as follows:

> "Who pays for dragging or maintaining an unimproved road through a village or city?"

Section 3379, G. C., being found in the chapter of the Cass highway law relating to dragging unimproved roads, reads as follows:

> "It shall be the duty of the council of cities and villages to cause the main graveled and unimproved roads within the limits of said corporation to be dragged so far as practicable and possible in accordance with the provisions of the above sections."

By the above section the legislature has, in express terms, cast upon villages and cities the duty of dragging the main graveled and unimproved roads within their limits. Aside from the provisions of section 3379, G. C., it is clear that the duty, both of dragging and of maintaining roads within cities and villages, rests upon the municipal corporation. By section 3714, G. C., the council of a municipal corporation is given the care, supervision and control of public highways within the corporation and required to keep them open, in repair and free from nuisance. I therefore advise you that the duty of dragging and maintaining an unimproved road through a village or city rests upon such municipal corporation.

Your fourteenth question is as follows:

> "Is there not a conflict in the jurisdiction of the township trustees as defined in the latter part of section 75 of the Cass law and the duties of the county highway superintendent as set forth in section 141 of the Cass law?"

That part of section 75 of the Cass Highway law, section 3370 G. C., to which you evidently refer, reads as follows:

> "Under the direction of the township trustees he (the township highway superintendent) shall have control of the roads of his district and keep them in good repair."

Section 141 of the Cass highway law, section 7184 G. C., reads as follows:

> "The county highway superintendent shall have general charge, subject to the rules and regulations of the state highway department, of the construction, improvement, maintenance and repair of all bridges and highways within his county, whether known as township, county or state highways, and such county highway superintendent shall see that the same are constructed, improved, maintained, dragged and repaired as provided by law, and shall have general supervision of the work of constructing, improving, maintaining and repairing the highways, bridges and culverts in his county, subject, however to the provision hereinafter made for the designation, by the state highway commissioner, of an engineer, other than the county surveyor, to have charge of state work in such county."

There would, at first glance, seem to be a conflict between these sections in that section 3370, G. C., provides that the township highway superintendent shall keep the township roads of his district in good repair, and that in so doing he shall act under the direction of the township trustees, whereas section 7184, G. C., provides that the county highway superintendent shall, subject to the rules and regulations of the state highway department, have general charge of the repair of all highways within his county, including township roads, and shall see that the same are dragged and repaired as provided by law. It is apparent, however, from a consideration of the several sections of the act, that the township highway superintendent is the executive officer of the township trustees in all matters relating to the dragging and repair of roads, and that while the township highway superintendent is in a measure answerable to the county highway superintendent, and may be removed for cause by that official, yet in so far as there is any apparent conflict between the jurisdiction and authority of the township trustees and that of the county highway superintendent, such conflict must be resolved in favor of the jurisdiction and authority of the trustees. I reach this conclusion by reason of the language of section 3374 to the effect that the township highway superintendent, in addition to certain definitely prescribed duties, shall perform such other duties as may be prescribed by law or by the rules and regulations of the township trustees, or the county highway superintendent, *so far as the rules and regulations of the county highway superintendent do not conflict with those of the township trustees.* Your fourteenth question is, therefore, to be answered by the observation that while there is an apparent conflict between the sections referred to by you, yet the true rule may be reached by a consideration of section 3374, G. C., and that in matters of road repair and dragging, the township trustees are supreme, and in so far as their rules and regulations may conflict with those of the county highway superintendent, the rules and regulations of the township trustees are to govern.

Your fifteenth question reads as follows:

> "May one of the board of township trustees act as township highway superintendent, and receive compensation therefor?"

This question must be answered in the negative. The township highway superintendent is subject to the rules and regulations of the township trustees. His compensation is to be fixed by the township trustees and his compensation and expenses can only be paid after approval by the township trustees. The office of township trustee constitutes a check upon the position of township highway superintendent and it must therefore be held, under well established rules of law, that the two offices or positions are incompatible and cannot be held by the same person at the same time.

The sixteenth question contained in your communication reads as follows:

> "In case board of township trustees refuses to appoint a township highway superintendent, what can be done and who is liable for non-performance of work as specified in the Cass law?"

This question is to be answered by reference to the provisions of section 3370, G. C. Under this section it is the mandatory duty of the township trustees to determine the number of road districts in their townships, the number to be not less than one nor more than four, to fix the boundaries of said districts in case they decide to create more than one district, and to appoint for each road district a township highway superintendent. The number of districts rests in the discretion of the township trustees, but their duty to act under this section, by determining the number of districts, fixing the boundaries thereof and appointing a superintendent for each district, is one which may be enforced by mandamus. The remedy, therefore, under the state of facts presented by you, is an action in mandamus against the township trustees to compel them to perform their duty and in the case of a wilful refusal on their part to act in the premises, they may also be proceeded against criminally, under the provisions of section 13421-5, G. C., which section reads as follows:

> "If any county highway superintendent or township trustee or township highway superintendent, wilfully neglects, fails or refuses to perform the duties of his office, he shall be fined not more than one hundred dollars, nor less than ten dollars, and said conviction shall operate as a removal from office."

Your seventeenth question is as follows:

> "In case the trustees of a township are not in favor of the dragging of the township roads and order the township highway superintendent not to drag, has the county highway superintendent the power to order the roads dragged? In all cases of township work, whose order has precedence, that of the township trustees or that of the county highway superintendent?"

It is my view of the law that the statutes relating to the dragging of unimproved roads by the township authorities are mandatory, and this, despite the provision of section 3377, G. C., to the effect that it shall be the duty of the township highway superintendent to cause all roads to be dragged, *as the township trustees may, from time to time direct,* at such time as in his judgment is most beneficial.

It is provided by section 3375, G. C., that the township highway superintendent *shall* divide the graveled and unimproved public roads of the township into road dragging districts, which *must* include all mail routes and main traveled roads within the township which are graveled or unimproved. It is further provided in the same section that the township highway superintendent *shall,* from time to time, designate what districts shall be dragged, and that the township trustees *shall* furnish suitable road drags. Under section 3376, G. C., it is provided that the township

trustees *shall* pay all claims for dragging that have the approval of the township highway superintendent, and that are not inconsistent with the provisions of the act. The same section provides that the trustees *shall*, each year, during the month of January, fix the price to be paid for dragging that year.

Under the provisions of section 3377, G. C., it is provided that the township highway superintendent *shall*, on or before the 15th day of February in each year, contract with one suitable person in each dragging district to drag the roads in that district for the year. To hold that the expression "as the township trustees may, from time to time, direct," found in section 3377, G. C., confers upon township trustees the power and authority of determining that the graveled and unimproved public roads of the township shall not be dragged, is to set aside a large number of other provisions in the same chapter of the law, which provisions are so drawn as to leave no doubt of their mandatory character. I must therefore conclude that the discretion which the legislature intended to lodge in the township trustees is not that of determining whether or not the graveled or unimproved public roads of the township shall be dragged, but that the legislature only intended that the trustees might exercise a discretion as to the method to be followed and their instructions in this particular were to be binding upon the township highway superintendent.

In reply to your seventeenth question I therefore advise you that township trustees are not authorized to dispense with the dragging of the graveled and unimproved public roads of their township. It is apparent, however, from a consideration of other provisions of the act that it was the intention of the legislature to vest in boards of county commissioners the power and authority of assisting the township trustees in the manner of dragging if, in the judgment of the board of county commissioners, such assistance seems necessary and proper.

Section 6906, G. C., provides, among other things, that the board of commissioners of any county shall have power to construct a public road by laying out and building a new public road or by improving, reconstructing or repairing any existing public road, or part thereof, by grading, paving, draining, *dragging*, graveling, macadamizing, resurfacing or applying dust preventives, or by otherwise improving the same. I therefore advise you that while the duty of dragging graveled and unimproved public roads rests upon the township authorities, yet county commissioners are authorized to assist in the discharge of this duty. The latter part of your seventeenth question is in part discussed and passed upon in my answer to your fourteenth question. In so far as the repair and dragging of roads is concerned, the order of the township trustees has precedence over that of the county highway superintendent. In so far as the construction or improvement of roads by township trustees is concerned, the relations existing between the township trustees and the county highway superintendent are substantially those existing between the county commissioners and the county highway superintendent. The question of the respective powers and duties of the trustees and the county highway superintendent in this matter is too broad to admit of a full discussion in this opinion and reference should be had to the provisions of chapter III of the Cass highway law for a determination of the same. I will be very glad to answer any questions that may arise as to any alleged conflict of duties.

Your eighteenth question reads as follows:

> "Whose duty is it to hire roller engineers, foremen, teams and laborers and purchase material in the repair of county roads? In the repair of township roads? May the county commissioners hire roller engineers, foremen, etc., without the approval of the county highway superintendent? May the township trustees hire roller engineers, foremen, etc., without the approval of the county highway superintendent or the township highway superintendent?"

This question has been substantially covered in my answer to your second question. In so far as the repair of roads by the county commissioners is concerned, engineers, foremen, teams and laborers are to be employed by the county highway superintendent, the employment first being authorized by the county commissioners. County commissioners may purchase material for the repair of roads or they may authorize the county highway superintendent to make such purchase. In so far as the repair of roads by township trustees is concerned, engineers, foremen, teams and laborers are to be employed by the township highway superintendent, the employment first being authorized by the township trustees. The township trustees may purchase material for the repair of township roads or they may authorize the county highway superintendent to make such purchase. The county commissioners are not themselves authorized to hire engineers, foremen and laborers and this is also true as to the township trustees.

Supplementing your inquiry of March 30th, you submit the following inquiry under date of May 1st:

> "We are submitting herewith a letter from Mr. Wm. F. Schepflin, county highway superintendent of Sandusky county, Ohio, in which he asks whether it is necessary for the county highway superintendent to approve all bills for road work ordered by the township trustees, and whether said bills should be approved before allowance by the township trustees, or whether his approval, or rejection, could be noted on the clerk's warrant or check before payment of same by the township treasurer.
>
> "As his letter presents a legal question, we would ask your written opinion upon same."

In conformity with opinion No. 847, rendered to you on September 21, 1915, I advise that all bills for road work ordered by the township trustees are to be approved by the county highway superintendent before payment. The bills may be approved before allowance by the township trustees or they may be allowed by the trustees subject to the approval of the county highway superintendent, but in either event the approval of the county highway superintendent is necessary before payment of the same may lawfully be made.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1607.

COLLATERAL INHERITANCE TAX—ST. VINCENT'S ORPHANS' ASYLUM, COLUMBUS, OHIO, EXEMPT FROM SAID TAX—IS INSTITUTION OF PUBLIC CHARITY.

St. Vincent's Orphans' Asylum of Columbus, Ohio, is an institution "for the purpose only of public charity" within the meaning of Section 5332, *G. C.*

COLUMBUS, OHIO, May 23, 1916.

HON. THOMAS C. BEATTY, *Probate Judge, Portsmouth, Ohio.*

DEAR SIR:—I have your letter of May 18th requesting my opinion as follows:

> "Will you tell me the status of St. Vincent's Orphans' Asylum of Columbus under the collateral inheritance tax act? Is it liable for the tax? Or is

it not taxable on the ground that it is an institution for purposes only of public charity? The matter is bothering me here on the question of a bequest."

Upon investigation I find that St. Vincent's Orphans' Asylum, while owned and controlled by the Catholic Church, is open to all orphan children alike and that there are no restrictions as to creed or nationality for admission. I am of the opinion, therefore, that said institution is one "for the purpose only of public charity" within the meaning of section 5332, G. C., which provides that:

> "The provisions of the next preceding section (relating to the collateral inheritance tax) shall not apply to property, or interests in property, transmitted to the state of Ohio under the intestate laws of the state, or embraced in a bequest, devise, transfer or conveyance to, or for the use of the state of Ohio, or to or for the use of a municipal corporation or other political subdivision thereof for exclusively public purposes, or public institutions of learning, *or to or for use of an institution in this state for purposes only of public charity* or other exclusively public purposes. The property, or interests in property so transmitted or embraced in such devise, bequest, transfer or conveyance shall be exempt from all inheritance and other taxes while used exclusively for any of such purposes."

This conclusion is based on the following authorities:

Morningstar Lodge, I. O. O. F. v. Hayslip, 23 O. S., 144;
Gerke v. Purcell, 25 O. S., 229;
Little v. Seminary, 72 O. S., 417;
Philadelphia v. Masonic Home, 160 Pa., 572.

These authorities were fully considered in opinion No. 261 of this department, rendered to Hon. William H. Lueders, probate judge of Hamilton County, under date of April 19, 1915, as found in the Annual Report of the Attorney-General for said year at page 493 of said report.

I enclose a copy of said opinion for your consideration in connection with my conclusion reached in answer to the question submitted by you.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1608.

WHEN CORPORATION IS "NATURAL GAS" COMPANY WITHIN MEANING OF PUBLIC UTILITY TAX STATUTES OF 1911—SUCH COMPANY REQUIRED TO PAY EXCISE TAXES ON BASIS OF ENTIRE RECEIPTS FROM ALL BUSINESS DONE—WHO IS LIABLE FOR OMITTED TAXES WHEN ASSETS OF COMPANY SOLD TO ANOTHER COMPANY—CHARGE SHOULD BE MADE AGAINST COMPANY ACTUALLY IN DEFAULT.

A corporation principally engaged in the business of producing and transporting natural gas and selling the same to distributing companies, but to some extent also in the business of selling such gas directly to consumers, is a "natural gas" company within the meaning of the public utility tax statutes of 1911, *and as such is required to pay excise taxes on the basis of its entire receipts from all business done.*

A charge for omitted taxes made by the tax commission of Ohio, acting under section 5461, *G. C., should be made against the public utility company which was actually in default, there being no authority to make the charge against another company which has in the meantime purchased the assets of the defaulting company. Such charge for such omitted taxes does not fasten upon the property and assets of the defaulting company which have, prior to the making of the charge, passed into the hands of a bona fide purchaser without notice of the default. The state may, however, pursue the property as such into the hands of a purchaser with notice, or a mere corporate reorganization, and may sue such purchaser and obtain a personal judgment for such omitted taxes if the purchaser has agreed to pay all liabilities of the selling company as a part of the consideration of the purchase.*

COLUMBUS, OHIO, May 23, 1916.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have had some correspondence with Honorable Carl Norpell, attorney-at-law, Newark, Ohio, in the matter of the charge made by the auditor of state in pursuance of the finding of an examiner of your commission against the Newark Consumers Gas Company on account of omitted excise taxes due from its predecessor in title, the Newark Heat & Light Company.

The facts so far as disclosed by the correspondence in my possession are as follows:

The Newark Heat & Light Company was engaged in the business of leasing oil and gas lands, mining the gas and oil and selling the same. The sales of gas were mainly, in fact almost entirely, made to distributing companies, but some gas was sold to consumers. In the year 1912 the company reported to the tax commission of Ohio as its gross receipts for business done in this state the amount of its sales to consumers only. An examiner of the tax commission went over the books, which are now in the possession of the Newark Consumers Gas Company, and found omitted receipts, viz.: receipts from sales of gas to distributors, and has made a charge therefor.

The Newark Heat & Light Company evidently went out of business at the end of the year 1912 and was succeeded by The Newark Consumers Gas Company. However, no facts are furnished respecting the exact present status of The Newark Heat & Light Company as a corporation nor as to the contract between The Newark Heat & Light Company and The Newark Consumers Gas Company whereby the latter "succeeded" the former. The facts furnished seem to indicate that the property formerly belonging to The Newark Heat & Light Company has become the property of The Newark Consumers Gas Company, but beyond this the correspondence is silent on the points suggested.

Under these circumstances two questions arise, viz.:

"(1) On what basis was The Newark Heat & Light Company liable for excise taxes for the year 1912?

"(2) Is The Newark Consumers Gas Company now liable to the state for any omitted taxes which could be lawfully charged against The Newark Heat & Light Company?"

Section 5417, G. C., provides as follows:

"The term 'gross receipts' shall be held to mean and include the entire receipts for business done by any person or persons, firm or firms, co-partnerships or voluntary association, joint stock association, company or corporation, wherever organized or incorporated, from the operation of any public utility, or incidental thereto or in connection therewith. *The gross receipts for business done by an incorporated company, engaged in the operation of a public utility, shall be held to mean and include the entire receipts for business done by such company under the exercise of its corporate powers, whether from the operation of the public utility itself or from any other business done whatsoever.*"

This section was in force in the year 1912, having been passed in 1911 (102 O. L., 224).

In the year 1912 The Newark Heat & Light Company was an "incorporated company." It was "engaged in the operation of a public utility." The business, the receipts from which are affected by the finding for omitted taxes, was "business done under the exercise of its corporate powers." In point of fact I think that even under the first sentence of section 5417, G. C. The Newark Heat & Light Company would have been liable for taxes on the omitted receipts; but the second sentence of the section removes all doubt. The constitutionality of this second sentence and the importance of the substantive change which its enactment made in the law were established in the case of Ohio Traction Co. v. State, recently decided by the supreme court, but not to be officially reported. The court of appeals in that case held that by virtue of the introduction of this section into the law when the Hollinger act of 1911 was passed the statutes were made to embody a "combination excise and franchise tax;" so that every company liable to the state for any privilege tax was made to bear a burden commensurate with the full exercise of its corporate powers.

None of the sections of the General Code applicable to such transactions authorizes the reduction of gross receipts on the ground that the same represent income from other companies also liable to excise taxation. It is sometimes urged that failure of the statutes expressly to authorize such deduction should not prevent their interpretation in such a way as to permit it, because otherwise the result would constitute unjust double taxation. This contention is not sound; all income and excise taxation is in this sense "double taxation." This point was settled in the case of Cincinnati, Milford & Loveland Traction Co. v. State, No. 14944, recently decided by the Supreme Court and not yet officially reported.

In the case of State v. Coshocton Gas Co., 12 N. P. n. s., 570, affirmed without report by the Supreme Court, the result of so-called "double taxation" was avoided by the fact that the relation of principal and agent, or one corresponding thereto, existed between the local company and the production and transporting company, so that sales made through the local company and the receipts therefrom were the products of a joint enterprise. That was a case in which the state was seeking to make the local distributing company account for receipts as the basis of excise taxation from all the business done in the city of Coshocton. The court held that the local company was required to report only its percentage of the receipts retained by it, the remainder of the total receipts being collected by it as agent of the transportation company. No question was made in that case as to the liability of the transportation company, which company is the one which bears an analogy to The Newark Heat & Light Company. In fact it was claimed in that case that the transportation company had paid excise taxes on its proportion of the local receipts.

The commission is, of course, familiar with these three cases, and I have referred to them only in a most general way. It follows from the terms of the statutes and from the interpretation given to them by the courts in the cases cited that The Newark Heat & Light Company was liable in the year 1912 for excise taxes based upon the income received by it from sales of gas to distributing companies.

The second question involved is more difficult of solution, for in this respect the statutes are not so clear nor have we the benefit of any decisions. The tax commission when it made the finding of omitted taxes was evidently acting under section 5461, G. C., which authorizes the commission to go back into previous years and make findings of omitted taxes. The section is very lengthy and I desire to quote only a part of it:

> "Section 5461. When a public utility or corporation fails to make any report or furnish any statement, which it is required to make or furnish, to the commission, or makes a return or statement of a portion only of the gross receipts or gross earnings, which it is required by law to make or return, and fails to make return or statement of the remainder, or fails to report a part or all of its taxable property, or report the same, or part thereof, according to its true value in money, the commission shall ascertain, as nearly as practicable, the gross receipts or gross earnings, or omitted portion of the same, or taxable property, or omitted part of the same, or such as was not reported according to its true value in money, that should have been reported or returned by such public utility or corporation, and certify such gross receipts or gross earnings, or the value of such property, so ascertained, as required in this act, with respect to its gross receipts, gross earnings and property of public utilities and corporations. * * * The power and duty of the commission, above provided for, shall extend to preceding years in such manner as that the commission shall, for such year or years preceding the year in which the inquiries are made, and omissions ascertained, certify such omitted amounts, so ascertained, certify such omitted amounts, so ascertained, as required in this act, with respect to such companies, in which event such omitted amounts shall be taxed at the rate of taxation belonging to the year or years in which the failure or omission occurred, in the case of property, and in all other cases the amount of the tax or fee upon such omitted amounts shall be calculated upon the amount so ascertained by the commission, at the rate provided by law, for such year or years; provided, however, that the power and duty of the commission with respect to property shall extend only to the five years next preceding the year in which such inquiries and corrections are made, and not in any event prior to the year 1911, except where no property of a company has been returned or assessed in any such year or years."

This section refers to the manner in which like certifications are "required in this act" to be made. This reference brings us back again to the group of statutes which provide for the exaction of the excise tax originally. The certification section relating to natural gas companies is section 5481, G. C. It provides as follows:

> "On the first Monday of October the commission shall certify to the auditor of state, the amount of the gross receipts so determined, of electric light, gas, natural gas, pipe line, waterworks, express, telegraph, telephone, messenger or signal, union depot, heating, cooling and water transportation companies, for the year covered by its annual report to the commission, as required in this act."

With this section, section 5483, G. C., belongs. It provides as follows:

> "In the month of October, annually, the auditor of state shall charge, for collection from each electric light, gas, natural gas, waterworks, telephone,

messenger or signal, union depot, heating, cooling and water transportation company, a sum in the nature of an excise tax, for the privilege of carrying on its intra-state business, to be computed on the amount so fixed and reported by the commission as the gross receipts of such company on its intra-state business for the year covered by its annual report to the commission, as required in this act, by taking one and two-tenths per cent. of all such gross receipts, which tax shall not be less than ten dollars in any case."

While nothing is said expressly in any of these sections as to the manner in which the charge shall be made, I think it is rather clear that in the absence of express statutory authority *the charge* must be made against the company in default, under section 5461, G. C. In other words, I find no authority in the tax commission to charge against a "successor" company any taxes on receipts omitted by its predecessor company.

Section 5506, G. C., provides as follows:

"The fees, taxes and penalties, required to be paid by this act, shall be the first and best lien on all property of the public utility or corporation, whether such property is employed by the public utility or corporation in the prosecution of its business or is in the hands of an assignee, trustee or receiver for the benefit of the creditors and stockholders thereof."

If the liability for the tax had accrued prior to the sale of its property by The Newark Heat & Light Company to The Newark Consumers Gas Company, and the same became a lien upon that property, then, of course, while The Newark Consumers Gas Company would not be subject to any direct liability *in personam*, yet the state could foreclose the lien and thus The Newark Consumers Gas Company would be required to pay the omitted tax in order to protect its property.

I find the question as to whether the omitted tax in question became a lien to be the most difficult one raised by the statement of facts. Without, however, stating all the considerations which have appealed to me as suggesting one answer or another to this question, I give it as my opinion that the lien did not attach in this case until after The Newark Heat & Light Company had sold its property to The Newark Consumers Gas Company; so that when it did attach it could operate only upon the property then belonging to The Newark Heat & Light Company. I wish to make clear that I am not dealing with priorities, and that nothing is intended to be expressed here as to the nature of the lien once it does attach to the property of the public utility. Nor do I intend to hold that as a general proposition the lien for the taxes regularly payable does not attach until the duplicate charge is made. I have to deal in this opinion with the narrow question as to when the lien attached on a charge *for omitted taxes*. It will be remembered that taxes are not assessed on the property as a subject of taxation. The lien is a mere method of securing the payment of the tax. The property is bound in a sense as surety for an obligation primarily *in personam*.

To be sure, any one dealing with a public utility for the purchase of its property would, by the provisions of this law, be put upon his notice as to the existence of any unsatisfied claims for taxes. However, the source of information available to him would be limited to the duplicates in the offices of the auditor and treasurer of state, or at the most, to the files and records of the tax commission of Ohio. For example, if The Newark Consumers Gas Company had exercised the very highest degree of diligence when it was considering the purchase of the property of The Newark Heat & Light Company, it could not have discovered by anything on record in any of the state offices that any charge against The Newark Heat & Light Company existed. On the contrary, the records would have shown that charges had been made against The Newark Heat & Light Company, but that the same had been satisfied

and the possibility of any liens on that account destroyed. To be sure, The Newark Heat & Light Company was technically in default in failing to include certain receipts in its statement to the tax commission. Nevertheless, it may have acted in good faith upon its understanding of the law; and this default should not, in the absence of a statutory provision a great deal more explicit than section 5506, G. C., be so imputed to The Newark Consumers Gas Company as to work an injury to it.

I must assume from the meager facts submitted to me that The Newark Consumers Gas Company is not a mere reorganization of The Newark Heat & Light Company, and that in the purchase in question it dealt with The Newark Heat & Light Company as an innocent purchaser, without notice of any claims of the state other than that with which it might be charged by the public records. On this assumption I arrive at my conclusion that the property which formerly belonged to The Newark Heat & Light Company could not be charged in the hands of The Newark Consumers Gas Company with a lien on account of the omitted taxes due from the former company.

I do not mean to hold that The Newark Consumers Gas Company is not liable to the state for the taxes of The Newark Heat & Light Company. I do not know what contract was made between the two companies for the sale of the property of one to the other. It may be that the state is the beneficiary of such a contract whereby The Newark Consumers Gas Company has agreed to assume all the liabilities of The Newark Heat & Light Company. If this is the case, I am of the opinon that the state could sue The Newark Consumers Gas Company and recover. If this is not so, the state's remedy is against The Newark Heat & Light Company, if that company is still in existence. If the company's affairs have been wound up, however, I am of the opinion that the claim of the state is uncollectible, for I do not believe that the winding-up trustees of the company could be held liable under all the circumstances.

My conclusions, then, are as follows:

(1) The claim certified to me is a proper one in the sense that there are omitted taxes for which there is a liability to the state.

(2) The charge, however, is improperly made. The tax commission should so certify to the auditor of state that the charge against The Newark Consumers Gas Company may be expunged and one against The Newark Heat & Light Company substituted therefor.

(3) Property formerly belonging to The Newark Heat & Light Company, and now belonging to The Newark Consumers Gas Company, would not be bound by lien of the charge against the former company, because the lien did not attach until after the title to the property had passed from the one company to the other. However, my holding here is based upon the assumption that The Newark Consumers Gas Company was a purchaser without notice. If it was substantially a reorganization of the old company and had notice of the old company's default, it may be that the state could successfully assert a lien on the property in question.

(4) Whether or not The Newark Consumers Gas Company is liable to the state by reason of the assumption by it of the liability of The Newark Heat & Light Company, or by reason of the fact that it may have been a mere reorganization of the latter company, is a question which cannot be determined from the correspondence in my possession. Possibly the examiner of the commission may have ascertained the facts with respect to this point and may have made his finding on the basis of such facts. If that is the case, his finding is erroneous merely with respect to the name in which it is certified. The examiner's conclusion should have been that a charge should be made against The Newark Heat & Light Company and proceedings for the collection of the same should be instituted against The Newark Consumers Gas Company.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1609.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, DOVER TOWNSHIP RURAL SCHOOL DISTRICT, TUSCARAWAS COUNTY, OHIO—BOND FORM TO BE REVISED.

COLUMBUS, OHIO, May 23, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Dover township rural school district in Tuscarawas County, Ohio, in the sum of $30,000.00 for the purpose of purchasing a site and erecting, equipping and furnishing a school house thereon, being *sixty bonds of five hundred dollars each.*"

I have examined the transcript of the proceedings of the board of education and other officers of Dover township rural school district relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code, except that the bond form fails to contain the recital that provision has been made for the levy and collection of a tax sufficient to pay interest and create a sinking fund for the redemption of said bonds as they fall due. As provision to that effect was made in the resolution authorizing the issuance of bonds, I am by letter instructing the clerk of the board to amend the bond form by inserting a recital to that effect.

I am of the opinion that said bonds drawn in accordance with the form to be amended as above suggested, and signed by the proper officers will, upon delivery, constitute valid and binding obligations of Dover township rural school district.

I suggest that opportunity be given me to further inspect the bonds when they are delivered to the treasurer of state.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1610.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, SHEFFIELD TOWNSHIP, RURAL SCHOOL DISTRICT, LORAIN COUNTY, OHIO.

COLUMBUS, OHIO, May 23, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Sheffield township rural school district, Lorain county, Ohio, in the sum of $6,500.00, being thirteen *bonds of five hundred dollars each.*"

I have examined the transcript of the proceedings of the board of education of Sheffield township rural school district and other officers relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted, and signed by the proper officers will, upon delivery, constitute valid and binding obligations of Sheffield township rural school district, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1611.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY CITY OF WOOSTER, OHIO.

COLUMBUS, OHIO, May 23, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:

"RE:—Bonds of the city of Wooster, Ohio, in the sum of $11,208.00, in anticipation of the collection of special assessments upon abutting properties for the improvement of East Bowman street, being twenty bonds of five hundred dollars each, and ten bonds of one hundred and twenty dollars and eighty cents each."

I have examined the transcript of the proceedings of the council and other officers of the city of Wooster relative to the above bond issue, also the bond and coupon form submitted, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted, and signed by the proper officers, will, upon delivery, constitute valid and binding obligations of the city of Wooster, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1612.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY CITY OF WOOSTER, OHIO.

COLUMBUS, OHIO, May 23, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:

"RE:—Bonds of the city of Wooster, Ohio, in the sum of $11,646.00, to secure funds to pay the city's portion of the cost of paving East Bowman street and of South Bever street, being one bond of one hundred and forty-six dollars, and twenty-three bonds of five hundred dollars each."

I have examined the transcript of the proceedings of the council and other officers of the city of Wooster relative to the above bond issue, also the bond and coupon form submitted, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted, and signed by the proper officers, will, upon delivery, constitute valid and binding obligations of the city of Wooster, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1613.

COURT CONSTABLE—JUDGE OF COMMON PLEAS COURT IN COUNTY WHERE ONLY ONE JUDGE HOLDS COURT CANNOT LEGALLY APPOINT COURT CONSTABLE TO ATTEND ASSIGNMENT OF CASES.

A judge of the court of common pleas in a county where only one judge holds court cannot legally appoint a court constable to attend the assignment of cases, and fix an additional compensation for so doing.

COLUMBUS, OHIO, May 23, 1916.

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

GENTLEMEN:—I have your letter of May 17, 1916, submitting the following inquiry:

> "May a judge of the court of common pleas, in a county where only one judge holds court, legally appoint the court constable to attend the assignment of cases and fix an additional compensation for so doing? See section 1692, G. C., as amended 103 O. L., 417, and section 1693, G. C., as amended 106 O. L., 347."

Section 1692, G. C., as amended 103 O. L., 417, provides as follows:

> "Section 1692. When, in the opinion of the court, the business thereof so requires, each court of common pleas, court of appeals, superior court, insolvency court, in each county of the state, and in counties having at the last or any future federal census more than seventy thousand inhabitants, the probate court may appoint one or more constables to preserve order, attend the assignment of cases in counties where more than two common pleas judges regularly hold court at the same time, and discharge such other duties as the court requires. When so directed by the court each constable shall have the same powers as sheriffs to call and impanel jurors, except in capital cases."

Section 1693, G. C., as amended 106 O. L., 347, provides as follows:

> "Section 1693. Each constable shall receive the compensation fixed by the judge or judges of the court making the appointment. In counties where four or more judges regularly hold court, such compensation shall not exceed twelve hundred and fifty dollars each year; in counties where more than one judge and not more than three judges hold court at the same time, not to exceed one thousand dollars per year, and in counties where only one judge holds court, such amount, not to exceed seven hundred and twenty dollars each year, as may be fixed by the court, and shall be paid monthly from the county treasury on the order of the court. Such court constable or constables may, when placed by the court in charge of the assignment of cases, be allowed further compensation not to exceed one thousand five hundred dollars, as the court by its order entered on the journal determines. In counties where only one judge holds court, the constable provided for herein, when not attending the common pleas court, shall, upon order of the judge of such common pleas court, and without additional compensation, attend the probate court or the court of appeals of such county."

Of these two sections the former is manifestly the enabling statute in respect to the appointment of court constables and the assignment of other duties. This

section plainly provides that court constables may be appointed to preserve order, and to attend the assignment of cases in counties where two or more judges hold court, that is to say, such constables may be appointed in any county to preserve order, and in counties where two or more judges hold court they may also attend the assignment of cases. If this statute stood alone it would not be seriously questioned that its provisions limited the right to include in the duties of such constables the assignment of cases only to such counties in which two or more judges hold court.

But it seems some common pleas judges have construed the provisions of the last named section, as conferring authority upon the common pleas court to impose the duty of assigning cases upon court constables in any county and to make an extra allowance for such services as provided in said section. I cannot understand upon what theory, or by what process of reasoning this conclusion was reached. This section 1693, G. C., supra, authorizes such extra allowance only when such court constable or constables are placed in charge of the assignment of cases. It does not fix or undertake to specify when and under what circumstances they may be given this duty. It refers to a condition which must exist before such allowance may be made and as a basis of such an allowance, but it in no manner whatever assumes to provide for that condition.

In the absence of any other provision of law it might be said that this statute by expressly authorizing such additional allowance under the conditions specified, impliedly delegates the power to create such condition, but such authority may only be implied in any case to make effective the object and purpose of the law in question. It is manifest that the sole purpose of section 1693, G. C., supra, is to provide for the compensation of court constables. It has no other object. If its purpose may be fully accomplished without involving the doctrine of implication, no reason may be said to exist for the application of said doctrine and it, therefore, does not apply. However, in the section first named full and complete provisions are found for the appointment of court constables, and as before stated, it being the enabling statute in this respect it is exclusive and must control.

While entertaining the greatest respect for the judges in question I am unable to concur in their construction of the law, and must, therefore, advise you that in my opinion a court constable or constables may be given the duty of assigning cases, and additional compensation allowed therefor only in those counties which have two or more common pleas judges holding court.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1614.

TAX COMMISSION—CIRCULAR LETTER TO COUNTY BOARD OF REVISION DISAPPROVED IN CERTAIN PARTICULARS—SUGGESTIONS OFFERED.

The circular letter referred to in the within opinion is returned to the State Tax Commission without approval, the same to be approved when corrected in accordance with the suggestions made in said opinion.

COLUMBUS, OHIO, May 23, 1916.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter under date of May 15, 1916, in which you enclose copy of a circular letter which your commission proposes to send out to county boards of revision. You request me to examine the instructions contained in said circular letter, and, if found "in accordance with the advice of the attorney-general," as required by provision of section 70, of the Parrett-Whittemore law (section 5623, G. C., 106 O. L., 265), to endorse such finding thereon.

The circular letter reads as follows:

May 15, 1916.

"To County Boards of Revision:

"A number of questions have arisen concerning the powers and duties of county boards of revision under the act of May 8, 1915, 106 O. L., 246, commonly known as the Parrett-Whittemore law. The tax commission of Ohio has decided such questions in accordance with the advice and opinion of the attorney-general as follows:

"1. Boards of revision at their June session, 1916, shall not increase or decrease valuations of real estate which has not been appraised or reappraised during said year.

"2. Boards of revision at their August session may increase or decrease any valuation or correct any assessment *complained* of whether or not there has been an appraisement or reappraisement for said year.

"3. Boards of revision at their August session are limited in their powers to the hearing of complaints *only*.

"4. The powers given to county boards of revision by the provisions of section 45 of the act, may only be exercised in the performance of their duties under section 44, of the act referring to the hearing of complaints.

"5. The powers of county boards of revision at both the June and August sessions extend *only* to valuations of the current year, i. e., at their sessions in 1916 they can only equalize and hear complaints as to the 1916 valuations.

"6. The powers given to county boards of revision by the provisions of section 43, of the act may be exercised at their June session only as to personal property and such real estate as may have been appraised or reappraised during the current year. These powers may also be exercised in the performance of their duties in hearing complaints.

"7. Boards of revision at their August session shall not increase the value of any real or personal property complained of without notice to the owner or his agent.

8. Boards of revision at their August session shall not decrease the value of any real or personal property, except upon written application, under oath of the party affected.

"9. Boards of revision at their June session may increase or decrease any valuation of personal property, or increase the listed amount of personal

property without notice to owners. (The increase or decrease in value may be by percentage upon the value of any class of personal property.)

"10. If there has been an original appraisement of real estate in any year, or a reappraisement ordered by the county auditor in any year, boards of revision may, at their June session, increase or decrease the value of any real estate without notice. (Such increase or decrease may be by percentage upon the value of real estate in any taxing district.)

THE TAX COMMISSION OF OHIO,

By.....

Secretary.

Upon examination of the instructions contained in the foregoing letter I find that said instructions are in accordance with opinion No. 1173 of this department, rendered to your commission under date of January 14, 1916, with the following exceptions:

In item No. 8 as above set forth you advise that "boards of revision at their August session shall not decrease the value of any real or personal property, except upon written application, under oath of the party affected."

In this connection I quote from the opinion, above referred to, at page 27, as follows:

"Under provision of section 47 of the act the county board of revision may not decrease any valuation complained of nor reduce the listed amount of any taxable property complained of, unless the party affected thereby, *or his agent,* makes and files with the board a written application therefor, verified by oath, showing the facts upon which it is claimed such decrease should be made, and not without affording the county auditor an opportunity to be heard thereon."

In view of the foregoing I suggest that the words "or his agent"be added to the instruction contained in item 8 as above set forth.

In item No. 9 you advise that boards of revision at their June session may increase or decrease any valuation of personal property, or increase the listed amount of personal property without notice to owners, and that "the increase or decrease in value may be by percentage upon the value of any class of personal property."

In item No. 10 you advise that "if there has been an original appraisement of real estate in any year, or a reappraisement ordered by the county auditor in any year, boards of revision may, at their June session, increase or decrease the value of any real estate without notice," and that "such increase or decrease may be by percentage upon the value of real estate in any taxing district."

In connection with the proposed instruction contained in the first part of item No. 9, I call your attention to the following on page 33 of the opinion above referred to:

"The only notice of changes in valuations, made by said county board of revision, acting as a board of equalization at its June session, required to be given, is that provided for in sections 58 and 59 of the act (sections 5606 and 5607, G. C.).

"Section 58 provides:

"'When the board of revision has completed its work of equalization, and has transmitted the statements and returns to him, the county auditor shall give notice, by advertisement, in two newspapers, of opposite politics, published in and of general circulation throughout the county, that the tax statement and returns for the current year have been revised and the valua-

tions completed, and are open for public inspection in his office, and that complaints against any valuation or assessment, except the valuations fixed and assessments made by the tax commission of Ohio, will be heard by the county board of revision, stating in the notice the time and place of the meeting of such board. Such advertisements shall be inserted in a conspicuous place in each such newspaper, and be published daily for ten days, unless there be no daily newspaper published in and of general circulation throughout such county, in which event such advertisement shall be so published one each week for two weeks. The county auditor shall, upon request, furnish to any person a certificate setting forth the assessment and valuation of any tract, lot or parcel of real estate or any specific personal property, and mail the same, when requested to do so, upon receipt of sufficient postage.'

"Section 59 provides:

" 'On or before the 15th day of July, annually, the county auditor shall cause to be printed a list showing all changes made in the assessment of any tract, lot or parcel of real estate or improvement thereon, or minerals or mineral rights therein, and shall cause a copy of such list to be mailed to each owner whose assessment has been changed, if known, and if not, then to his agent, if known.' "

While it is true that the notice required by sections 5606 and 5607 of the General Code, as above quoted, is not a condition precedent to the valid exercise of the authority conferred upon the board of revision by section 51 of the act (section 5605, G. C.), to increase any valuation of personal property, or increase the listed amount of personal property, nevertheless I am of the opinion that said proposed instruction, in the absence of any qualification, is misleading, and that the same should be modified by reference to the requirements of said sections 5606 and 5607 of the General Code in conformity with that part of my former opinion above quoted.

Coming now to a consideration of the proposed instruction contained in the first part of item 10, as above set forth, I call your attention to that part of opinion No 1173, above referred to, as found on page 30, in which I held that the county board of revision, in the performance of its duties under section 51 of the act, at its June session in any year is limited in its consideration of valuations of real property to the statements and returns for such year as placed before it by the county auditor in compliance with section 51 of the act, and that said board may not increase or decrease valuations of real estate which has not been appraised during said year.

It will be observed that in said opinion a distinction was made between an original assessment or appraisement of real property, which may be ordered by your commission in all counties of the state at the same time, i. e. the same year, and a reassessment or reappraisement of real property, or any class thereof, in any taxing district, or part thereof, which may be ordered by the county auditor under provision of section 55 of the act (section 5548, G. C., 106 O. L., 260), or in the manner provided in the latter part of said section, or by the tax commission under provision of sections 79 and 80 of the act (sections 5624-4 and 5624-5, G. C., 106 O. L., 267).

In view of this distinction taken in connection with the holding of the opinion, as above set forth, I am of the opinion that your proposed instruction contained in the first part of item 10 should be limited by striking therefrom the words "or a reappraisement ordered by the county auditor in any year," and that the words "or reappraised," in the instruction contained in items 1 and 6, and the words "or reappraisement," as found in the instruction contained in item 2, should be omitted. Said instruction, as found in the first part of item 10, should be further limited by

the modification as to notice suggested in connection with your proposed instruction contained in the first part of Item No. 9.

You further propose to instruct the county board of revision in the latter part of item No. 9 that "the increase or decrease in value may be by percentage upon the value of any *class* of personal property," and in the latter part of item No. 10 that the increase or decrease in the valuation of the real estate in any taxing district, made by the county board of revision, may be by percentage upon such valuation.

Inasmuch as the question of the authority of the county board of revision to increase or decrease valuations of real or personal property, as returned by the assessing officer of any assessment district, by percentage upon such valuations, has not been answered in any former opinion to your commission, it remains to be determined whether said county board of revision, in the exercise of the authority conferred upon it by the provisions of section 51 of the act (section 5605, G. C.), may, in any year, increase or decrease valuations of personal property, or of real estate in case an original appraisement of real estate has been made in said year, by a percentage upon the valuation of classes of personal property, or upon the valuation of real estate, as returned by the original assessing officer in any taxing district, in accordance with said instructions.

The authority of the tax commission to increase or decrease the aggregate value of real or personal property, or any class of real or personal property, in any county, township, city, village or taxing district, or in any ward or division of a municipal corporation, by a percentage upon such aggregate value as reported to said commission by the several county auditors of the state, is found in section 76 of the act (section 5613, G. C., 106 O. L., 267), which provides:

> "The tax commission of Ohio shall, annually, determine whether the real and personal property, and the various classes thereof, in the several counties, cities, villages and taxing districts in the state, have been assessed at the true value thereof in money, and if it finds that the real or personal property, or any class of real or personal property, in any county, city, village or taxing district in the state as reported by the several county auditors to it, is not listed at its true value in money, it may increase or decrease the aggregate value of the real property or of the personal property, or any class of real or personal property, in any such county, township, city, village, or taxing district, or in any ward or division of a municipal corporation, by such rate per cent., or by such amount as will place such property on the tax list at its true value in money, to the end that each and every class of real and personal property in the state shall be listed and valued for taxation by an equal and uniform rule at its true value in money."

No such authority is expressly given to county boards of revision by any provision of the statutes now in force.

Section 51 of the act (section 5605, G. C., 106 O. L., 259), provides in part as follows:

> "On the second Monday of June, 1916, and annually, thereafter, the county auditor shall lay before the county board of revision the *statements and returns of property received by him* for the current year, and such board shall forthwith proceed to examine and revise the *statements and returns* of all property, both real and personal, to see that the *valuations* thereof are equal and uniform throughout the county, and that all property, and each and every class, kind or description thereof, is valued for taxation throughout the county at its full and true value in money. If the board finds *any statement or return* of personal property to be erroneous, either in the amount of property,

moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, *listed in the name of any person, company, firm, partnership, association or corporation, or in the valuation of any item or items thereof, it shall correct such statement or return,* by listing thereon any omitted property and giving to it, as well as to any property that has been listed therein but which has been incorrectly valued, the true value in money thereof, and by omitting therefrom property improperly listed thereon. * * * If the board finds that any tract, lot or parcel of land or any buildings, structures or improvements thereon, or any minerals therein or rights thereto have been improperly listed either inthe name of the owner, the description or quantity thereof, or have been incorrectly valued, or have been omitted and not valued, it shall make the necessary corrections *and shall give to each such tract, lot or parcel of land, or any buildings, structures or improvements thereon or any minerals therein or rights thereto, incorrectly valued or omitted, the true value in money thereof.* * * *"

It will be observed that under provision of section 5613, G. C., supra, the tax commission deals with the aggregate value of property or of a class of property in a county, township, city, village or taxing district, or ward or division of a municipal corporation and not with individual returns. The tax commission has no authority to consider individual returns of property made by the local assessing authorities except in cases of appeal, as provided in section 53 of the act (section 5610, G. C., 106 O. L., 260). On the other hand, it seems clear that the county board of revision, in the exercise of the authority conferred on it by section 5605, G. C., in any year, in increasing or decreasing the valuation of personal property, or of real estate in case an original appraisement of real estate has been made in said year, is confined to individual returns, and that said county board of revision cannot make horizontal increases by percentage upon the aggregate value of real or personal property, or class thereof, in an assessment district.

While it may be argued that there can be no objection to the county board of revision making increases or decreases by percentage upon the valuations of property as returned by the original assessing officer, so long as the same results in placing the property in question on the duplicate at its true value in money, and that, in case such a result is not realized by the individual owner, such owner may avail himself of his judicial remedy, the same as in the case of increases made by the tax commission under provision of section 5613, G. C., this argument meets with the objection that inasmuch as the county board of revision deals with individual returns rather than the aggregate value of all the returns of property or of a class of property in any district, the only valuation upon which the county board of revision could determine the percentage of increase or decrease would be the individual return of property as made by the original assessing officer. Such a method would be directly opposed to equalization of values and to the realization of the return of the property of the district at its true value in money.

I am of the opinion, therefore, that your proposed instruction contained in the latter part of item No. 9, as well as that contained in the latter part of item No. 10, is without authority in law, and that said instructions should be omitted from the list of proposed instructions as submitted by you.

I am returning said list of instructions to be corrected in the respects hereinbefore suggested. When such corrections are made I will endorse on said list the finding requested by your commission.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1615.

COUNTY BOARD OF EDUCATION—WHEN BOARD CAN EMPLOY ATTORNEYS TO REPRESENT IT.

Section 4744-3, G. C., 106 O. L., 399, now provides that the county auditor when making his semi-annual appropriation of the school funds of the various village and rural school districts shall set aside a contingent as well as a tuition fund to the credit of "The County Board of Education Fund."

Where, in an action between the board of education of a school district within the county school district and the county board of education, the prosecuting attorney of the county declines to represent said county board of education, said county board may, upon the filing with it of a certificate of available money in said contingent fund for said purpose, employ counsel to represent it in said case and, out of said fund, pay for the services rendered.

COLUMBUS, OHIO, May 24, 1916.

HON. J. W. WATTS, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR:—In your letter under date of May 10th, you request my opinion as follows:

> "The county board of education of this, Highland county, has been sued in the common pleas court in which its conduct with reference to the creation of certain school districts has been called into question, and said county board has asked me to submit to you for your opinion the question of its right to employ and pay attorneys to defend this action."

You are familiar with opinion No. 336 of this department, rendered to the bureau of inspection and supervision of public offices, under date of May 6, 1915 (page 564 of the annual report of the attorney-general for said year). Attention was called in said opinion to the provisions of section 4761, G. C., which are as follows:

> "Except in city school districts, the prosecuting attorney of the county shall be the legal adviser of all boards of education of the county in which he is serving. He shall prosecute all actions against a member or officer of a board of education for malfeasance or misfeasance in office, and he shall be the legal counsel of such boards or the officers thereof in all civil actions brought by or against them and shall conduct such actions in his official capacity. When such civil action is between two or more boards of education in the same county, the prosecuting attorney shall not be required to act for either of them. In city school districts, the city solicitor shall be the legal adviser and attorney for the board of education thereof, and shall perform the same services for such board as herein required of the prosecuting attorney for other boards of education of the county."

While it was held in said opinion that within the limitations of the above provisions of section 4761, G. C., the prosecuting attorney of the county may act as the legal adviser of the county board of education, it was observed that, in the case of an action between the county board and the local board of education of a school district within the county school district, the prosecuting attorney cannot represent both boards and is not required to represent either of said boards and the question arose as to whether, in case the prosecuting attorney declined to represent either of said boards, or if he chose to represent the local board, the county board of education might employ counsel other than the prosecuting attorney to represent it under authority of section 2918, G. C., which provides in part that:

> "Nothing in the preceding two sections shall prevent a school board from employing counsel to represent it, but such counsel, when so employed, shall be paid by such school board from the school fund."

the provisions of section 2916, G. C., not being material to the consideration of said question and section 2917, G. C., providing that the prosecuting attorney shall be the legal adviser of the county commissioners and all other county officers and county boards and for all township officers, and that no county officers may employ other counsel or attorney except as provided in section 2412, G. C. Attention was then called to the provision of section 1 of article X of the constitution:

> "The general assembly shall provide by law for the election of such county and township officers as may be necessary."

And it was further held in said opinion that the members of the county board of education are not county officers, and the said board is not a county board within the meaning of the provisions of section 2917, G. C., as limited by the above provision of the constitution and that this section has, therefore, no application to a county board of education.

After noting that under the above provision of section 2918, G. C., payment for services rendered to the board of education of a school district by counsel other than the prosecuting attorney must be made from the "school fund" of such district and that the contract of employment would not be within the exceptions of the requirements of section 5660, G. C., provided in section 5661, G. C. and that it would therefore be necessary that a certificate of available funds be filed with said contract by the clerk of said board, the conclusion was reached in said opinion that, while the authority of the local board, in the case referred to in said opinion, to employ counsel other than the prosecuting attorney to represent it, provided it had sufficient funds in its treasury available for such purpose, was clear, the county school district under the statutes as then in force had no school fund within the meaning of section 2918, G. C., out of which counsel other than the prosecuting attorney might be paid by the county board of education for services rendered to said board, and there being no authority in law to create such fund, the county board of education was without lawful authority to employ counsel other than the prosecuting attorney of the county.

In submitting the question as to the authority of your county board of education under the statutes now in force to employ counsel to represent it in the case now pending in the common pleas court of your county, you evidently have in mind the change effected in section 4744-3, G. C., in the amendment of said section by the act of the general assembly as found in 106 O. L., 396, which was passed subsequent to the time the aforesaid opinion was rendered, i. e., May 27, 1915, and which became effective August 26, 1915. Said section as amended and as now in force provides in part:

> "The county auditor when making his semi-annual apportionment of the school funds to the various village and rural school districts shall retain the amounts necessary to pay such portion of the salaries of the county and district superintendents *and for contingent expenses*, as may be certified by the county board. * * *"

This section as amended in 104 O. L., 143, and as in force at the time the former opinion, above referred to, was rendered, provided only for a tuition fund to be known as "the county board of education fund," which fund could only be used for tuition purposes.

I understand that you have declined to represent your county board of education in the case referred to in your inquiry and, inasmuch as said section 4744-3, G. C., as

now in force, provided for a contingent as well as a tuition fund, I am of the opinion in answer to your question that, upon the filing with said county board of education by its clerk of a certificate of available money in said contingent fund for said purpose, said board may employ counsel to represent it in said case and, out of said fund, pay for the services rendered.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1616.

DISAPPROVAL, LEASE OF CANAL LANDS IN CITY OF AKRON TO HANCOCK BROTHERS, A PARTNERSHIP.

COLUMBUS, OHIO, May 24, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of May 8, 1916, transmitting to me for examination a lease of certain canal lands in the city of Akron to Hancock Bros., a partnership.

I am returning this lease without my approval for two reasons: In the fifth paragraph, on the second page of the lease, there is set forth an agreement on the part of the party of the second part, his heirs, administrators and assigns, to furnish the party of the second part a suitable room for office purposes. It is manifest that there is an error in this provision, and that what was intended was an agreement on the part of the party of the second part, his heirs, administrators and assigns, to furnish the party of the first part a suitable room for office purposes.

The lease is drawn to Hancock Bros., a partnership, and the signature is as follows:

"Hancock Bros.
"By { E. D. Hancock,
{ Ford Hancock."

It does not appear on the face of the lease how many persons compose the partnership or whether the lease has been executed by all the partners. A single partner or any number of partners less than all is without authority to bind a partnership except as to matters within the scope of the partnership business.

In order that no question of lack of authority may be raised against leases executed to partnerships, I suggest that a proper recital be made of the names of all partners, and that a lease to a partnership be executed by all the partners.

If it be a fact that E. D. Hancock and Ford Hancock are the only members of the partnership in question, then the lease is properly executed, but the recital in the first paragraph thereof should be amplified to read as follows:

> "Hancock Bros., a partnership consisting of E. D. Hancock and Ford Hancock."

For the reasons above stated I am returning the lease without my approval, but when the changes above suggested have been made therein I will be glad to approve the same.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1617.

APPROVAL, RESOLUTIONS FOR IMPROVEMENT OF CERTAIN ROADS IN UNION, ASHTABULA, JEFFERSON AND STARK COUNTIES.

COLUMBUS, OHIO, May 24, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communications of May 20 and 22, 1916, transmitting to me for examination final resolutions relating to the following roads:

"Union county—Sec. 'C,' Marysville-Marion road, Pet. No. 3012, I. C. H. No. 115.

"Ashtabula county—Sec. 'J,' Jefferson-Andover road, Pet. No. 2048, I. C. H. No. 151.

"Jefferson county—Sec. 'J,' Ohio River road, Pet. No. 2539, I. C. H. No. 7, M. M. No. III.

"Jefferson county—Sec. 'D,' Canton-Steubenville road, Pet. No. 660, I. C. H. No. 75 (supplemental).

"Stark county—Sec. 'I,', Akron-Canton road, Pet. No. 2937, I. C. H. No. 66, M. M. No. IX."

I find these resolutions to be in regular form and am therefore returning the same with my approval endorsed thereon. Respectfully,

EDWARD C. TURNER,
Attorney-General.

1618.

MUNICIPAL CORPORATION—ANNEXATION OF TERRITORY FROM ONE OR MORE TOWNSHIPS TO A CITY—HOW FUNDS AND INDEBTEDNESS OF SAID TOWNSHIP ARE TO BE APPORTIONED—HOW FUNDS AND INDEBTEDNESS OF SCHOOL DISTRICTS ARE TO BE APPORTIONED IN SUCH CASE—CITY OF AKRON.

In case of the annexation of territory from one or more townships to a city, under authority of and in the manner provided by section 3558, et seq., G. C., an equitable division of the funds and indebtedness of said township or townships and the proper apportionment thereof may be made under authority of and in the manner provided by section 3544, G. C., read in connection with the provisions of the statutes governing the annexation of said territory to said city.

While it cannot be said that section 4690, G. C., 104 O. L., 134, is repealed by implication by the act of the general assembly (106 O. L., 396), in view of the provisions of the latter part of said section authorizing the transfer of the title to the school property located in territory annexed to a city, by agreement of the boards of education of the several school districts affected by such annexation, nevertheless if said boards fail to reach such an agreement, there is no way to effect such transfer other than that provided by section 4696, G. C., 106 O. L., 397, and in the manner therein set forth, and in any event the only method of procedure whereby the equitable division of funds and indebtedness may be effected is that provided by section 4696, G. C., and in the manner therein set forth. Such proceedings under section 4696, G. C., must be had prior to the time the territory above referred to is annexed to said city by the aforesaid annexation proceedings.

COLUMBUS, OHIO, May 25, 1916.

HON. C. P. KENNEDY, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—In your letter of April 25th, you request my opinion as follows:

"A short time ago an annexation proceeding was started by the city of Akron by virtue of sections 3558, 3559 and 3560 of the General Code of Ohio.

The petition therefor was presented to the board of county commissioners of Summit county, as provided by law, the petition praying for the annexation of territory entirely surrounding said city of Akron. The petition came on for hearing before the board of county commissioners, as is provided for in section 3521, General Code, and the matter is now pending before said board.

"If the petition for annexation is finally allowed, the city will annex a part of the territory in several townships, and the question arises as to the division of funds and indebtedness of the various townships. Should section 3544 of the General Code be followed in determining these matters?

"The territory proposed to be annexed includes a part of several rural school districts. If it is annexed, does the territory annexed, which now comprises a part of a rural school district, become a part of the city school district for school purposes? If so, in what manner and by what means are the funds and the indebtedness of the various rural school districts to be apportioned?

"Section 4690 of the General Code, 104 O. L., 134, provides as follows:

" 'When territory is annexed to a city or village, such territory thereby becomes a part of the city or village school district, and the legal title to school property in such territory for school purposes shall remain vested in the board of education of the school district from which such territory was detached, until such time as may be agreed upon b[illegible]e several boards of education when such property may be transferred by [illegible]rranty deed.' "

"Section 4696, of the General Code, 104 O. L., page 135, provides in substance that when territory is transferred from one district to another by the annexation of territory to a city, the division of the funds in the treasury and in process of collection of the board of education of the school district in which the territory is detached, shall upon application to the probate court of the county, by either board of education interested, be determined and ordered by such court. Also the indebtedness, if any, together with the proper amount of money to be paid to such board by the board of education of the school district to which the territory is annexed, shall, in like manner, be determined and ordered by the court.

"Section 4696, however, has been amended by the legislature in Ohio laws, 105-106, page 397, and as amended leaves out entirely the provisions of the section setting forth the procedure before the probate court to determine the equitable division of funds and indebtedness in case of annexation, and I fail to find that any other procedure has been provided in such an instance.

"Is the effect of section 4696, as now amended, such as to provide the only way in which the transfer of a part of a school district under the jurisdiction of the county board of education can be made to a city school district? Or, are the ways provided therein in addition to those provided in section 4690, General Code, in which the territory automatically becomes a part of the city school district?

"If section 4690, of the General Code, is not repealed by implication, and I do not see how it is under the rule that repeals by implication, are not favored unless the intention of the legislature to so repeal is clearly indicated, are we then to be governed by the latter part of section 4696 as to the division of the funds and indebtedness?

" 'No such transfer shall be in effect until the county board of education and the board of education to which the territory is to be transferred each pass resolutions by a majority vote of the full membership of each board, and until an equitable division of the funds or indebtedness be decided upon by the boards of education acting in the transfer. Also a map shall be filed with the auditor. or auditors, of the counties affected by such transfer.'

"It would seem from a reading of the latter part of section 4696, that even though territory of a rural school district was annexed to the city school district by reason of section 4690, that the effect of the same would be held in abeyance, and there would in reality be no transfer for school purposes until such time as the county board of education and the city board of education had passed the resolutions and agreed upon the equitable division of funds or indebtedness, as required in section 4696."

Considering first your question as to how the division of the funds and indebtedness of the several townships affected by the transfer of the territory referred to in your inquiry, shall be made, I note that section 3560, G. C., as found in chapter 3 under division I of title XII of part first of the General Code, relating to the annexation to or detachment from a municipal corporation of territory, and under the subdivision of said chapter relating to annexation of territory to a municipal corporation on application of such corporation to the commissioners of the county in which such corporation is located, provides:

"Sec. 3560. The application of the corporation to the county commissioners for such purpose shall be by petition, setting forth that, under an ordinance of the council the territory therein described was authorized to be annexed to the corporation. The petition shall contain an accurate description of the territory, and be accompanied by an accurate map or plat thereof."

Section 3561, G. C., provides that:

"When the petition is presented to the commissioners, like proceedings shall be had, in all respects, so far as applicable, as are required in case of annexation on application of citizens in this chapter."

Section 3549, G. C., as found in the subdivision of said chapter relating to annexation of territory to a municipal corporation on the application to the county commissioners of the county in which such corporation is located, of citizens residing in the territory proposed to be transferred to such municipal corporation, provides that:

"The petition (signed by a majority of the adult freeholders residing in such territory) shall be presented to the board of commissioners at a regular session thereof, and when so presented the same proceedings shall be had as far as applicable, and the same duties in respect thereto shall be performed by the commissioners and other officers, as required in case of an application to be organized into a village under the provisions of this division. * * *"

Section 3544, G. C., as found in chapter 2 of the aforesaid division and title of the General Code relating to the incorporation of a village, provides:

"Sec. 3544. When a village has been created out of a portion of a township, or portions of more than one township, a proper division of the funds for township purposes in the treasury, or in the process of collection, of the township or townships from which the territory has been taken, shall, upon application of the village to the probate court of the county in which the territory is situated, be determined and ordered paid over to the treasurer of the village. In determining the portion of such funds to which the village is entitled, the indebtedness of each township shall be taken into consideration. Ten days notice of such hearing shall be given by the treasurer of the

applicant to the treasurer of each township whose funds are sought to be divided. The findings and orders of the probate court shall be final."

It will be observed that when the petition referred to in your inquiry has been presented to the county commissioners and from that time on, the same proceedings are to be had in all respects, so far as applicable, as in the case of an application to incorporate a village, and that the same duties are to be performed not only by the county commissioners but by "other officers" as are required under the provisions of the aforesaid *division* of the statutes in the case of the incorporation of a village. This adoption by reference of the statutory provisions relating to the incorporation of a village makes it necessary to consider said provisions of said statutes and determine what proceedings are provided and what powers and duties are imposed on said county commissioners and "other officers" in connection with and growing out of such incorporation.

The sections referred to as thus adopted are sections 3517 to 3546, both inclusive, of the General Code, and one of these sections so adopted is section 3544, G. C., the provisions of which are as above set forth.

In view of the adoption by reference of said statutes it seems clear that the legislature intended to make all of the provisions of said statutes relating to the incorporation of villages apply to the annexation of territory to a municipal corporation in so far as said provisions are, in their nature, applicable. It seems equally clear that it is not merely the procedure before the county commissioners that is thus adopted since it is provided that the same duties shall be performed not only by the commissioners but by all other officers as are required in the incorporating of a village.

Among other provisions of these statutes thus adopted are those found in sections 3532 to 3535, both inclusive, of the General Code, relative to the juirsdiction and duties of the common pleas court in case of an application by any person interested for an injunction against the recording of proceedings, the grounds of such injunction and the duties of the court and other officers in relation thereto.

The courts have frequently exercised the jurisdiction thus conferred and have granted decrees therein provided for either for or against the annexation of territory to cities and villages. In several of these cases the statutes above referred to have been under discussion and have been considered by the courts as having been adopted in their entirety as governing annexations to municipal corporations and the rights of all parties growing out of such annexations.

Among other cases is the case of Shipbaugh v. Kimball, 7 N. P. (N. S.), 514 wherein the court, on the authority of section 3532, G. C., entered a permanent injunction against the recording of proceedings to annex territory to the city of Ashtabula.

Section 3532, G. C., by its terms has to do only with proceedings relating to the incorporation of villages but, as the court in the case of Shipbaugh v. Kimball, supra, plainly indicates, these provisions have by adoption become a part of the law relating to annexation of territory to cities. The same application of said statute was given by the court in the case of Hulbert v. Mason, 29 O. S., 562.

The same jurisdiction has been exercised and like decrees entered by the court of common pleas of Franklin county in several cases, among them being the case of Holtzman, et al., v. Barr, No. 56607 in said court (not reported), decided by Bigger, J., wherein the court enjoined the annexation to the city of Columbus of t he village of Bexley and other territory; also the case of Wilson, et al., v. Barr, No. 58689 also unreported, decided by Evans, J., wherein the provisions of the statutes, above referred to, were invoked and the court, after a full hearing and consideration of the merits, refused an injunction.

It is submitted that with equal force and propriety the provisions of section 3544, G. C., as above quoted, relative to the duties of the probate court with respect

to the division of funds and indebtedness of a township, a part of which has been incorporated into a village, are applicable to the situation created by the annexation of such portion of a township to a municipal corporation.

It was clearly the intention of the legislature to adopt this section as well as the others to which reference has been made. While it would have been better if the legislature had seen fit to make the annexation statutes complete in themselves, it is none the less clear, upon an examination of all the statutes hereinbefore referred to, that the legislature fully intended and provided that these statutes, including section 3544, G. C., should be adopted and applied in the case of the annexation on territory to a municipal corporation.

Any doubt as to the correctness of this conclusion is settled by the decision of the Supreme Court in the case of Shugars, Clerk, v. Williams, et al., 50 O. S., 297, wherein the court holds that the statutes, relating to annexation and those relating to the incorporation of a village are to be, for the purpose of construction, treated as one act. The syllabus in this case reads as follows:

> "Chapters 2 and 5, of division 2, of title 12, Revised Statutes, relating to the general subject of the creation of villages and hamlets, and the annexation of territory to those already created, are to be treated, for purpose of construction, as one act. * * *"

Chapter 2, thus referred to, is the chapter relating to the creation of villages and hamlets and comprises sections 1553 to 1571a, inclusive, of the Revised Statutes (sections 3517 to 3546, inclusive, of the General Code), while chapter 5, so referred to, is the chapter relating to annexations of territory to municipal corporations and comprises sections 1589 to 1615, inclusive, of the Revised Statutes (sections 3548 to 3576, inclusive, of the General Code).

In view of the foregoing, I am of the opinion, in answer to your first question that if the petition for the annexation of the territory referred to in your inquiry is allowed and said territory is annexed to the city of Akron from the several adjoining townships, an equitable division of the funds and indebtedness of said township and the proper apportionment thereof may be made under authority of and in the manner provided by section 3544, G. C., as above quoted, read in connection with the provisions of the statutes governing the annexation of said territory to said city.

In determining the answer to your remaining questions, relative to the apportionment of the school funds and indebtedness of the territory proposed to be annexed to the city of Akron, considering said territory as a part of the several rural school districts from which the same is to be detached by said annexation proceedings, serious difficulty is encountered.

Section 4690, G. C. (104 O. L., 134), by its terms provides that upon the annexation of said territory to said city the same automatically becomes a part of the city school district. No provision, however, is made for an apportionment of the funds and indebtedness of said territory.

Said section further provides that

> "the legal title to school property in such territory for school purposes shall remain vested in the board of education of the school district from which such territory was detached, until such time as may be agreed upon by the several boards of education when such property may be transferred by warranty deed."

In this connection I note that this section, as in force prior to its amendment in 104 O. L., contained the additional provisions that

> "In case of disagreement between such boards of education, like proceedings shall be had by application to the probate court as are provided by law in case of the transfer of property from one school district to another."

No such provision is contained in this or any other statute now in force.

While section 4696, G. C., as amended in 104 O. L., 135, provided that:

> "When territory is transferred from one district to another by the annexation of territory to a city or village, the proper division of funds in the treasury, or in process of collection, of the board of education of the school district from which the territory is detached, shall, upon application to the probate court of the county in which such territory is situated by either board of education interested, be determined and ordered by such court. If such board of education is indebted, such indebtedness, together with the proper amount of money to be paid to such board by the board of education of the school district to which the territory is transferred, annexed, or of the district created, shall be in like manner determined and ordered by the court,"

as observed by you, this provision was repealed by the act of the general assembly (106 O. L., 396), and no such provision is found in the statutes as now in force.

While the latter part of said section 4696, G. C., (106 O. L., 397), provides that:

> "No such transfer shall be in effect until the county board of education and the board of education to which the territory is to be transferred each pass resolutions by a majority vote of the full membership of each board and until an equitable division of the funds or indebtedness be decided upon by the boards of education acting in the transfer; also a map shall be filed with the auditor or auditors of the county or counties affected by such transfer."

this provision by its terms is clearly limited to transfers of territory made by the mutual agreements of boards of education under authority of and in the manner provided by said section as now in force, and has no application to territory annexed to a village or city in the manner provided by the statutes, hereinbefore referred to, and governing annexation proceedings, which territory, if effect can be given to the first paragraph of said section 4690, G. C., automatically becomes a part of the school district of such village or city. There is no provision of any statute now in force vesting in any court or administrative board or officer the authority to make a division of school funds and indebtedness, when territory is annexed to a village or city from one or more adjoining townships under authority of section 3558, et seq., of the General Code.

It is evident, however, that upon the filing, with the boards of education of your county school district, of a petition signed by at least fifty per cent. of the qualified electors residing in each of the several parts of the territory in question located respectively in the several township rural school districts, praying for the transfer of such part of said territory from the respective rural school district in which the same is located to the Akron city school district, your county board of education and the board of education of said city school district may act under authority of, and in the manner provided by, said section 4696, G. C., (106 O. L., 397), and in this way said territory can be made a part of said city school district and the equitable division of funds and indebtedness may be realized, provided such proceedings are had prior to the time the territory in question is annexed to said city by the aforesaid annexation proceedings.

I am of the opinion, therefore, in answer to your remaining questions, that while it cannot be said that said section 4690, G. C., is repealed by implication by the act

of the general assembly (106 O. L., 396), in view of the provision of the latter part of said section authorizing the transfer of the title to the school property located in the territory proposed to be annexed, by agreement of the boards of education of the several school districts affected by such annexation, nevertheless if said boards fail to reach such an agreement, there is no way to effect such transfer other than that provided by section 4696, G. C., (106 O. L., 397), and in the manner therein set forth, and that in any event the only method of procedure whereby the equitable divisions of funds and indebtedness may be effected is that provided by said section 4696, G C.. and in the manner therein set forth.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1619.

MUNICIPAL CIVIL SERVICE COMMISSION—FEES OF WITNESSES SUBPOENAED BY SAID COMMISSION ARE PAYABLE OUT OF COUNTY TREASURY.

Fees of witnesses subpoenaed by a municipal civil service commission in any hearing before it, when the same are duly certified by said commission and audited, are payable out of the county treasury.

COLUMBUS, OHIO, May 25, 1916.

HON. F. C. GOODRICH, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—I have your letter of May 22, 1916, as follows:

> "Sometime ago I wrote you in reference to the construction of the fifth division of section 486-7, O. L., 105-6, page 403, in reference to witness fees paid in civil service examinations, and in reply you sent me a copy of a decision that you had rendered the state civil service commission, and from this I gather that your holding would be that in our case the fees for witnesses could not be paid from the county fund, but in order to be sure I am giving you the state of facts as they exist in our case, and I wish you would definitely state whether or not we can pay these witness fees from the county treasury.
>
> "The chief of police and the chief of the fire department of our city were removed by the mayor the 1st of January, and new appointments made upon charges being preferred and sent to the civil service commission for investigation. The mayor furnished a list of witnesses to sustain his charges and the defendants furnished a list of witnesses in their defense, and these witnesses were subpoenaed upon request of both parties by the clerk and the civil service commission of Troy. The witnesses are now demanding their fees, and the clerk of the civil service commission has certified the fees to the county auditor.
>
> "It is my construction of this section that each party should pay their own witness fees, and the witnesses should have demanded their fees in advance before testifying, as provided by statute in other cases.
>
> "I wish you would advise me at once if my interpretation is correct, and if not, tell me what the true construction is."

The opinion to which you refer in your foregoing letter, being opinion No. 1497, holds in effect that when a civil service commission is requested by any party to a hearing before it to have certain witnesses summoned to testify it may or may not in

its discretion summon said witnesses. If it does not summon the witnesses so requested by said party, the latter at his own expense may procure and offer said witnesses, but if the commission in compliance with said request summons said witnesses and certifies their fees for payment, said fees, when duly audited, then and thereby become payable out of the state treasury, if summoned by the state civil service commission, and out of the county treasury if summoned by a municipal civil service commission as provided in the fifth paragraph of section 486-7, G. C., as amended 106 O. L., 403, which provides as follows:

> "* * * Fees shall be allowed to witnesses, and on their certificate, duly audited, shall be paid by the state treasurer, or in the case of municipal commissions by the county treasurer, for attendance and traveling, as is provided in section 3012, of the General Code, for witnesses in courts of record."

From the facts stated in your foregoing letter it appears that the municipal civil service commission subpoenaed the witnesses in question at the request of the parties and that it thereafter certified their fees to the county auditor. It follows, therefore, that when such fees are duly audited they become and are payable out of the county treasury.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1620.

CANDIDATES—FEE REQUIRED BY SECTION 4970-1, G. C., 106 O. L., 548, MAY BE COMPUTED ONLY UPON SALARY OF OFFICE FIXED BY LAW AND NOT UPON ANY FEES TO WHICH INCUMBENT OF OFFICE MAY BE ENTITLED.

The fee required by section 4970-1, G. C., 106 O. L., 548, may be computed only upon the salary of the office fixed by law and not upon any fees to which the incumbent of the office may be entitled.

COLUMBUS, OHIO, May 25, 1916.

HON. FORREST G. LONG, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR:—Yours under date of May 10, 1916, is as follows:

> "Referring to section 4970-1 of the General Code, or 106 Ohio Laws, page 548, I would be much pleased to have your opinion as to what fee a candidate should pay when he files his declaration of candidacy for nomination for county office, in case the office pays a salary in part and fees in part, or fees only. In other words, where a county commissioner received a certain salary and fees in addition, what amount should he pay upon the filing of his declaration of candidacy as aforesaid, or in case of a coroner, where he received fees only, how and in what manner should the amount he is to pay upon the filing of his declaration be ascertained.
>
> "The term used by this statute is 'annual salary.' The amount, of course, can easily be ascertained where there is a fixed salary, but where there is a salary and fees, or fees only, I am undecided as to how to advise those who have asked me this question. Said section also provides that a candidate for certain office shall not be required to pay any fees, and the language at the end of said section is '*nor for office for which no salary is paid,*' but I would

take it that this means where there is no compensation. Am I right in this regard?"

That part of section 4970-1, G. C., 106 O. L., 548, necessary to be considered, is as follows:

> "At the time of filing the declaration of candidacy for nomination for any office, each candidate shall pay a fee of one-half of one per cent. of the annual salary for such office, but in no case shall such fee be more than twenty-five dollars. * * * No fee shall be required in the case of candidates for committeeman or delegate or alternate to a convention or for president or vice-president of the United States, nor for offices for which no salary is paid."

Your inquiry, in so far as the same relates to candidates for coroner, is answered in opinion No. 1186, of this department, addressed to Hon. Charles Q. Hildebrant secretary of state, under date of January 20, 1916, a copy of which opinion is herewith enclosed, and in which opinion it was held that section 4970-1, G. C., 106 O. L., 548, does not require the payment of any fee by candidates for the office of coroner.

As stated in that opinion, there is a well defined distinction genarally recognized between a salary or an annual salary for an office and a fee or perquisite to which an officer may legally be entitled by reason of the performance of certain services in the line of his duties as such officer. A salary is generally understood to mean, in the connection, a fixed sum of money authorized to be paid to an officer at fixed and regular intervals by reason of his incumbency of the office, without regard to the performance of specific duties, either in kind or amount. An annual salary is therefore a fixed sum of money to be paid to the incumbent of the office for or during the official year, or a sum to be paid during the official year in quarterly, monthly or other equal installments.

A salary is understood to mean a pre-determined amount for a stated period of time and an annual salary would be such fixed amount to be paid within the period of one official year. Fees for the performance of specific services are, in the nature of things, incapable of accurate pre-determination. The impracticability of anticipating the aggregate amount of fees which may accrue in a definite period of time would seem ample reason to justify the legislature in not seeking to require the payment of a fee upon a purely speculative basis and confining the requirement of the payment of a nominal fee to those offices the compensation of the incumbents of which is a fixed and certain amount.

I am therefore of the opinion, in answer to your further inquiry, that the fee required to be paid by the provisions of section 4870-1, G. C., 106 O. L., 548, may be calculated only on that fixed sum which is determined in advance and not dependent upon the performance of a particular class of the duties of the office. That is to say, the fee referred to may be computed only by the salary fixed by law, and not upon any fees which the officer may receive for the performance of specific duties.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1621.

DISAPPROVAL, PROPOSED SALE OF CERTAIN CANAL LANDS IN CITY OF AKRON TO B. F. GOODRICH COMPANY.

COLUMBUS, OHIO, May 25, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of May 4, 1916, which communication reads as follows:

> "Herewith I transmit a memorandum of the sale of certain state canal lands in the city of Akron, Summit county, Ohio, as sold at public vendue on the 1st day of May, 1916, the same having been previously advertised for thirty days as required by law.
>
> "The law requires that the governor and attorney-general approve all sales of canal lands made by the superintendent of public works, and I therefore request your approval of said sale as required by the provisions of section 464 of the General Code."

I have examined your record of proceedings transmitted to me and find that the sale which I am asked to approve is being made to The B. F. Goodrich Company of Akron, Ohio, and that the principal tract of land which it is proposed to sell to said company is described as follows:

> "Known as being all the land owned by the state of Ohio between the produced south line of Cedar street in said city of Akron on the north, the north line of Bartges street in said city of Akron on the south, the west property line of The B. F. Goodrich Company and the west property line of The Philadelphia Rubber Company, on the east, and on the west, a line drawn parallel to the westerly line of the state canal property as established by the survey of G. F. Silliman, made under the direction of the state board of public works in the summer of 1912, and seventy-five (75) feet easterly therefrom, containing one hundred fourteen thousand (114,000) square feet;"

The authority of the superintendent of public works to make a sale of land in the vicinity of the plant of The B. F. Goodrich Company in the city of Akron, Ohio, was considered by this department in opinion No. 1113, rendered to you on December 20, 1915. This opinion was rendered in response to your request under date of November 5, 1915, which request contained the following statement:

> "The B. F. Goodrich Company has made application to the superintendent of public works for the purchase of the parcels of state land along the Ohio canal in the city of Akron, shown in yellow on the plat hereto attached, marked 'Exhibit A,' and made a part hereof."

The plat referred to by you and which is on file in this office, together with your communication of November 5, 1915, shows that the Ohio canal in the vicinity of the plant of the B. F. Goodrich Company, in the city of Akron, is at one point approximately 267 feet wide, there being at this point a basin or wide-water of substantial extent. It also appears from the plat in question that the strip of land which it was proposed to reserve for the state extended in a straight line from a point just south of Chestnut street to a point some distance south of Falor street. The proposed sale of land which I was called upon to consider in opinion No. 1113, referred to above, was

a sale of a very narrow strip of land on the east side of the canal and a wide strip of land on the west side of the canal, at a point where the basin or wide-water now exists. I advised you in the opinion in question that in my opinion you were authorized by the provisions of section 412, G. C., to narrow the towing path embankment between Cedar street and Bartges street in the city of Akron, by the use of concrete retaining walls and to eliminate by the construction of a new berme bank so much of the basin to the west of the plant of The B. F. Goodrich Company as is not needed for canal purposes, and that when this narrowing process is completed a part of the land not occupied by the canal and its embankments might, under certain conditions, be sold but that in making a sale of such lands you should, under no circumstances, reduce the width of the state's property below its narrowest width at any adjacent point. It was pointed out that in view of the width of the state's property at other points within the city of Akron, the width should not be reduced at this point to less than seventy-five feet.

It appears from the proceedings which I am now asked to approve that it is proposed to sell that part of the basin or wide-water lying to the east of a line drawn parallel to the state's west property line and at a distance of seventy-five feet therefrom. In other words, the seventy-five foot strip of land reserved for the state is to be located along the west side of the basin instead of along the east side. I am satisfied, after a careful investigation, to approve a sale of the land which you are now proposing to sell to The B. F. Goodrich Company and that the seventy-five foot strip reserved for the state may as properly be reserved along the west side of the basin as along the east side thereof. However, for reasons set forth in opinion No. 1234 of this department, rendered to you on February 4, 1916, I am unable to approve the sale, on account of the form of the legal advertisement thereof.

On February 2, 1916, you addressed to me a communication calling my attention to opinion No. 1113, referred to above, and stating that you were of the opinion that the land referred to in that opinion and lying outside the seventy-five foot strip to be reserved by the state, should be offered for sale and that the B. F. Goodrich Company was willing, in case it was the successful bidder, to do all dredging and other work required in making necessary changes in the canal embankment, and was also willing to construct cement retaining walls on both sides of the canal where the same were not already in existence. It was further stated that the company was willing to do this work in addition to paying the state the amount of its bid and after observing that all bidders should be placed on the same terms, you inquired whether notice of these conditions should be embodied in the legal advertisement of the sale and requested me, if I should so hold, to suggest the proper language to be used in the legal advertisement in setting forth such conditions. In reply to your inquiry I advised you in opinion No. 1234, referred to above, that while you might properly sell the land in question and require the purchaser, in addition to the money consideration paid by him, to make the changes which you would be authorized to make under section 412, G. C., yet this proceeding could be properly carried forward only by including in the legal advertisement made under section 13971 of the appendix to the General Code of Ohio a full and complete statement of the conditions under which the land was offered for sale. Complying with your further request I suggest in this opinion a proper form in which to set forth in the legal advertisement the conditions in question.

I have been furnished with a copy of the advertisement in pursuance of which the land which it is now proposed to sell was offered, and find that the conditions in question, or similar conditions which must necessarily have obtained in the making of the sale, were not even referred to in such advertisement. I am therefore of the opinion, as hereinbefore indicated, that the sale in question should not be approved for the ground that proper legal advertisement of such sale was not made.

Under section 412, G. C., the superintendent of public works is authorized to make such alterations or changes in the public works of the state as he may deem proper in the discharge of his duties. I have heretofore advised you that this section confers a certain degree of authority upon you to narrow the embankments of the canals of the state and to eliminate basins not necessary for the storage of water or other purposes incident to the operation and use of the canals, by constructing a new embankment inside the line of the old and that when this narrowing process is completed a part of the land not occupied by the canal and its embankments may, under certain conditions, be sold. It is my opinion, however, that you are not authorized to sell without condition land actually occupied by the canal or its basins at the time of the sale, and upon the theory that there may thereafter be made by the state such changes as will result in a relocation of the embankment of the canal so that the property sold will be outside of the lip of the embankment.

On the contrary, it is my view that the conditions should be clearly set forth in the legal advertisement and these conditions would ordinarily be that the purchaser before taking possession of the land purchased, must at his own expense make all needed changes according to plans and specifications prepared or approved by you. If, for any reason, it is more desirable that the changes be made under your direct management and control, the conditions of the sale should be such that the state will be assured of receiving for the land sold the full value thereof, definitely ascertained and fixed, *and the items of purchase price and cost of changes should not be mingled.* If you have available sufficient funds with which to make the changes, and plans for the same have been prepared and the cost estimated, it would be proper to insert in the advertisement of sale a statement that the purchaser would be required, in addition to paying the full purchase price, to pay the estimated cost of making the changes and that if the cost of making the changes exceeds the estimate, the purchaser would also be required to pay the excess cost, and that the purchaser would not be entitled to possession of the premises sold until all such payments have been made and all such changes fully completed by the state, all of which conditions should, of course be fully set forth in the deed.

Should you desire to take action along the line herein suggested, I will be glad to examine the legal advertisement and advise you as to its sufficiency before the publication of the same, or to prepare the advertisement, if you so wish.

I am unable, however, for the reasons above stated, to approve the sale made by you, and am, therefore, returning your record of proceedings without my approval.

Respectfully,

EDWARD C. TURNER,
Attorney-General.

1622.

BOARD OF EDUCATION OF RURAL SCHOOL DISTRICT—FUNDS MAY NOT BE EXPENDED IN ACQUIRING "RIGHT OF WAY" THROUGH PRIVATE PROPERTY FOR USE OF PUPILS WHO ARE REQUIRED TO BE TRANSPORTED.

The board of education of a rural school district may not expend the funds of the district in acquiring a "right of way" through private property for the use of pupils residing in the district and living more than two miles from the nearest school in said district, for the purpose of relieving itself of the duty of providing transportation for such pupils under provision of section 7731, *G. C.*, 104 *O. L.*, 140.

COLUMBUS, OHIO, May 25, 1916.

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

GENTLEMEN:—In your letter of May 15th you request my opinion as follows:

> "May a board of education of a rural school district expend school funds in acquiring a 'right of way' through private property for school children, thus relieving the district of transportation charges for pupils attending the public schools of such district?
>
> "If school funds can be legally expended for such purpose, in many sections of the state the distance to the schools can be made less than two miles. The question in our mind is, whether such a privilege complies with the requirement of the law as to being *a public highway*, and whether or not pupils living more than two miles by a regularly established highway can be compelled to walk across fields to attend the public schools furnished such pupils by the board of education?"

While section 4749, G. C., is general in its terms and provides that the board of education of a school district, when properly organized, is a body politic and corporate, and as such, capable of acquiring, holding, possessing and disposing of real and personal property, this provision of said section 4749, G. C., should properly be read in connection with the provision of section 7624, G. C. (103 O. L., 466), in determining the purposes for which a board of education may acquire the title or an interest in real property.

Section 7624, G. C., provides:

> "When it is necessary to procure or enlarge a school site or to purchase real estate to be used for agricultural purposes, athletic field or play ground for children, and the board of education and the owner of the property needed for such purposes are unable to agree upon the sale and purchase thereof, the board shall make an accurate plat and description of the parcel of land which it desires for such purposes, and file them with the probate judge, or court of insolvency, of the proper county. Thereupon the same proceedings of appropriation shall be had which are provided for the appropriation of private property by municipal corporations."

It is clear that under provision of said section 7624, G. C., the board of education could not expend the funds of its district in acquiring a right of way through private property for the purpose mentioned in your inquiry.

I find no provision of any statute expressly authorizing a board of education to acquire such right of way and in view of the limitations expressed by the above pro-

vision of section 7624, G. C., as to the purpose for which such board may condemn the title to real property, I would be inclined to the opinion that said board would be without authority in law to expend the school funds for said purpose, even if by acquiring such right of way the purpose mentioned in your inquiry could be realized.

That such a purpose could not be realized is evident from a reading of the provisions of section 7731, G. C. (104 O. L., 140), which are as follows:

> "In all rural and village school districts where pupils live more than two miles from the nearest school the board of education shall provide transportation for such pupils to and from such school. The transportation for pupils living less than two miles from the school house, by the most direct public highway shall be optional with the board of education. When transportation of pupils is provided, the conveyance must pass within one-half mile of the respective residences of all pupils, except when such residences are situated more than one-half mile from the public road. When local boards of education neglect or refuse to provide transportation for pupils, the county board of education shall provide such transportation and the cost thereof shall be charged against the local school district."

Under provision of this latter statute it clearly appears that where a pupil, residing in a rural or village school district, lives more than two miles from the nearest school in such district, measured "by the most direct public highway," such pupil is entitled to transportation and the statute makes it the duty of the board of education to furnish the same.

Even if the board of education could acquire the right of way mentioned in your inquiry, such right of way would not be a "public highway" within the meaning of the above provision of the statute and the pupil in question could still insist on transportation being provided.

In the great majority of cases the privilege of pupils, residing in rural districts, to cross private property in reaching the school to which they are assigned is not denied by the owners of such property, and in such cases it might well be argued that the reason for the first part of section 7731, G. C., supra, would cease to exist.

The manifest purpose of the legislature, however, in enacting said provision of said section 7731, G. C., was to make the nearest school in the district more accessible to such pupils and to secure the regular attendance of such pupils at such school by requiring the board of education of the district to provide for their transportation and thus relieve them of the hardship which they would undergo if compelled to walk to said school along the public highway or across private property during stormy weather at times when traffic is rendered difficult on account of rain or snow or on account of the condition of the ground due to freezing and subsequent thawing out.

Inasmuch as the purpose mentioned in your inquiry for which the board of education would acquire the right of way therein referred to would not be realized to the extent of relieving the board of education of its duty, under the above provision of the first part of section 7731, G. C., and in the absence of any provision of the statute expressly authorizing the expenditure of school funds for such purpose, I am of the opinion that your question must be answered in the negative.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1623.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, CITY OF WARREN, OHIO.

COLUMBUS, OHIO, May 26, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the city of Warren, Ohio, in the sum of $1,500.00 for the purpose of erecting and equipping two additional buildings to the present detention hospital, being three bonds of five hundred dollars each."

I have examined the transcript of the proceedings of council of the city of Warren, Ohio, and other officers relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and signed by the proper officers will, upon delivery, constitute valid and binding obligations of the city of Warren, Ohio.

Respectfully.
EDWARD C. TURNER,
Attorney-General.

1624.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, CITY OF WARREN, OHIO.

COLUMBUS, OHIO, May 26, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the city of Warren, Ohio, in the sum of $4,000.00 to pay the cost and expense of purchasing land for the opening and establishing a new street from Dana avenue to Griswold street, being eight bonds of five hundred dollars each."

I have examined the transcript of the proceedings of council of the city of Warren, Ohio, and other officers relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and signed by the proper officers will, upon delivery, constitute valid and binding obligations of the city of Warren, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1625.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, CITY OF WARREN, OHIO.

COLUMBUS, OHIO, May 26, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the city of Warren, Ohio, in the sum of $7,500.00 for constructing a storm water sewer in East Market street, being fifteen bonds of five hundred dollars each."

I have examined the transcript of the proceedings of council of the city of Warren, Ohio, and other officers relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and signed by the proper officers will, upon delivery, constitute valid and binding obligations of the city of Warren, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1626.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, CITY OF WARREN, OHIO.

COLUMBUS, OHIO, May 26, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the city of Warren, Ohio, in the sum of $4,500.00 to secure funds for the city's portion of the cost and expense of constructing a new span at the south end of the bridge crossing the Mahoning river at South Main street, being nine bonds of five hundred dollars each."

I have examined the transcript of the proceedings of council of the city of Warren, Ohio, and other officers relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and signed by the proper officers will, upon delivery, constitute valid and binding obligations of the city of Warren, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1627.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, CITY OF WARREN, OHIO.

COLUMBUS, OHIO, May 26, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the city of Warren, Ohio, in the sum of $12,500.00 to pay the city's share and cost of expense of paving and otherwise improving North Laird avenue to East Market street, and the construction of sanitary sewers in Walnut and Beaver streets, East South street and Maple street, and the construction of a sanitary trunk sewer in sewer subdivision 'C,' being twenty-five bonds of five hundred dollars each."

I have examined the transcript of the proceedings of council of the city of Warren, Ohio, and other officers relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted and signed by the proper officers, will, upon delivery, constitute valid and binding obligations of the city of Warren, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1628.

ROADS AND HIGHWAYS—OBSTRUCTION IN PUBLIC HIGHWAYS—WHO SHALL REMOVE SAID OBSTRUCTIONS—COUNTY COMMISSIONERS MAY PROCEED TO WIDEN HIGHWAY ALTHOUGH FRANCHISE HAS BEEN GRANTED FOR ELECTRIC RAILWAY UPON SUCH PUBLIC HIGHWAY.

When the conditions prescribed in section 7204, G. C., obtain as to obstructions in public highways, the person or company responsible for such conditions must remove said obstructions.

The mere fact that county commissioners have granted a franchise for the construction and operation of an electric railway upon a public highway does not preclude the commissioners from thereafter entertaining a proceeding to widen such highway.

COLUMBUS, OHIO, May 26, 1916.

HON. OTHO W. KENNEDY, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—I acknowledge the receipt of your recent communication in which you state that the county surveyor of your county, through one of his assistants, wrote to Hon. Clinton Cowen, state highway commissioner, relative to certain matters, requesting the state highway commissioner to obtain my opinion as to the matters in question and that the state highway commissioner replied that these matters would have to be taken up through the prosecuting attorney rather than through the state

highway department. You enclose a copy of the letter from the county surveyor and request my opinion upon the matters therein set forth. The letter in question reads as follows:

"In pursuance of your order of March 30, 1915, directing us to make preliminary survey in Crawford county at the Galion-Bucyrus road, I. C. H. No. 201, we find, on making survey, it will be quite impossible to locate the new improvement on the center line of the highway at present, owing to the occupancy of a portion of the north half of the highway by the track of the Cleveland, Southwestern and Columbus Railway, which is an electric line. At certain points the rail is laid within 13 feet from the center line of the highway.

"We find that either the track will have to be shifted, or the improvement placed 10 feet or more south of the center line of the highway to make room for the ditch and slopes between the track and the improvement. In the latter case ditch slopes on the south side will extend beyond the property line, and upon private property, a distance of 10 feet or more.

"We have taken up the matter with the railway company, with a view toward inducing them to procure private right of way. But the company claims to have certain rights upon the highway where now located, and claims to have a perpetual franchise, but submits that it is willing to shift the track a few feet.

"The questions which present themselves to us, and which we should be pleased to have you submit to the attorney-general for opinion are these:

"(1) What rights has the company within the highway under the terms of the franchise?

"(2) When does the franchise expire?

"(3) Can the county commissioners legally grant to an individual or railroad compny a franchise wherein the grantee acquires certain exclusive rights in the highway that will exclude or interfere with public improvements sought to be made according to a general plan?

"(4) Can the company be compelled to shift its tracks; if so, how far?

"(5) What rights would the county commissioners have to acquire additional lands for road purposes, in view of having granted such franchise?

"With a view toward the solution of the questions involved we enclose herewith a copy of the franchise, together with county commissioners' proceedings in connection therewith."

The franchise referred to by the county surveyor was granted by the county commissioners of Crawford county on September 29, 1896. The grantees, their heirs, successors or assigns are, by the terms of the franchise, authorized to construct, operate and maintain on the Bucyrus and Galion road a railroad operated by electricity or any other motive power except steam power and it is provided that the rail of said railroad next to the center of said Bucyrus and Galion road shall be 15 feet from the center thereof, except switches and turnouts. The grantees, their heirs, successors or assigns are also authorized to construct, operate and maintain all necessary switches, turnouts, crossings, polls, feed wires, span wires, trolley wires and appurtenances. All side tracks, switches and turnouts must be filled between the rails with some hard substance where the same encroach upon the roadway so as not to impede the public in driving vehicles over the road. Poles must be so placed as not to obstruct the travel on said highway or at any public or private driveways. All natural waterways must be protected and all public and private driveways must be planked, or so filled as to make a convenient and safe crossing across the tracks of said railroad.

The granting clause of the resolution of the county commissioners reads as follows:

> "We, the commissioners of Crawford county, Ohio, do hereby grant to said Wm. E. Haycox, of Mansfield, Ohio, and said Fred B. Perkins, of Toledo, Ohio, said grantees, their heirs, successors or assigns, the right and privilege to construct, maintain and operate said railroad as above described to convey passengers, freight, baggage, express, United States mail, and all other business coming to said railroad as long as said right of way is used for railroad purposes, from the date of these presents."

It is also provided that in case said railroad is abandoned, the right of way shall be restored to its former condition.

The first question set forth in the above quoted letter is too general to admit of a specific answer. It can only be observed, in answer to the same, that the Cleveland, Southwestern and Columbus Railway Company, assuming that said company is the assignee of the original grantee, is entitled under the terms of the franchise to maintain and operate, at some point within the limits of the highway in question, a railroad operated by electricity or any other motive power, except steam power, together with the necessary switches, turnouts, crossings, polls, feed wires, span wires, trolley wires and other necessary appurtenances.

An answer to your third and fourth questions will necessarily involve a full statement of the rights and liabilities of the railway company, unless indeed it is proposed to attempt to compel the company to entirely remove its tracks from the highway in question. In other words, a discussion of the length of the franchise and of the methods in which the same may be terminated can only be of interest in connection with the problem confronting the authorities of your county in case the county authorities seek to terminate the franchise of the company and its occupancy of this highway. It may be that the powers of the authorities charged with the improvement of this road, as outlined in my answer to your third and fourth questions, will be sufficient to accomplish all that is desired. If such does not prove to be the case, an opinion covering your second question will be prepared, but in that event I would expect a brief from you upon the matter.

Coming now to consider your third and fourth questions, a very similar matter was presented to this department by Hon. Clinton Cowen, state highway commissioner, and was considered in an opinion rendered to him on the 22nd day of September, 1915. The state highway commissioner was proposing to improve a section of highway upon which were located the tracks of the Columbus, Delaware and Marion Railway Company, the franchise of the company being a renewal of a pre-existing franchise and containing a provision to the effect that the tracks of the company should be and remain as located at the time the renewal franchise was granted and there was no provision in the franchise by which the authorities charged with the care of the road in question were authorized to require the company to move its tracks. The tracks were located about 12 feet east of the center line of the highway and the state highway commissioner inquired as to whether, under any existing statutes, authority existed to force the Columbus, Delaware and Marion Railway Company to move its tracks to the center line of the road and as to whether public funds might legally be expended to pay in whole or in part the cost of moving such tracks, or whether the railway company could be compelled to pay the entire cost of such work. In that case the tracks of the company were located as provided by the terms of its franchise, while in the case now under consideration the tracks of the company are located nearer to the center of the highway than is permitted under the terms of its franchise. It was pointed out in the opinion in question that the law applicable to such cases is now found in section 161 of the Cass highway law, being section 7204, G. C., which section reads as follows:

"It shall be the duty of the owners or occupants of land situated along the highways to remove all obstructions within the bounds of the highways which have been placed there either by themselves or their agents, or with their consent. It shall be the duty of all telephone, telegraph, steam or electric railway, or other electrical companies, oil, gas, water, or public service companies of any kind, to remove their poles and wires, connected therewith, or any tracks, switches, spurs, or oil, gas or water pipes, mains, conduits or other objects when the same, in the opinion of the county highway superintendent constitute obstructions in the highway or interfere with the construction, improvement, maintenance, or repair of the highway or use thereof, by the traveling public, subject, however, to the rights of any such company to be or remain in such highway, by virtue of any grant or franchise to said company. If, in the opinion of the county highway superintendent, such companies have obstructed said highway, said highway superintendent shall forthwith notify the county commissioners who shall cause notice to be served on said owner, occupant or company, directing the removal of said obstructions and if said owner, occupant or company shall not within five days proceed to remove said obstruction and complete the same within a reasonable time, the county highway superintendents, upon order of the county commissioners may remove said obstructions. The expense thereby incurred shall be paid in the first instance out of money levied and collected and available for highway purposes, and the amount thereof shall be certified to the proper officials to be placed upon the tax duplicate against the property of such owner, occupant or company, as provided by law, to be collected as other taxes, and the proper fund shall be reimbursed out of the money so collected, or the cost of removing such obstructions may be collected from the owner, occupant or company by civil action by the county commissioners or township trustees.

"All such persons, firms or corporations shall be required to reconstruct or relocate their properties or any part thereof upon such public highway, upon the order of the proper authorities if in the opinion of such authorities the same constitute an obstruction in such public highway."

The following quotation from the opinion in question, being opinion No. 855 follows a reference to the above quoted section:

"The above section defines the policy of the state which now controls its relation to railway companies occupying public roads with tracks which may constitute an obstruction to any improvement of said roads and said section places the entire cost of removing and relocating said tracks upon the companies which own the same.

"It may be, and doubtless will be contended, however, by the company in question that the enforcement of the provisions of the section just quoted as against it would be an unconstitutional application thereof, in that it would contravene the provisions of section 28 of article II of the constitutuon providing against the enactment of any laws impairing the obligations of contracts. A franchise such as the one under which this company is now located upon this highway and operating its railroad thereon, is frequently denominated and termed a contract and is commonly so regarded, but in a strictly legal sense it is only a right or privilege granted in this instance by the state through its duly constituted agents, the board of county commissioners of Franklin county, upon such terms and conditions as were fixed by said commissioners and it is a right which can only be exercised by reason of the grant thus made. Sections 9101 and 9113, G. C.

"The terms and conditions, however, of this franchise, as fixed by said county commissioners, are subject to the limitation that said commissioners could not in any manner or degree surrender or alienate that governmental power of the state which is required to exist for the welfare of the public, which welfare and right to use said public road is the paramount right in this case. This power so reserved and which said commissioners could not alienate is known as the police power of the state. Referring to this reserved governmental power, Elliott on streets and roads, section 939, says:

" 'The general rule is well settled that no contract can be made which assumes to surrender or alienate a strictly governmental power which is required to exist for the welfare of the public. To what extent it prevails as against chartered rights which are protected as rights flowing from a contract it is not possible to say with certainty and precision, but we believe that it may be fully affirmed that the power extends so far as to require the private corporation to yield to the public welfare in the matter of the reasonable regulation of roads and streets.'

"The rights and privileges granted as aforesaid under said franchise are subject to still further limitations which are reserved to the state by section 2 of the bill of rights and section 2 of article XIII of the constitution. By the provisions of the first section noted no special privileges or immunities shall ever be granted that may not be altered, revoked or repealed by the general assembly. Under the last quoted section it is provided that corporations may be formed under general laws, but all such laws may from time to time be altered or repealed.

"Without attempting to cite the many decisions of both federal and state courts in which the scope and effect of the foregoing constitutional provisions are considered and applied to the franchise rights of corporations, in many of which cases said rights have been set aside or additional burdens have been imposed on the owners thereof, it is sufficient to say that in my judgment they amply sustain the right of the state through its legislature to impose the provisions of said section 161, supra, upon railway and other compamies occupying public roads when said conditions exist as therein prescribed.

"It further must be observed that these constitutional reservations above noted are as much a part of the franchise granted by the agents of the state as they would be if actually made a part thereof and written therein. Railroad Company v. Defiance, 52 O. S., 314. However, as before observed, regardless of the application of these constitutional provisions the police power of the state cannot be alienated and the existence of this power must be preserved for the well being of organized society, and when exercised in a reasonable manner by the state cannot be said to impair the obligation of contracts."

The conclusion expressed in the opinion from which the above is quoted was that under the provisions of said section 7204, G. C., the company might be compelled to relocate its tracks and move them to the center of the highway, provided the conditions prescribed in the statute obtained in the case of the company in question and that the expense of such removal must be paid by the company and that no public funds might be used for that purpose.

I take it that you are interested in an answer to your third question only in so far as the same may bear upon the actual facts submitted and that this question is

sufficiently answered in the conclusion as to your fourth question, in reply to which I advise you that if the conditions referred to in section 7204, G. C., obtain, that is to say, if the tracks of the railway company constitutes obstructions in the highway or interfere with the proposed improvement of the same or use thereof by the traveling public, then the company may be required, in the manner pointed out in the section in question, to remove its tracks to a new location within the limits of said highway.

Your fifth question is to be answered without reference to the fact that the franchise in question has been granted and is held by the company. In other words, the mere fact that county commissioners have granted a franchise for the construction and operation of an electric railway upon a public highway, does not preclude the county commissioners from thereafter entertaining a proceeding to widen such highway. The jurisdiction of the commissioners in respect to widening the highway in question is the same as it would be if no franchise for the construction and operation of the electric railway upon said highway had ever been granted. Proceedings for the widening of roads other than inter-county highways and main market roads are governed by the provisions of chapter I of the Cass highway law, but that chapter has no application to inter-county highways and main market roads. Where it is desired to widen an inter-county highway or main market road, the proper procedure is outlined in chapter VIII of the Cass highway law, and the county commissioners or township trustees making the application for a proposed improvement must furnish the requisite additional right of way, in the manner pointed out in that chapter, provided the improvement is to be constructed with local co-operation, and the state highway commissioner must procure such additional right of way where he proposes to improve a road without the co-operation of the county commissioners or township trustees. The procedure is outlined by sections 194 and 195 of the Cass highway law, being sections 1201 and 1202, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1629.

ROADS AND HIGHWAYS—EXPENSES OF ASSISTANTS APPOINTED UNDER SECTION 1219, G. C., ENGAGED IN MAKING SURVEYS AND PLANS—HOW APPORTIONED—EXPENSES OF ASSISTANTS, SUPERINTENDENTS AND INSPECTORS APPOINTED BY PROVISIONS OF ABOVE SECTION ENGAGED IN WORK OF SUPERVISION AND INSPECTION—HOW APPORTIONED.

The actual and necessary expenses and other similar expenses incurred by assistants appointed under section 1219, *G. C., and engaged in making of surveys and plans, are to be equally divided between the state and the county or township on whose application the improvement is being made.*

The necessary traveling expenses and other similar expenses of assistants, superintendents and inspectors appointed under section 1219, *G. C., and employed in the work of supervision and inspection, after the contract for the improvement has been let, are to be paid by the state and the county or township on whose application the improvement is being made and should be divided in the same proportion as the cost of construction.*

COLUMBUS, OHIO, May 27, 1916.

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

GENTLEMEN:—I have your communication of May 20, 1916, which communication reads as follows:

"We are submitting herewith letter to this department from Hon. Meeker Terwilliger, prosecuting attorney of Pickaway county, Ohio, and would ask your written opinion upon the questions therein propounded."

Mr. Terwilliger's questions may be phrased as follows:

"Who should pay the traveling expenses and other similar expenses of assistants, superintendents and inspectors appointed by the county highway superintendent under authority of section 1219, G. C., and engaged upon state work?"

The answer to this question is to be found in the provisions of the section in question. It is provided that the expense of surveys and plans shall be equally divided between state and county, except where the improvement is made on the application of township trustees, in which case the expenses of surveys and plans shall be equally divided between the state and township. It is further provided that the expense of supervision and inspection shall be apportioned on the same basis as the cost of construction.

In view of these povisions I advise you that the actual and necessary traveling expenses and other similar expenses incurred by assistants in the making of surveys and plans should be equally divided between the state and the county or township on whose application the improvement is being made. The necessary traveling expenses and other similar expenses of assistants, superintendents and inspectors employed in the work of supervision and inspection, after the contract for the improvement has been let, should be paid by the state and the county or township on whose application the improvement is being made and should be divided in the same proportion as the cost of construction.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1630.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, VILLAGE OF CHICAGO JUNCTION.

COLUMBUS, OHIO, May 29, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Chicago Junction, as follows:—

"(a) Village's portion of the cost of improving Maple street, $4,700.00, being one bond of $200.00 and nine bonds of $500.00 each.

"(b) Special assessment bonds for the improvement of Maple street, $9,685.20, being ten bonds of $968.52 each.

I have examined the transcript of the proceedings of the council and other officers of the village of Chicago Junction relative to the above bond issues, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of the village of Chicago Junction, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1631

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, VILLAGE OF CHICAGO JUNCTION.

COLUMBUS, OHIO, May 27, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the village of Chicago Junction, as follows:—

"(a) Village's portion of improving Woodbine street, $2,500.00, being 5 bonds of $500.00 each.

"(b) Assessment bonds for the improvement of Woodbine street, $5,259.34, being ten bonds of $525.93 each."

I have examined the transcript of the proceedings of the council and other officers of the village of Chicago Junction relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of the village of Chicago Junction. Respectfully,

EDWARD C. TURNER,
Attorney-General.

1632

SUPERINTENDENT OF PUBLIC WORKS—FORM OF LEGAL ADVERTISEMENT FOR SALE OF CANAL LANDS—B. F. GOODRICH COMPANY.

COLUMBUS, OHIO, May 29, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of May 27, 1916, which communication reads as follows:

"Herewith I am transmitting a form of advertisement to be used in connection with the sale of certain state canal lands at Akron, Ohio, as applied for by The B. F. Goodrich Company.

"In order to make sure of having it in proper form, we will greatly appreciate it if you will go over the same, and if satisfactory approve the same, otherwise, make such suggestions as to changes as you may deem necessary. We are anxious to have your opinion by noon Monday, the 29th inst."

The form of advertisement submitted by you is as follows:

"*Sale of State Lands.*

"The superintendent of the public works of the state of Ohio, acting for and on behalf of said state, will offer for sale, at public vendue, at the door of the courthouse, in the city of Akron, Summit county, Ohio, at 12 o'clock, noon, on the 29th day of June, 1916, the following described real estate, situated in the city of Akron, Summit county, Ohio, to-wit:

"Known as being all the land owned by the state of Ohio between the produced south line of Cedar street in said city of Akron on the north, the north line of Bartges street in said city of Akron on the south, the west property line of The B. F. Goodrich Company and the west property line of The Philadelphia Rubber Company, on the east and, on the west, a line drawn parallel to the westerly line of the state canal property as established by the survey of G. F. Silliman, made under the direction of the state board of public works in the summer of 1912, and seventy-five (75) feet easterly therefrom containing one hundred and fourteen thousand (114,000) square feet; and also the rectangular strip of land twenty (20) feet in width and fifty (50) feet in length easterly and near to lock one of said Ohio canal, on which parcel of land 'The Canal Collector's Office,' so-called, now stands, said parcel of land being bounded on the north, east and south by lands of The B. F. Goodrich Company, and westerly by the west property line, at or near said lock one, of said The B. F. Goodrich Company, produced the entire length of said parcel of land and containing one thousand (1,000) square feet.

"The superintendent of public works, under the power and authority vested in him by section 412 of the General Code of Ohio, has changed the location of the Ohio canal to the westerly seventy-five foot strip of canal land, from the produced southerly line of Cedar street to the northerly line of Bartges street, in said city of Akron, reserved for the state for the use, maintenance and operation of the Ohio canal.

"The superintendent of public works has prepared and approved plans and specifications providing for and showing all the alterations and changes necessary in making said change of location. In accordance with said plans and specifications, which will be on file in the office of the superintendent of the public works on and after the 15th day of June, A. D., 1916, for inspection, it will be necessary to dredge out a new channel for the canal, change certain bridges, construct a new towing path on the easterly side of such new channel, change the 'Guard lock' from its present location to a point south of said Bartges street and make some change in the grade of Falor street. The estimated cost of making such alterations and changes is $5,000.00.

"The successful bidder at the sale herein advertised, before taking possession of the land purchased, must,at his own cost and expense, in addition to paying the full purchase price of the real estate herein described, make all changes required by said plans and specifications and under the control, direction, supervision, and to the satisfaction and approval of the superintendent of the public works. All said conditions shall also be fully set forth in the deed to the purchaser.

"Said land has been appraised at the sum of forty six thousand six hundred sixty-six dollars and sixty-six one hundredths ($46,666.66), and no bid for less than three-fourths of said appraisement will be considered.

"Terms, cash on day of sale.

"----------

"Superintendent Public
Works of Ohio."

The above form of legal advertisement appears to have been prepared in accordance with the former opinions of this department and is, in my opinion, sufficient. Inasmuch as at least thirty days' notice of the sale must be given, this notice should be published today in order to authorize a sale on the 29th day of June next.

Respectfully,
EDWARD C. TURNER,
Attorney-General

1633.

TAX MAPS—COUNTY COMMISSIONERS NOT AUTHORIZED TO EMPLOY PERSON OTHER THAN COUNTY SURVEYOR FOR PURPOSE OF *CORRECTING* AND *KEEPING UP TO DATE* AN EXISTING SET OF TAX MAPS OF COUNTY—SEE OPINION No. 844, RENDERED SEPTEMBER 20, 1915, AS TO WHO CAN *MAKE* TAX MAPS.

County commissioners are not authorized to employ any person other than the county surveyor for the purpose of correcting and keeping up to date an existing set of tax maps of the county.

COLUMBUS, OHIO, May 29, 1916.

HON. PERRY SMITH, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—In your communication under date of March 28, 1916, you state that the county commissioners of Muskingum county have made a contract for the tax map work of the county and enclose a copy of the contract. The contract in question, which you state has been entered upon the journal of the county commissioners, reads as follows.

"CONTRACT AND AGREEMENT

Made and entered into between James Buchanan, Samuel Frazier and Alfred Kelly, as commissioners of Muskingum county, Ohio, and John Dennis, of Zanesville, Ohio.

"WITNESSETH, Whereas, that we enter into contract with Mr. John Dennis for taking care of the county tax maps of our county, commencing March 1, 1916, and ending March 1, 1917, at a salary of $75.00 per month, payable monthly, and said John Dennis on his part agrees to faithfully perform all the duties reqiured of him in said capacity, upon the performance of which the said county commissioners hereby agree to pay him the above amount stipulated.

"The duties of the said John Dennis are, according to the rules and regulations laid down by the county commissioners, and the county recorder and the county auditor, and that at all times he shall be under the jurisdiction of the above mentioned parties.

"ALL MAPS belonging to said county to be checked up and kept up to date in every respect. All maps to be checked over and to be reported to the county auditor and county recorder at least once every two weeks.

"Now if the said John Dennis in contract for taking care of the county tax maps abides by the above agreement well and good, otherwise this contract is null and void.

"In Witness hereby, we have hereunto set our hands in duplicate, this the first day of March, 1916.

"(Signed) JAMES BUCHANAN,
"ALFRED KELLY,
"County Commissioners.
"(Signed) JOHN S. DENNIS,
"Contractor."

You call my attention to opinion No. 844, of this department, rendered to the bureau of inspection and supervision of public offices, on September 20, 1915,, in answer to the following questions among others:

"1. Does the annual salary provided by section 138 of the act above referred to cover services rendered by the county surveyor in the making of tax maps under the provisions of section 5551 and 5552, General Code?

"1-A. In view of the provisions of section 138 of the act, to the effect that the county surveyor shall give his entire time and attention to the duties of his office, may the county commissioners still appoint the county surveyor as tax map draftsman? If not, may they employ some other competent person?"

In a discussion of these questions the following language was used in the opinion in question:

"Coming to your questions 1 and 1-A, which will be considered together, it will be necessary to examine sections 5549, 5550, 5551 and 5552, the Warnes law and the Parrett-Whittemore law in connection with the above quoted statutes.

"The maps provided for in sections 5549 and 5550 were for the use of the assessors in making the quadrennial assessment. This scheme of assessment was repealed by the Warnes law, and sections 5549 and 5550 were repealed by implication when section 41 of the Warnes law (section 5620, G. C., 103 O. L. 797), was enacted and the duty of providing such maps was cast upon the district assessor.

"This section of the Warnes law (section 41, G. C., 5620), will be in effect until January 1, 1916, when all of the provisions of the Parrett-Whittemore law (106 O. L., 786), will become effective.

"The same maps which might have been made under sections 5549 and 5550 also could have been made under sections 5551 and 5552; that is to say, that while sections 5549 to 5552 were all in effect, the county commissioners may have pursued either course as to the *making* of the maps, though only under 5551 and 5552 where they also wanted the maps kept up to date. The maps to be made under section 5551 and 5552 were 'a complete set of tax maps for the county.' Such maps were for the use of the board of equalization and the auditor. The Warnes law abolished the board of equalization. Section 93 of the Parrett-Whittemore law, G. C., 5589, 106 O. L., 270, provides:

" 'The county commissioners shall furnish for the county board of revision in each county, and its experts, clerks and employes, suitable office rooms at the county seat and shall furnish the county auditor for his own office and for the county board of revision all maps, plats, stationery, blank forms, books, supplies, furniture and other equipment necessary for the proper discharge of its duties and for the preservation and safe keeping of its books, records and files. Provided, however, that the maps, plats, stationery, blank forms and other supplies and equipment used by the county auditor shall, so far as practicable, be used only by the county board of revision.'

"This section will become operative January 1, 1916, and will supersede all other authority for the making of future tax maps. Sections 5551 and 5552 have never been expressly repealed, but their operative effect will be limited to the tax maps referred to in said section 93, G. C., 5589, after January 1, 1916.

"When this last mentioned section becomes operative the county commissioners will have the option of either appointing the county surveyor to make the maps or of contracting with outside parties, but not of doing both. That is to say, that as the law now stands the county commissioners may

appoint the county surveyor to make, correct and keep up to date a complete set of tax maps for the county. The county commissioners may not now have this work done by any one save the county surveyor and his assistants. After January 1, 1916, the county commissioners may have the tax maps made by either the county surveyor and his assistants or by outside parties, but not by both. In other words, one set of maps is required but two sets are not authorized.

"Section 5551, G. C., provides:

" 'The board of county commissioners may appoint the county surveyor, who shall employ such number of assistants as are necessary not exceeding four to provide for making, correcting, and keeping up to date a complete set of tax maps of the county. Such maps shall show all original lots and parcels of land, and all divisions, subdivisions and allotments thereof, with the name of the owner of each original lot or parcel and of each division, subdivision or lot, all new divisions, subdivisions or allotments made in the county, all transfers of property showing the lot or parcel of land transferred, the name of the grantee, and the date of the transfer, so that such maps shall furnish the auditor, for entering on the tax duplicate, a correct and proper description of each lot or parcel of land offered for transfer. Such maps shall be for the use of the board of equalization and the auditor, and be kept in the office of the county auditor.'

"Section 5552, G. C., provides:

" 'The board of county commissioners shall fix the salary of the draughtsman at not to exceed two thousand dollars per year. They shall likewise fix the number of assistants not to exceed four, and fix the salary of such assistants at not to exceed fifteen hundred dollars per year. The salaries of the draughtsman and assistants shall be paid out of the county treasury in the manner as the salary of other county officers are paid.

"Section 5551 does not impose a positive duty upon the county surveyor. It authorizes the county commissioners under certain conditions to impose a duty on the incumbent of the surveyor's office. In other words, the making, correcting and keeping up to date of tax maps is not necessarily, but may by action of the county commissioners be made one of the duties of the county surveyor. If this action is taken by the county commissioners, then it is their duty to provide a compensation for this additional work and I am of the opinion that the county surveyor may receive it in addition to the salary provided for in section 138 of the Cass law above quoted.

"I am impelled to this conclusion not only from a consideration of the Cass law and the deliberate leaving unrepealed of sections 5551 and 5552, but as well from considerations of public economy. The tax maps must be made. The commissioners may not compel the surveyor to make them without providing a compensation therefor. If the county surveyor does not make the maps, then the commissioners must contract with outside parties for the work, in all probability at a greater cost and *without the benefit of having the tax maps kept up to date.*"

Your inquiry of March 28th leaving some doubt as to the exact question upon which you desired my opinion, I requested you to more fully state the same, and in reply to his request I have your communication of May 11, 1916, from which it appears that you desire my opinion upon the following questions:

First. May the county commissioners employ any person other than the county surveyor for the purpose of correcting and keeping up to date a complete set of tax maps of the county?

Second. If the above question is answered in the affirmative, may such contract of employment be made without competitive bidding?

I agree with your observation that the contract between the board of county commissioners of Muskingum county and John Dennis, as set forth above, is one for the correcting and keeping up to date of a set of tax maps and is not a contract for the making of a new set of maps. As indicated in opinion No. 844, a part of which is quoted above, the commissioners are now required, under section 93, of the Parrett-Whittemore law, section 5589, G. C., to furnish the county auditor for his own office and for the county board of revision all maps and plats that may be necessary with the qualification that the maps and plats used by the county auditor shall, so far as practicable, be used also by the county board of revision.

It was further pointed out in the opinion in question that this section supersedes all other authority for the making of future tax maps. As indicated in that opinion the county commissioners may now perform the duty of furnishing maps and plats in two ways; they may under authority of sections 5551 and 5552, G. C., require the county surveyor to correct and keep up to date a complete set of tax maps of the county provided they fix a compensation to be paid to the county surveyor for such services. If they do not exercise the authority conferred by sections 5551 and 5552 G. C., and appoint the county surveyor as tax map draftsman and fix his compensation, then the commissioners must contract with outside parties for the making of tax maps.

I think the reasoning of opinion No. 844 indicates the answer that must be made to your first question, and that where county commissioners elect to discharge the duty of furnishing maps and plats enjoined upon them by section 5589, G. C., by correcting and keeping up to date an existing set of tax maps of the county, then they must act in the manner pointed out in sections 5551 and 5552, G. C., and must appoint the county surveyor as tax map draftsman.

The first question above set forth must therefore be answered in the negative and I advise you that the county commissioners are not authorized to employ any person other than the county surveyor for the purpose of correcting and keeping up to date an existing set of tax maps of the county.

The answer to your first question makes it unnecessary to consider your second.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1634.

HUMANE OFFICER—APPOINTED FOR "THE ENSUING YEAR"—HOW LONG SUCH OFFICER IS ENTITLED TO RECEIVE COMPENSATION.

Under an appointment of a humane officer made by a humane society for "the ensuing year" approved by the probate judge of the county, under the provisions of section 10071, *G. C., county commissioners are bound to provide compensation for a period of one year under the provisions of section* 10072, *G. C.*

Such obligation is at an end when the term for which the officer was appointed expires.

COLUMBUS, OHIO, May 29, 1916.

HON. OTHO W. KENNEDY, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—Your request for an opinion is as follows:

"In Crawford county we have what is known as the Crawford county humane society, with its office located in the city of Galion, this county.

This organization was duly organized about the year 1904. The society had divers meetings from time to time, and on the 9th day of July, 1913, at the regular annual meeting of said society, *they elected a humane officer for Crawford County, for the ensuing year.* The appointee was duly sworn on the 10th day of July, 1913. On the 11th day of July, 1913, this appointment was approved by the mayor of the city of Galion, Ohio. On the 30th day of July, 1913, this appointment was approved by the probate court of Crawford county, Ohio. All proceedings thus far appear to be regular.

"You will note from the foregoing that this humane officer was elected on the 9th day of July, 1913,*for the ensuing year,* which would seem to mean for the period of one year immediately following the above date. No action whatever has been taken by the society since that date toward appointing a humane officer, or reappointing this same officer, the society apparently relying upon the proposition that it was not necessary to appoint a man every year, although this man was appointed for a period of but one year at the time, contending that he would hold his position until his successor would be elected and qualified.

"This officer has been presenting his bills to the county, and the county has been paying same until within the last three or four months; when it refused to pay the same for the reason that said appointee's term had expired, and that he is not now such humane officer. In other words, the commissioners contend that he does not hold his position of office until his successor is elected and qualified, but only for a period of one year, the time for which he was appointed.

"I desire your opinion as to whether or not the county is legally obligated to pay this humane officer at the present time, under the above statement of facts. An early reply will be appreciated."

Sections 10070, 10071 and 10072 of the General Code, provide for the appointment of an agent of such society, prescribe his duties and the manner in which the county or municipality may compensate such agent. The sections referred to are as follows:

"Sec. 10070. Such societies may appoint agents who are residents of the county or municipality for which the appointment is made, for the purpose of prosecuting any person guilty of an act of cruelty to persons or animals, who may arrest any person found violating any provision of this chapter, or any other law for protecting persons or animals or preventing acts of cruelty thereto. Upon making such arrest, such agent shall convey the person so arrested before some court or magistrate having jurisdiction of the offense, and there forthwith make complaint on oath or affirmation of the offense.

"Sec. 10071. All appointments by such societies under the next preceding section shall have the approval of the mayor of the city or village for which they are made. If the society exists outside of a city or village, appointments shall be approved by the probate judge of the county for which they are made. The mayor or probate judge shall keep a record of such appointments."

"Sec. 10072. Upon the approval of the appointment of such an agent by the mayor of the city or village, the council thereof shall pay monthly to such agent or agents from the general revenue fund of the city or village, such salary as the council deems just and reasonable. Upon the approval of the appointment of such an agent by the probate judge of the county, the county commissioners shall pay monthly to such agent or agents, from the

general revenue fund of the county, such salary as they deem just and reasonable. The commissioners, and the council of such city or village may agree upon the amount each is to pay such agent or agents monthly. The amount of salary to be paid monthly by the council of the village to such agent shall not be less than five dollars, by the council of the city not less than twenty dollars, and by the commissioners of the county not less than twenty-five dollars. But not more than one agent in each county shall receive remuneration from the county commissioners under this section."

It is specifically stated in your letter that the humane officer for Crawford county referred to having been elected on the 9th day of July, 1913, by the Crawford county humane society for "the ensuing year," and in accordance with the provisions of sections 10071 and 10072 of the General Code, supra, and the approval of the mayor of the city of Galion and the probate judge of Crawford county followed, the question for consideration is as to whether or not the humane officer referred to is entitled to receive compensation for the entire period from the date of his election up to the present time.

You state in your letter that until within the last three or four months the county commissioners have been making monhtly payments to him but have now refused to continue the same, contending that his election was for a definite period of one year. No where in the law is there any provision fixing a definite term of office for an agent of a humane society which the society is authorized to appoint subject to the approval of the mayor of a municipality and the probate judge of the county in which the society exists.

In an opinion of my predecessor, addressed to the state civil sevice commission Columbus, Ohio, under date of April 24, 1914, Mr. Hogan held that:

"The humane agent is an employe of the humane society, a corporation. He is engaged in a public duty, and for performing that duty the county or municipality is authorized to pay him a compensation. He is not, in my opinion, in the service of the state, county or city within the meaning of section 1 of the civil service act. Humane agents, therefore, are not subject to civil service regulations."

This opinion is to be found on page 503 of the Annual Report of the Attorney-General for 1914, Vol. I.

In an opinion of attorney-general Denman, under date of October 13, 1910, addressed to Honorable George G. Barnes, prosecuting attorney, Georgetown, Ohio, to be found on page 891 of the Report of the Attorney-General for 1910 and 1911, the question of the term of office of the humane society agent was under consideration, the same sections of the General Code being involved. In the opinion it was held as follows:

"Nowhere in the General Code have I been able to find any provision as to the tenure of office of these agents. The mere fact that the appointment must be approved by certain local officers is inconclusive. The general rule is that appointments authorized to be made for terms not limited are at the pleasure of the appointing authority.

"I am, therefore, of the opinion that, unless otherwise provided at the time of the appointment, a humane society agent holds his position at the pleasure of the society appointing him, and of the mayor or probate judge, as the case may be."

Section 10072 of the General Code, supra, upon the approval by the probate judge of the appointment of a humane agent, fixes upon the county an obligation to

pay reasonable compensation, subject to the limitation that it shall not be less than twenty-five dollars per month. The action of the probate judge in approving the appointment of the humane officer under consideration fixed an obligation upon the county commissioners of Crawford county to pay such humane officer at least $300.00. in monthly sums of not less than $25.00. This obligation was specific and the humane officer would have been entitled to institute an action to recover the same, However, at the expiration of the year for which he was appointed, no further obligation rested on the county commissioners under the approval of the probate judge previously given for the appointment of the humane officer for the period stated in your letter. Had the humane officer been appointed for an indefinite term and the approval of the probate judge given to the appointment in that form, no question would exist as to the right of the officer to the monthly compensation provided for in said section 10072 of the General Code, supra.

In the case of the State ex rel. The Coshocton Humane Society v. Ashman, probate judge, 90 O. S., 200, which was an action in mandamus to compel the defendant as probate judge, to approve the appointment of an agent made by the Humane society, the court, at page 201, said:

> "The theory presented for the reversal of the judgment is that the probate judge is without authority to refuse to approve if the person appointed is competent for the discharge of the duties of the place. The statutes relating to the subject comprise sections 10062 to 10084, General Code, inclusive. They authorize the society to make appointments of agents without the approval of the probate judge, or any other officer, and the approval if given, accomplishes but one purpose, possibly two. It does authorize the payment of the agent's compensation out of the funds of the county and possibly it adds to the agent's authority in making arrests. But the fact that the absence of the approval of the probate judge protects the county from the payment of salary or compensation to the agent must, we think, be regarded as vesting in the probate judge a discretion to determine whether, in view of all conditions existing, there is a public necessity for such appointment. No language of the statute restricts his discretion to a consideration of the fitness of the person whom the society names as agent, and the effect of this approval would not authorize us to infer such limitation."

In view of the fact that the tenure of office of the humane officer under the appointment and subject to the approval of the probate judge, was for the "ensuing year," which could mean only one year, it is my opinion that the approval of the judge of the appointment extended no further than the terms of the appointment and by such approval an obligation was placed on the county commissioners to provide compensation in accordance with the statute for time fixed by the appointment only, and that they are under no obligation to make further payments to the humane officer under the appointment referred to as having been made in July, 1913.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1635.

APPROVAL, RESOLUTIONS FOR IMPROVEMENT OF CERTAIN ROADS IN ASHTABULA, COLUMBIANA AND WASHINGTON COUNTIES.

COLUMBUS, OHIO, May 29, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of May 27, 1916, transmitting to be for examination final resolutions relating to the following roads:

"Ashtabula county—Sec. 'K,' Cleveland-Buffalo road, Pet. No. 2046, I. C. H. No. 2.

"Columbiana county—Sec. 'N,' Unity-Salem road, Pet. No. 1445, I. C. H. No. 86.

"Washington county—Sec. 'K,' Marietta-McConnelsville road, Pet. No. 3058, I. C. H. No. 393.

"Washington county—Sec. 'K,' Marietta-McConnelsville road, Pet. No. 3058, I. C. H. No. 393. (Duplicate.)

"Washington County—Sec. 'K,' Marietta-McConnelsville road, Pet. No. 3058, I. C. H. No. 393.

"Washington county—Sec. 'K,' Marietta-McConnelsville road, Pet. No. 3058, I. C. H. No. 393. (Duplicate.)

"Washington county—Sec. 'L,' Athens-Marietta road, Pet. No. 3063, I. C. H. No. 157.

"Washington county—Sec. 'L,' Athens-Marietta road, Pet. 3063, I. C. H. No. 157. (Duplicate.)

"Washington county—Sec. 'L,' Athens-Marietta road, Pet. No. 3063, I. C. H. No. 157.

"Washington county—Sec. 'L,' Athens-Marietta road, Pet. 3063, I. C. H. No. 157. (Duplicate.)

I find these resolutions to be in regular form and am therefore returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1636.

MUNICIPAL CORPORATION—MEMBER OF COUNCIL MAY AT THE SAME TIME BE A CENTRAL COMMITTEEMAN.

COLUMBUS, OHIO, May 31, 1916.

HON. FRANK L. JOHNSON, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR:—Yours under date of May 17, 1916, is as follows:

"Section 4207, G. C., providing for the qualifications of councilmen provides:

" 'Each member of council shall be an elector of the city, shall not hold any other public office or employment, except that of notary public or member of the state militia.'

"And the question upon which I would like to have your opinion is: Can a member of council be a central committeeman?

It is manifestly the purpose of section 4207, G. C., from which you quote, to define the qualifications of members of council rather than of other officers, and while the language might be construed as an inhibition against a person holding another public office or employment, I am more inclined to the view that it was intended rather to prevent one who holds another public office or employment from being a member of council. That is to say, the holding of other public office or employment would, by force of section 4207, G. C., work a disqualification as a member of council, and I assume that it is to the qualification of the members of council that your inquiry is directed.

It will be noted that the provision of section 4207, G. C., referred to, is limited to public office or employment.

The position of central committeeman is not an employment nor is it to my mind a public office. An office is defined in the case of The State ex rel. v. Hunt, 84 O. S., 149, as:

"A public position to which a portion of the sovereignty of the country attaches, and which is exercised for the benefit of the public."

The functions of a central committeeman are exercised more particularly for the benefit of a political party than for public benefit and while it may be argued that the functions of a committeeman are at least of minor public interest, I am not inclined to the view that such committeeman is a public officer within contemplation of the provisions of said section 4207, G. C., and am therefore of opinion that an elector may be at the same time a member of council and a central committeeman.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1637

DEPUTY STATE SUPERVISORS OF ELECTION — MEMBER OF SUCH BOARD OR CLERK THEREOF AFTER HAVING FILED DECLARATION OF CANDIDACY ARE RENDERED INELIGIBLE TO ACT AS SUCH ELECTION OFFICERS.

A person who serves as deputy state supervisor of elections or clerk of the board of deputy state supervisors of elections after having filed his declaration of candidacy as provided by section 4969, G. C., 106 O. L., 544, for any office to be filled at an election other than committeeman or delegate or alternate to a convention, is thereby rendered ineligible to such office under the provisions of section 5092, G. C., 103 O. L., 496.

COLUMBUS, OHIO, May 31, 1916.

HON. CHARLES E. BALLARD, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—Yours under date of May 25, 1916, is as follows:

"A is a deputy state supervisor of elections of Clark county, Ohio, and expects to become a candidate before the August primary for nomination to a county office. Must A resign such position before August 8, 1916, or

should he resign before filing his declaration of intention to become a candidate, which would be June 8, 1916?

"Section 5092, may throw some light upon this question."

Section 5092, G. C., 103 O. L., 496, to which you refer, provides as follows:

"No person, being a candidate for an office to be filled at an election, other than for committeeman or delegate or alternate to any convention, shall serve as deputy state supervisor or clerk thereof, or as a judge or clerk of elections, in any precinct at such election. A person serving as deputy state supervisor or clerk thereof, judge or clerk of elections contrary to this section shall be ineligible to any office to which he may be elected at such election."

The manifest and highly proper purpose of the enactment of this section was to afford an inhibition against any person being connected in any official capacity with the conduct of an election at which he is a candidate and to protect the public and other candidates against opportunities favorable to the commission of fraud by persons having an averse interest to other candidates. To effect its full purpose it should be liberally construed in favor of the parties for whose protection it was enacted.

Now by the plain terms of the above quoted statute it is provided that no person shall serve as deputy state supervisor of elections or clerk thereof after he becomes a candidate for an office to be filled at an election. A nomination is necessary to enable a candidate to have his named printed upon the ballot but a nomination is not at all essential to one's being a candidate. The nomination is only a means toward the primary object sought, viz.: election to office. A candidate, when used in relation to the election of public officers, is one who seeks election to office, and when one begins actively to seek a public office, he becomes a candidate. Persons who are candidates for office may have their names printed upon the primary ballot for the purpose of securing a party nomination by filing a declaration of candidacy and paying the required fee as provided by section 4969, G. C., 106 O. L., 545. While the filing of such declaration of candidacy is not essential to being a candidate, it is not only sufficient but conclusive evidence that the person so filing is actively seeking election to an office and therefore a candidate for office within the meaning of the terms of said section 5092, G. C., supra, and unless the office which the person seeks is within one of the classes excepted therein, such person renders himself ineligible thereto if he thereafter serves as deputy state supervisor of elections.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1638.

APPROVAL, SALE OF TRACT OF LAND IN CITY OF AKRON TO THE WILLIAMS FOUNDRY AND MACHINE COMPANY.

COLUMBUS, OHIO, May 31, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of May 8, 1916, transmitting to me a copy of your proceedings relative to the sale to The Williams Foundry & Machine Company, of a tract of canal land in the city of Akron.

I find that your proceedings have been in accordance with the statutes and that the resolution providing for the sale of the land in question is properly drawn, and I have therefore attahed my signature to the duplicate copies of the resolutions in question.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1639.

BOARD OF HEALTH—PAYMENT FROM PUBLIC TREASURY OF BUSINESS LOSSES ACCRUING AS AN INCIDENT TO PROMULGATION OF QUARANTINE ORDERS NOT AUTHORIZED—INABILITY TO MARKET EGGS AND BUTTER.

Payment from the public treasury of business losses accruing as an incident to the promulgation of quarantine orders by the board of health, such as the inability to market eggs and butter from the quarantined premises, is not authorized.

COLUMBUS, OHIO, June 1, 1916.

HON. F. C. GOODRICH, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—Under date of May 29th you requested my written opinion as follows:

> "In reference to quarantining, I would like to have an opinion on the following facts:
>
> " 'A farmer is quarantined for scarlet fever and the health officers refuse to allow him to secure persons to take care of his chickens and cows, and collect the eggs and milk and market same, and by so doing causes him the the loss of $50 to $100 from the sale of his eggs and milk during the quarantine.'
>
> "The statute provides that the health board shall pay all necessary expenses including food and medical attention if the party quarantined is unable to pay for same, but I can find no statute which allows the party quarantined to collect his eggs and butter, as stated above.
>
> "Please let me have your opinion as to whether or not the township trustees are liable for the loss incurred by their order of quarantine in this matter."

Section 4428, of the General Code, provides that in case of the prevalence of a contagious or infectious disease in a house or other locality, the board of health may, as it deems best, send the person so affected to a quarantine hospital or other place provided for such persons or may restrain them and others exposed within such house

or locality from intercourse with other persons and prohibit ingress or egress to and from such premises.

Section 4436, G. C., provides that the board of health shall furnish the necessary food, fuel, medical attendance, medicine, nurses, etc., to persons quarantined, when necessary, and that the expense so incurred shall be paid by the municipality, in case the persons quarantined are not able to pay it.

Section 4434, G. C., provides that the board of health may destroy infected clothing, bedding, or other articles which cannot be made safe by disinfection, and when a building, hut or other structure has become infected with smallpox or other dangerous communicable disease, and cannot, in the opinion of the board of health, be made safe by disinfection, the board may have such building, hut or other structure appraised and destroyed.

Section 4435, G. C., provides for the payment of the appraised value or such sum as the council deems just compensation for such destroyed articles.

Section 4460, G. C., provides:

> "In case scarlet fever, typhoid or other dangerous contagious or infectious disease should occur in the family of a dairyman or among his employes, or in a house in which milk is kept for sale, such dairyman or vender of such milk shall immediately notify the health officer of the municipality in which such milk is sold or offered for sale of the facts of the case, and the health officer may order the sale of such milk stopped pending an investigation and for such time thereafter as the board of health may require, The investigation shall be made without delay, and the board of health may make and enforce such orders as it deems necessary to prevent the sale of impure, adulterated and unwholesome milk or milk liable to carry disease.".

The foregoing sections of the General Code are found in the chapter creating boards of health in cities and villages and prescribing their duties and authority.

Section 3391, G. C., provides that in each township the trustees thereof shall constitute the board of health for the township outside the limits of any municipal corporation.

Section 3394, G. C., provides in part:

> "Township boards of health shall have the same duties, powers and jurisdiction within the township and outside of any municipality as by law are imposed upon or granted to boards of health in municipalities."

It does not clearly appear from your statement whether the person mentioned in your inquiry is a resident of a municipal corporation or of a township outside of a municipal corporation.

The place of residence of the party affected by the quarantine order, of course, will determine the jurisdiction of the respective boards, but the duties imposed and authority conferred upon the boards with respect to matters of quarantine are the same within their several jurisdictions.

These statutes are enacted pursuant to the police power of the state and the liability to make compensation for infected articles of property destroyed by order of the board of health and the payment of expenses incurred is strictly legislative, and there must be affirmative legislative provision in order to authorize the payment of claims growing out of the execution of the lawful orders of the board.

I do not find any statute broad enough in its terms to authorize the payment of losses of income or profits from one's business arising from the promulgation of quarantine orders by the board of health in conformity to the statutes.

Business losses are a probable incident to quarantine orders, yet the legislature while dealing with the kindred matters of compensation for property destroyed by order of the board and payment of expenses incurred in certain cases, has not made a corresponding provision in regard to compensation for losses to one's business interests occasioned in some degree by the quarantine order.

I therefore hold that such payment would not be authorized, and that in case the board of health has found conditions warranting the quarantining of premises on account of prevalence of scarlet fever therein, and such order prevented the marketing of eggs and butter from the premises, there is no authority for payment from the public treasury of the amount of the loss so incurred.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1640.

COMMON PLEAS JUDGE—PAYMENT OF $10.00 PER DAY PROVIDED FOR BY SECTION 2253, G. C., DOES NOT INCLUDE TIME SPENT BY A JUDGE IN GOING TO AND RETURNING FROM COUNTY OF SAID ASSIGNMENT.

The payment of $10.00 *per day for each day of the assignment provided for by section* 2253, *G. C., as amended,* 104 *O. L.,* 251, *does not include the time spent by a judge in going to and returning from the county of said assignment.*

COLUMBUS, OHIO, June 1, 1916.

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

GENTLEMEN:—I have your letter of May 18, 1916, submitting the following inquiry:

> "When the chief justice assigns a judge of the court of common pleas to aid in disposing of business of some county other than that in which he resides, as provided by the latter part of section 2253, General Code, as amended 104 O. L., 251, is the judge entitled to $10.00 per day for the days spent in traveling to and from his place of assignment in addition to the per diem while on the assignment?"

Section 2253, G. C., as amended 104 O. L., 251, to which you refer in your foregoing inquiry, in so far as its provisions are pertinent here, provides as follows:

> "Each judge of the court of common pleas who is assigned by the chief justice by virtue of section 1469, to aid in disposing of business of some county other than that in which he resides, shall receive ten dollars per day for each day of such assignment, and his actual and necessary expenses incurred in holding court under such assignment, to be paid from the treasury of the county to which he is so assigned, upon the warrant of the auditor of such county, and the amount allowed herein for actual and necessary expenses shall not exceed three hundred dollars in any one year."

The precise and plain mandate of the foregoing law is, that said judge, so assigned, shall receive ten dollars per day for each day of such assignment. The assign-

ment of the chief justice is the thing which gives said judge jurisdiction and authority to proceed to a county, other than his home county, to hold court and such assignment must be placed upon the journal of the court in the county to which he is assigned as evidence of his authority to hold court therein. This assignment fixes the time when his services are to begin. Manifestly, then, no services under said assignment may begin until the date so fixed. It would seem plainly evident that the legislature only purposed by this provision to compensate a judge for services actually rendered the county to which he is assigned because said compensation is payable from the treasury of said county and does not in any way affect the regular salary of the judge. That salary goes on undisturbed by the absence of the judge from his home county or district. There is nothing in the evident purpose of this section nor in the surrounding circumstances, to warrant any construction of its language other than that which such language plainly imports. In other words, there is nothing in the statute or in the surrounding circumstances to warrant a conclusion other than that the provision in question means that the ten dollars per day is to begin with the date of the assignment and the services of the judge thereunder and ends when said services are completed by the adjournment of the court.

I therefore hold that the payment of ten dollars per day allowed by the provisions of this section is to be based upon the time actually spent by said judge in holding court in the county to which he is so assigned, and does not include the time spent in going to and returning from the county of such assignment.

It must be understood that the foregoing observations with reference to the payment of said ten dollars per day apply only to judges who were elected or appointed subsequent to the taking effect of said section 2253, G. C., to wit: June 8, 1914.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1641.

DISAPPROVAL, PROPOSED SALES OF CANAL LANDS TO THE B. & O. S. W. R. R. CO. AND THE C. H. & D. RY. CO., AT CHILLICOTHE, OHIO.

COLUMBUS, OHIO, June 1, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of April 29, 1916, which communication reads as follows:

> "Herewith I transmit resolutions providing for the sale of two small tracts of abandoned Ohio canal lands in the city of Chillicothe, Ross county, Ohio, one to the Baltimore & Ohio Southwestern Railroad Company, and the other to The Cincinnati, Hamilton and Dayton Railway Company.
>
> "These two tracts of land comprise the respective rights of way of each company across the abandoned canal property, and have been occupied with bridge crossings for many years.
>
> "Before approving these resolutions, we desire to have the attorney-general determine whether or not we in any way jeopardize prospective leases for railway purposes over the state canal property where the new road must cross over, under or at grade, the tracks of the existing railway tracks. If a company owning the right of way can compel the new road to pass over or under the existing tracks, we are of the opinion that it will very greatly de-

preciate the right of way that may subsequently be leased by the state to a nother corporation, and in that case we doubt the propriety of conveying the tracts described in the resolutions. This same situation will arise at many points along the abandoned canals, and we therefore respectfully request the attorney-general to render an opinion as to our duties in the premises.

"You will therefore approve or disapprove the resolutions in accordance with the opinion you render."

Your communication does not set forth the law under which the railroad companies to which you refer are occupying the portions of the Ohio canal now in use by them, but I am informed by Mr. E. E. Booton, of your department, that the occupancy of the companies is under the provisions of section 8775, G. C., et seq. These sections of the General Code do not define the respective rights of the state and a railroad company, where a canal is abandoned by the state, and I am not aware of any court decision in which this matter has been determined.

Authority to sell the land in question is conferred by senate bill No. 212, being an act to abandon certain portions of the Ohio canal and to provide for the selling and leasing of the lands connected therewith, the act in question being found in 102 O. L., 293. If such lands should be sold to the railroad companies in question,and it was thereafter desired by the state to sell or lease the remaining portions of the Ohio canal through the city of Chillicothe for railroad purposes, the company desiring to construct a line of railway along the bed of the canal would be compelled to obtain a crossing across the tracks of The Baltimore & Ohio Southwestern Railroad Company and The Cincinnati, Hamilton & Dayton Railway Company, in the manner provided by sections 8834 to 8842, inclusive, of the General Code, and the company desiring to construct such new line of railway would be compelled to compensate The Baltimore & Ohio Southwestern Railroad Company and The Cincinnati, Hamilton & Dayton Railway Company for the land occupied by the crossing. In case the companies were unable to agree upon the compensation to be paid for such land, this question would necessarily be submitted to a jury in accordance with the provisions of section 8838, G. C.

In view of this fact, I am of the opinion that the proposed sales would substantially impair the value of the remaining canal property within the city of Chillicothe, and I am therefore of the opinion that a sale of this property should not be made, and am returning your records of proceedings without my approval.

It is my opinion that the property in question might properly be leased to the two companies under such conditions that the companies would be permitted to eliminate over-head bridge construction with the ten foot clearance provided for by section 8775, G. C., et seq., and allowed to substitute other proper drainage structures, reserving to the state the right to lease the property to another company desiring to cross the existing railway lines at these points and expressly stipulating that if such action be taken the lessee of the bed and banks of the canal will not be required to make any compensation to The Baltimore & Ohio Southwestern Railroad Company and The Cincinnati, Hamilton & Dayton Railway Company for the lands occupied by their crossings and referring the companies to the statute for a determination of the method of crossing and the division of the initial expense thereof and the expense of maintenance.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1642.

APPROVAL, CONTRACT FOR WOMEN'S DORMITORY AT KENT STATE NORMAL COLLEGE.

COLUMBUS, OHIO, June 1, 1916.

Board of Trustees of Kent State Normal College Kent, Ohio.

DEAR SIRS:—I have received from you the affidavit and proof of publication, the proposals, contract of Robert H. Evans & Company in the sum of $113,264.00, with contact bond attached, and copy of resolution from the minutes of your board, submitted relative to the letting of the contract for the women's dormitory to the Kent State Normal College, and having carefully examined the same.

I find that the advertisement for bids is in proper form and was duly made. The estimate of the architect for the improvement was $113,274.61 and the bid of Robert H. Evans & Company, of Columbus, Ohio, was $113,264.00. Therefore, the bid is within the estimate, and the contract entered into with said Robert H. Evans & Company, who were the low bidders as appears from the bid submitted, and the contract bond together with the proposal of said Robert H. Evans & Company, attached thereto are in all respects in compliance with law.

I have obtained from the auditor of state, a certificate to the effect that there is sufficient money appropriated to cover the consideration named in the contract.

I have therefore, this day approved said contract and filed the same, together with the bond covering said contract, in the office of the auditor of state, and herewith return to you the other papers submitted.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1643.

COUNTY COMMISSIONERS—JOINT COUNTY DITCHES—COSTS, HOW PAID—COUNTY AUDITOR'S COSTS FOR MAKING AND SERVING NOTICES IN SUCH CASES—SECTION 6449, G. C., 106 O. L., 135, GOVERNS.

When a joint board of county commissioners acting under section 6563-1, *et seq., upon consideration of the report of the surveyors appointed in the matter of establishing a joint county ditch or ditches, determine to abandon said proceedings, all the costs thereof shall be paid equally by the several counties involved in said proceedings upon the order of said joint board as provided in section* 6563-14, *G. C.*

In such cases the costs due county auditors for making and serving notices upon lot or land owners are to be determined by the provisions of section 6449, *G. C., as amended,* 106 *O. L.,* 135.

COLUMBUS, OHIO, June 1, 1916.

HON. EARL K. SOLETHER, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—I have your letter of May 27, 1916, submitting the following facts and inquiry:

> "Some time ago a petition was filed with the auditor of Lucas county by fifty or more persons praying for the improvement of a ditch known as Crane

creek, which said ditch is located in the counties of Lucas, Wood and Ottawa.

"This petition was filed under section 6563-1 of the General Code, and proceedings were had under the provisions of said section, and the joint board as provided in section 6563-9 proceeded to go ahead with the improvement and ordered the county surveyors to make plans, specifications, profiles, etc. The surveyors proceeded with their work and filed their report as provided in section 6563-13.

"The joint board then considered the reports of the surveyors as provided in section 6563-14, and at this meeting abandoned the proceedings and dismissed the petition. Subsequently, the auditors of the three counties filed their cost bill with the secretary of the joint board of commissioners and the joint board then met to consider the cost bills.

"The auditor of Wood county made a charge in his cost bill for the making of notices which he was ordered to serve upon all persons interested as provided in section 6563-15, according to the rate and fee as allowed him under section 6524, G. C.

"The largest number of persons interested were located in Wood county and the making of the notices amounted to $170.50, and only a small number of the property owners interested were located in Lucas and Ottawa counties.

"Objection was made by Lucas and Ottawa counties to this charge made by the auditor of Wood county, claiming that this should not be allowed for the reason that the prayer of the petition was dismissed and that by reason of section 6453, G. C., the fees of the auditor for making notices could not be allowed. They further contended that section 6563-44 stated that the auditor should be allowed the same fees as are allowed in ditch work and that said section referred back to section 6453 of the single county ditch law.

"The auditor of Wood county contends that section 6453 does not apply in this case for the reason that the joint board determined to go ahead with the proceedings and ordered the surveyors to make plans, specifications, profiles, etc., thereby relieving the bondsmen from liability as provided in section 6563-10, and that all expenses of the auditor, surveyor and commissioners should be paid equally as provided in section 6563-14, G. C.

"Will you kindly give me your opinion as to the proper interpretation of these sections?"

From the facts stated in your foregoing letter it would seem that the contention of neither party to the controversy may be fully sustained.

It appears that the joint board, under the provisions of section 6563-14, G. C., determined to abandon the proceedings which section provides as follows:

> "If upon consideration of the reports of said surveyors said joint board shall determine to abandon said proceedings, it may dismiss the same, and the costs of said proceedings shall be paid by each county equally upon the order of the joint board, and the secretary thereof shall certify the amount to be paid by each county to the auditor thereof, and the auditor shall draw his warrant for the amount, and it shall be paid by the treasurer of the county."

When, therefore, the proceedings were abandoned as aforesaid the costs therein incurred became payable upon the order of said joint board by the counties involved in said proceedings in equal proportions. This is so because by the provisions of section 6563-10, G. C., when the joint board determines to appoint surveyors the petitioners are released from liability. This section provides as follows:

> "If the joint board shall determine that said surveyors shall be so appointed, then the bond given by said petitioners shall be released from liability.

But if said joint board determines not to proceed with said petition, then said petitioners shall pay the expenses of said proceeding."

The foregoing statute plainly provides that the petitioners shall pay the expenses of said proceedings when said joint board determines not to appoint surveyors and not to proceed with said petition. It appears from the facts stated in your letter that the joint board appointed surveyors and received their report as provided in section 6563-13, G. C. This action by the joint board clearly released the petitioners from any liability for the expenses of said proceeding and determined the liability of the counties involved for such expenses as provided in section 6563-14, G. C., aforesaid.

Section 6563-44, G. C. provides:

"Said surveyors named in section 8 (G. C. Sec. 6563-9) shall meet with the joint board of county commissioners whenever required by said board and said surveyors and auditors shall be paid their necessary expenses while employed under this act and shall be allowed the same fees as are allowed in ditch work generally and said commissioners shall receive the sum of three dollars a day and their actual expenses while employed under this bill."

Under this section the fees of the auditors of the several counties included in the proceedings aforesaid are to be the same as are allowed in ditch work generally. It appears from your statement that the auditor of Wood county contends that the fees for ditch work generally are fixed by the provisions of section 6524, G. C. This is true only as to such fees as are not covered by special provisions. The section which fixes the charges of an auditor for making and serving notices is not section 6524, G. C., but section 6449, G. C., as amended 106 O. L., 135, which provides as follows:

"The county auditor shall also prepare copies of the notice, for which he shall receive six cents per one hundred words, but not more than twenty-five cents for any one notice. At least fifteen days before the day set for hearing one copy of the notice shall be served upon each lot or land owner, or left at his usual place of residence and upon an officer or agent of each public or private corporation operating or having a place of business in the county. The person who serves such copies shall make return on the notice, under oath, of time and manner of service, and file it with the auditor on or before such day, and shall receive two dollars for each day actually employed in such service. If, however, the petition prays for the improvement of the channel of a river, creek or run, or part thereof, in more than one county and more than two hundred freeholders will be affected, if said improvement is granted as prayed for, all persons, firms and corporations, except steam railway companies having an agent located in the county, which shall be notified as hereinbefore provided, may be given notice by publication, whether they are resident or nonresident of any or all of the counties through which the improvement will pass, and no other notice shall be required. * * * *"

I therefore must advise that the costs of serving notices in Wood county are fixed by the provisions of said last named section and when determined as provided by said section are payable by the several counties involved in the manner prescribed in section 6563-14, G. C., supra.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1644.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF JEFFERSON TOWNSHIP RURAL SCHOOL DISTRICT, CLINTON COUNTY, OHIO.

COLUMBUS, OHIO, June 1, 1916.

Industrial Commission of Ohio, Columbus. Ohio.

GENTLEMEN:—

"RE:—Bonds of Jefferson township rural school district, Clinton county, Ohio, in the sum of $36,000.00, being seventy-two bonds of five hundred dollars each."

I have examined the transcript of the proceedings of the board of education of Jefferson township rural school district relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted, and signed by the proper officers of the district will, upon delivery, constitute valid and binding obligations of said school district.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1645.

DISAPPROVAL, LEASE OF CERTAIN CANAL LANDS AT CLEVELAND, OHIO, TO CORRIGAN McKINNEY AND COMPANY—SHOULD BE EXECUTED BY ALL PARTNERS.

COLUMBUS, OHIO, June 1, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of May 15, 1916, transmitting to me for examination a lease of certain state canal lands at Cleveland, Ohio, to Corrigan McKinney & Co., a partnership.

I am returning this lease without my approval for the reasons set forth in opinion No. 1616, rendered to you on May 24, 1916. A proper recital should be made in the body of the lease of the names of all the partners and the lease should be executed by all the partners.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1646.

JURY SERVICE—TALESMEN—BYSTANDERS—WHEN ENTITLED TO FEE.

Under the provisions of section 3008, *G. C., talesmen summoned in any case are entitled to the statutory fee of* $2.00 *for each day's service regardless of whether they are actually called to the jury box or not.*

The only authority for the calling of "bystanders" is that contained in section 13650, *G. C., which applies only in the trial of a person charged with a capital offense.*

There is no provision of law for the payment of a fee to bystanders called to the jury box for examination as to their qualifications as jurors unless they are qualified and sworn as jurors.

COLUMBUS, OHIO, June 2, 1916.

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

GENTLEMEN:—I am in receipt of a request for an opinion from honorable John C. Hover, judge of the court of common pleas, Logan county, and deeming the matter to be one of general interest, I am in accordance with my custom addressing the opinion to you. Judge Hover's request for an opinion is as follows:

> "Section 3008 provides that:
>
> " 'Each grand or petit juror drawn from the jury box pursuant to law, each juror selected by the court as talesman as provided by law, and each talesman, shall receive two dollars for each day of service, and if not a talesman, five cents each mile from his place of residence to the county seat. * * *'
>
> "When a regular juryman does not appear for service and there being no request for a special venire, and the court directs the sheriff to fill the panel, and, in compliance therewith, a talesman is placed in the jury box, who, upon examination or challenge, is excused, the question is: Is such juryman entitled to two dollars? Or, if he responds to the request of the sheriff and reports at the clerk's office, ready for service and is not called into the jury box, is he entitled to the statutory compensation?
>
> "The matter of paying talesmen who are thus called is questionable, and I would like an opinion from your office, that we may be governed accordingly in the practice of this court. * * *"

Section 3008 of the General Code is as follows:

> "Each grand or petit juror drawn from the jury box pursuant to law, each juror selected by the court as talesman as provided by law, and each talesman, shall receive two dollars for each day of service, and if not a talesman, five cents each mile from his place of residence to the county seat. Such compensation shall be certified by the clerk of the court and paid by the county treaurer on the warrant of the county auditor."

Section 11431, G. C., in part is as follows:

> "Sec. 11431. When, by reason of challenge or other cause, enough jurors summoned as aforesaid to make up the panel, either of the grand or petit jury, are not present, or if the array be set aside, the sheriff shall summon talesmen until the deficiency is made up. * * *"

Section 11434, G. C., is as follows:

> "Sec. 11434. When it is necessary to summon talesmen, the court, on the motion of either party, shall select them, and cause to be issued immediately a venire for as many persons having the qualifications of a juror as, in the

opinion of the court, may be necessary, which persons shall be required to appear forthwith, or at such times as may be fixed by the court; but no person known to be in or about the court house shall be selected without the consent of both parties."

It will be noted from a reading of sections 11431 and 11434, G. C., supra, that under the conditions therein described it is made the duty of the sheriff to summon talesmen to make up the panel. In section 11434, G. C., it is specifically provided "that no person known to be in or about the court house shall be selected without the consent of both parties." The reason for the provision just quoted is obvious.

In the case presented by your first question, viz. "Where the court directs the sheriff to fill the panel, and in compliance therewith a talesman is placed in the jury box, who, upon examination is excused," it is important that the provisions of section 13650 of the General Code be considered in view of the application of its provisions to the practice in various jurisdictions.

Section 13650, G. C., is as follows:

"Sec. 13650. Jurors summoned, as provided by the first three sections of this chapter, not set aside on challenge, with bystanders having the legal qualifications as make the number of twelve, or, if the whole array be set aside, twelve of such bystanders having such qualifications and not set aside on challenge, shall be a lawful jury for the trial of a prisoner charged with a capital offense. Either party may demand and have a special venire to fill the panel. When it is necessary to summon talesmen, the court, on motion of either party, shall select them, and issue forthwith a venire for such number having the qualifications of jurors as is necessary. Such jurors shall appear forthwith, or at such time as is fixed by such court; but a person in or about the court house shall not be selected, without the consent of both parties. After a cause has been assigned for trial and a jury for the trial thereof has been drawn as herein provided, and the cause continued to another term of court, the jury so drawn shall be discharged, and a new jury drawn, as herein provided for the trial of such cause."

Section 13650, G. C., applies only in the case of the trial of a person charged with a capital offense. It provides among other things that bystanders may constitute a lawful jury in whole or in part for the trial of a prisoner charged with a capital offense. It is further provided in the section that "when it is necessary to summon *talesman*, the court, on motion of either party, shall select them and issue forthwith a venire for such number having the qualifications of jurors as is necessary."

A bystander who may be called to the jury box under the provisions of section 13650 G. C., supra, is not a talesman, hence would not be entitled to receive a fee under the provisions of section 3008, G. C., supra, unless he qualified and was sworn as a juror in the case.

In the case of State ex rel. v. Merry, 34 O. S., 137, it was held that "jurors are to be allowed compensation for days spent in whole or in part in going to and from court and for days in attendance during the term whether impaneled or not."

Section 3008, G. C., supra, provides for the payment of a fee and "each juror selected by the court as talesman as provided by law" in the first place, and secondly for "each talesman." The term talesman is used to describe a person summoned for jury service in a particular case and distinguishes such person from the general juror, in the bystander referred to in section 13650, G. C., supra, and I am therefore of the opinion that the talesman who is placed in the jury box, under the order of the court directing the sheriff to fill the panel, is entitled to receive the statutory fee of $2.00

for each day's attendance notwithstanding the fact that upon examination or challenge he is excused from service. His character as a talesman would end upon his being excused or challenged.

Coming to your second question which is "if he responds to the request of the sheriff and reports at the clerk's office ready for service and is not called into the jury box, is he entitled to the statutory compensation?" Section 3008, G. C., supra, provides under other things that "each talesman shall receive $2.00 for each day of service." In the case presented by you the talesman, who under the orders, or upon the request of the sheriff acting under the instructions of the court, reports at the clerk's office ready for service in the cause in which he has been called, is subject to the orders of the court, and his failure to attend and perform the duties assigned to him would subject him to punishment for contempt of court.

The provision in section 3008, G. C., concerning "each talesman" was evidently placed there to meet just such a condition as that described by you in your letter, and I am of the opinion, in answer to your second question, that the talesman who reports for service in obedience to the request of the sheriff acting under the orders of the court is entitled to the statutory fee of $2.00 for each day of attendance up to his discharge notwithstanding the fact that he may not be called into the jury box to perform actual jury service. In other words, he is simply a talesman as characterized in the statute, and as such is entitled to the statutory fee.

A copy of this opinion has been sent to Judge Hover.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1647.

APPROVAL, RESOLUTIONS FOR IMPROVEMENT OF CERTAIN ROADS IN RICHLAND AND FAYETTE COUNTIES.

COLUMBUS, OHIO, June 2, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of June 1, 1916, transmitting to me for examination final resolutions relating to the following roads:

"Richland county—Sec. 'O,' Mansfield-Ashland road, Pet. No. 2858, I. C. H. No. 140.

"Richland county—Sec. 'A,' Mt. Vernon-Mansfield road, Pet. No. 2867, I. C. H. No. 338.

"Richland county—Sec. 'A,' Bellville-Lexington road, Pet. No. 2872, I. C. H. No. 483.

"Fayette county—Sec. 'K,' Hillsboro-Washington road, Pet. No. 2333, I. C. H. No. 259.

I find these resolutions to be in regular form and am therefore returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1648.

ROADS AND HIGHWAYS—PERSON MAY BE EMPLOYED AS ASSISTANT UNDER SECTION 7181, G. C., AND ALSO AS ASSISTANT SUPERINTENDENT OR INSPECTOR UNDER SECTION 1219, G. C., SUBJECT TO QUALIFICATION THAT HE CANNOT ACT IN BOTH CAPACITIES AT SAME TIME—COMPENSATION, HOW COMPUTED.

One person may be employed as an assistant under section 7181, G. C., and also as an assistant, superintendent or inspector under section 1219, G. C., subject to the qualification that he cannot act in both capacities at the same time. The methods of computing compensation, where one person acts in both capacities, are herein pointed out.

COLUMBUS, OHIO, June 2, 1916.

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

GENTLEMEN:—I have your communication of May 16, 1916, which communication reads as follows:

> "We are submitting herewith letter received from Mr. F. P. Crosse, county surveyor of Lorain county, Ohio, and would request your written opinion upon the question asked by him."

The attached letter of Mr. Crosse reads as follows:

> "Will you kindly advise me regarding my pay-rolls as divided between the state highway department and Lorain county?
>
> "Most of my men are on a monthly salary basis. These men are employed both on county and state work. I wish to make the total of the amounts paid for state highway work and for county work equal the monthly salary I have fixed for these men. The state highway department insists on the men being certified to them on a per diem basis. If we use the total number of days in the month in calculating the per diem rate for these men you can readily see that in case the men should work a full month for the state highway department they would lose considerable in salary, as we would not be allowed to turn in time for Sundays, and as all the working days would be charged to the state highway department. It would also be almost impossible to adjust the salary provided for working a fractional part of the month for each.
>
> "Would it meet your approval if we based the rate to the state highway department on a month of twenty-five or twenty-six working days, the county to pay the difference on the work done for the county, always keeping in mind that the total amount paid by the state highway department and by the county will never in any instance exceed the monthly salary fixed in my department."

The difficulty experienced by Mr. Crosse is probably due to his overlooking the fact that assistants employed on county and township work are of an entirely different class from those employed on state work. Assistants engaged on county work are appointed under authority of section 7181, G. C., which section provides, among other things, that in the event the county highway superintendent cannot properly perform all the duties of his office, the county commissioners shall fix the aggregate compensation to be expended for assistants by the county highway superintendent during the year, which compensation shall be paid out of the county treasury in the

same manner as the salaries of county officials are paid. Assistants, superintendents and inspectors employed on state work are appointed under authority of section 1219, G. C., which provides, among other things, that the county highway superintendent, with the approval of the chief highway engineer, may employ such assistants as are necessary in the preparation of plans and surveys and also with like approval such superintendents and inspectors as may be necessary in the construction of improvements carried forward by the state highway department. The compensation of such assistants, superintendents and inspectors is fixed by the chief highway engineer. It was evidently not contemplated by the legislature that one person might be employed as an assistant under section 7181, G. C., and that the same person might also be employed as an assistant, superintendent or inspector under section 1219, G. C. I see no legal objection, however, to the employment of a person in both capacities, but this statement is, of course,subject to the qualification that he cannot act in both capacities at the same time. In other words, upon those days on which he is employed upon state work he cannot act as an assistant upon county or township work, under and by virtue of an appointment or employment under section 7181, G. C.

As previously pointed out, it is provided by section 7181, G. C., that the compensation of assistants appointed under the provisions of that section shall be paid out of the county treasury in the same manner as the salary of county officials is paid.

Under the provisions of section 2989, G. C., county officers receive their salary in monthly installments. While the natural and ordinary method of fixing the compensation of assistants appointed under section 7181, G. C., would, therefore, be to fix such compensation on a monthly basis, I see no objection to fixing the same upon a per diem basis, in which case the compensation would be paid at the end of each month, and would be computed by multiplying the per diem compensation by the number of days actually employed on county or township work. The fact should not be overlooked that the county highway superintendent fixes the compensation of assistants appointed under section 7181, G. C., while the chief highway engineer, a state official, fixes the compensation of assistants, superintendents and inspectors appointed under section 1219, G. C. Where it is desired by a county highway superintendent to appoint a certain person as an assistant, making the appointment under the provisions of section 7181, G. C., and to require such person to devote only a part of his time to county and township work, and to also appoint him as an assistant, superintendent or inspector, under authority of the provisions of section 1219, G. C., and require him to devote a part of his time to work carried forward by the state, it would be more desirable and would be conducive of easy bookkeeping to fix upon a per diem basis the compensation to be paid to him when serving as an assistant appointed under authority of section 7181, G. C. At the end of any given month such assistant would then be entitled to receive for his services performed as an assistant appointed under section 7181, G. C., a sum of money calculated by multiplying his per diem compensation, as such assistant, by the number of days upon which he was actually engaged on county or township work. He would also be entitled to receive from the state and from the county, or some township thereof, a sum of money calculated by multiplying the per diem compensation fixed by the chief highway engineer by the number of days actually spent upon state work. From the above it will be apparent that where the compensation fixed by the county highway superintendent is greater than that fixed by the chief highway engineer, the assistant in question will suffer a reduction in the aggregate monthly compensation received by him in those months during which he spends any part of his time on state work, and the greater the proportion of time spent by him on state work the greater will be the reduction in compensation which he will suffer. Where the compensation fixed by the chief highway engineer is higher than that fixed by the county highway superintendent, the converse of the above situation will result, however, and there is no escape under the statutes from this consequence. Where the compensation of the assistant appointed

under section 7181, G. C., is fixed upon a monthly basis, and during any given month such assistant spends any time upon state work, acting as an assistant, superintendent or inspector, by virtue of an appointment under section 1219, G. C., the compensation which he is to receive from the county treasury, for the month in question, as compensation for services performed as an assistant appointed under section 7181, G. C., is to be computed by first ascertaining a per diem compensation by dividing his monthly compensation by the number of working days in the month in question, and then multiplying this per diem compensation so ascertained by the number of days upon which, during the month in question, he was actually engaged upon county or township work.

I believe the above constitutes a complete answer to Mr. Crosse's question, but that there may be no misunderstanding I will illustrate the proper computation by assuming that the compensation of an assistant appointed under section 7181, G. C., has been fixed by the county highway superintendent at $125.00 per month, and that in a certain month, containing twenty-five working days, such assistant has been excused from the performance of duties in connection with county or township work, and has been appointed as an assistant under section 1219, G. C., and assigned to the performance of duties in connection with work carried forward by the state highway department, and that his compensation as an assistant engaged on state work has been fixed by the chief highway engineer at $4.00 per day, and that he has devoted during the month five days to such state work and twenty days to county and township work. By dividing the number of working days into the monthly compensation fixed by the county highway department, it will be ascertained that the per diem compensation for county and township work is $5.00 per day. The assistant will be entitled to receive from the county treasury for his county and township work $5.00 per day for a total of twenty days, making $100.00, and he will be entitled to receive from the state and the county, or some township thereof, depending on whether the said improvement is being made upon the application of the county or a township, the sum of $4.00 per day for a total of five days, making $20.00. His total aggregate compensation for the month will be $120.00, or $5.00 less than he would be entitled to receive in case he had devoted his entire time to county and township work. If the compensation fixed by the chief highway engineer is the same as that fixed by the county highway superintendent, the compensation of the assistant will, of course, be the same, without reference to the character of the work on which he is engaged. If the chief highway engineer fixes a higher rate of compensation than that fixed by the county highway superintendent, the assistant will, of course, receive an increased compensation for any month during which he devotes a part of his time to state work. Where, by the application of the above rules, the total aggregate compensation for any month is below that fixed by the county highway superintendent, there is no authority for paying to the assistant out of the county treasury the difference between his actual compensation computed on the above basis and the monthly compensation fixed by the county highway superintendent.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1649.

CIVIL SERVICE—PERSONS IN CLASSIFIED SERVICE MAY NOT BE APPOINTED TO OFFICES OR POSITIONS IN UNCLASSIFIED SERVICE WITHOUT THEIR CONSENT AND APPROVAL OF PROPER CIVIL SERVICE COMMISSION.

Persons holding offices or positions in the classified service may not be appointed to offices or positions in the unclassified service without their consent and without the approval of the civil service commission having jurisdiction thereof and such persons may not be deemed legal incumbents of said latter offices or positions until they accept the same and qualify therein.

COLUMBUS, OHIO, June 2, 1916.

HON. JOHN C. D'ALTON, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—I have your letter of May 26, 1916, as follows:

"We are in receipt today of a letter from Clarence Conlisk, treasurer of this county, in which he submits the following:

" 'TOLEDO, OHIO, May 23, 1916.

" 'MR. JOHN C. D'ALTON, *Prosecuting Attorney, Lucas County, Toledo, Ohio.*

" 'DEAR SIR:—On March 10, 1916, acting under section 2637, of the General Code, I, as treasurer of Lucas county, appointed David W. McAleese a deputy treasurer, he heretofore having been chief clerk in the treasurer's office. He refused and has since refused to take the oath of office.

" 'On March 10, 1916, acting under the same section 2637, of the statutes, as treasurer of Lucas county, I appointed Walter L. Grudzinski a deputy treasurer. He has not as yet filed his oath of office.

" 'The state civil service commission contends that these two persons are not in fact deputies, because these appointments have not been approved by the said state civil service commission.

" 'Kindly advise me at your earliest convenience whether, under the law, Mr. McAleese and Mr. Grudzinski are deputies or not.

" 'Yours very truly,

CLARENCE CONLISK,

" '*Treasurer, Lucas County.*'

"Inasmuch as the ruling from this department must necessarily involve an interpretation of the functions of the State civil service commission, we very mush desire that you would render us an opinion with respect thereto."

It is evident from the facts stated in the treasurer's letter aforesaid that the parties named therein have neither accepted the appointment of deputies nor have they qualified in any manner whatever for such positions or offices. These facts of themselves are a complete answer to his inquiry.

However, in addition to the facts stated in the letter aforesaid it appears from the records of the state civil service commission that said parties have been employed as clerks in the office of the treasurer of Lucas county since September 2, 1902, or for more than seven years prior to the first day of January, 1915. This service brings them within certain protective provisions of section 486-31, G. C., 106 O. L., 418, which provisions are as follows:

"Provided, however, that all persons who have served the state or any political subdivision thereof continuously and satisfactorily for a period of

not less than seven years next preceding January 1, 1915, shall be deemed appointees within the provisions of this act."

They therefore may be deemed to be permanent appointees in their positions as clerks, which positions are in the classified service and from which they may only be removed as provided by section 486-17a, G. C., as amended, 106 O. L., 412, which section provides that:

> "The tenure of every officer, employe or subordinate in the classified service of the state, the counties, cities and city school districts thereof, holding a position under the provisions of this act, shall be during good behavior and efficient service; but any such officer, employe or subordinate may be removed for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of the provisions of this act or the rules of the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance or nonfeasance in office."

Should either of these men accept positions in the unclassified service he or they naturally would not have the protection of the classified service but would be subject to removal at any time at the pleasure of the treasurer. Their appointment in the unclassified service would be in effect a removal from their present positions in the classified service and it is claimed that these men object to such transfer from the classified to the unclassified service. This is apparent from the fact that one of the parties, as stated in the treasurer's letter, has refused to accept said appointment and has refused to take the oath of office, while the other has not as yet taken the oath of office.

The state civil service commission is required to protect these men in their employment as clerks in the office of said treasurer and unless they voluntarily resign said positions and accept the appointment of deputies and qualify as such, they are entitled to remain in their positions as clerks until removed as provided by section 486-17a, G. C., supra, or until such positions are abolished as provided by law. In other words, they may not be compelled against their wishes to accept the position of deputies of the treasurer and so long as they insist upon remaining in their positions as clerks the treasurer is without authority to cause their removal therefrom by appointing them as his deputies.

Nothing herein contained is to be construed as holding that a county treasurer may not abolish any position in his office and thus dispense with the services of one or more persons so long as such action is taken in *good faith.* However, no county treasurer has the right to attempt to evade the civil service law by going through the form of abolishing a position and then hiring some one else to perform the duties of the former employe, either under the same or a different title. The civil service commission has the right to inquire into the good faith of the transaction and the validity of the transaction depends upon the good faith of the officer. The state civil service commission has the right to know what such new duties are and to determine whether they come within the purview of paragraph 9 of section 486-8, G. C., 106 O. L., 404, which provides:

> "The deputies of elective or principal executive officers authorized by law to act for and in the place of their principals and holding a fiduciary relation to such principals."

Under this section only such persons as are authorized by law to act for and in the place of said treasurer and who hold a fiduciary relation to him may become his

deputies and be exempt from the test of a competitive examination. After the present civil service law went into effect said parties were certified by the treasurer as clerks in his employ and as having been appointed, as hereinbefore noted, on September 2, 1902. Manifestly, if they have heretofore been properly classed and now are not to assume any new and different duties from those they have been performing they may not qualify as deputies under the foregoing provisions of paragraph 9 aforesaid. A mere change of their official name, which does not involve a change of duties, will not be sufficient to qualify them to enter the unclassified service as deputies as provided in said section 486-8, G. C. They must not only be appointed as deputies but the duties of such position must be of such a character as to conform to the requirements of paragraph 9 aforesaid before the state civil service commission may legally approve their appointment. The responsibility of determining this matter rests with said state civil service commission by virtue of the provisions of section 486-9, G. C., 106 O. L., 406, which provides:

> "As soon as practicable after the taking effect of this act, the commission shall put into effect rules for the classification of offices, positions and employments, in the civil service of the state and the several counties thereof; * * *"

The treasurer has the unquestioned authority under the section he cites, to wit, section 2637, G. C., to name and appoint his deputies, but the state civil service commission has the equally unquestioned authority under the civil service laws to see that the duties he imposes upon said deputies and which they perform when so appointed meet the requirements of said paragraph 9 aforesaid, so that they may be placed in the unclassified service. In other words, it is the duty of the state civil service commission to determine in what class of the civil service each position shall be placed, which determination must be reached by a consideration of the duties to be performed in said position. Tested by these considerations the appointment as deputies of the parties named must eventually receive the approval of the state civil service commission before said parties may be deemed to be in the unclassified service and exempt from the test of a competitive examination.

Answering the direct question submitted by the treasurer in his letter, I must advise that the parties named therein may not be considered as his deputies until they accept said positions and qualify therein as required by law and the state civil service commission approves their appointment. thus placing them in the unclassified service.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1650.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY VILLAGE OF FELICITY, CLERMONT COUNTY, OHIO.

COLUMBUS, OHIO, June 2, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

> "RE:—Bonds of the village of Felicity, Clermont county, Ohio, in the sum of $2,200.00 for purchasing necessary equipment to transmit and supply electricity to the village, being eleven bonds of two hundred dollars each."

I have examined the transcript of the proceedings of the council and other officers of the village of Felicity, relative to the above bond issue, and I find the same regular and in conformity with the provisions of the General Code. I am by letter requesting the legal adviser of the village to amend the bond form attached to the transcript by inserting a recital that provision has been made for a sufficient tax levy to pay the interest and redeem said bonds at maturity.

I am of the opinion that said bonds, drawn in accordance with such amended form, and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of the village. I should be given an opportunity to examine the bonds when presented to the treasurer of state for delivery.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1651.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY NEW RICHMOND VILLAGE SCHOOL DISTRICT, CLERMONT COUNTY, OHIO.

COLUMBUS, OHIO, June 2, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of New Richmond village school district, Clermont county, Ohio, in the sum of $4,460.00 to provide funds to pay the indebtedness of said school district, being eight bonds of five hundred dollars each, and one bond of four hundred and sixty dollars."

I have examined the transcript of the proceedings of the board of education of New Richmond village school district relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted, and signed by the proper officers, will, upon delivery, constitute valid and binding obligations of said village school district.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

652.

AUTOMOBILE LICENSE PLATES—BOARD OF ADMINISTRATION HAS AUTHORITY TO MANUFACTURE SUCH PLATES WITH CONVICT LABOR IN PENITENTIARY AND REFORMATORY.

There is ample provision of law to authorize the manufacture of automobile license plates by convict labor in the penitentiary and reformatory.

Section 41 of article 11 of the constitution, adopted September 3, 1912, has for its primary purpose the elimination of private profit from the labor of convicts in the penal institutions of the state.

Any surplus resulting from revenues derived from registration fees after defraying the expense of carrying out the provisions of the law must be turned into the state treasury weekly.

The question of the expediency of manufacturing automobile license plates is one for the determination of the Ohio board of administration, and before the state or any institution thereof may be called on to purchase supplies manufactured by said board it is required that a written notice shall be given to the effect that the board is equipped to furnish the supplies in question.

If the Ohio board of administration qualifies to furnish automobile license plates at current market prices, it will be necessary under the provisions of section six (6) of the current appropriation bill to secure the approval of the board mentioned in section four (4) of said appropriation bill to dispense with competitive bidding in order that arrangements for the furnishing of the license plates may be made with the Ohio board of administration.

COLUMBUS, OHIO, June 3, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your request for an opinion is as follows:

> "We beg to submit to you for an opinion the following question, to wit:
> " 'Are there any provisions of law authorizing the state board of administration to manufacture and supply automobile license plates, as provided in section 6300 of the General Code of Ohio, for the year 1917, by convict labor?' "

Section 6300 of the General Code, as amended (103 O. L., 764), is as follows:

> "Such distinctive number as an identification mark shall consist of a placard, upon the face of which shall appear the distinctive number assigned to such motor vehicle as hereinbefore provided, in arabic numerals, such numerals to be not less than four inches in length, and each stroke not less than one half inch in width. Such placard shall also contain the name of this state and the figures of the calendar year for which this distinctive number is signed. Such distinctive number or placard shall be of a different color or shade each year, such color or shade to be selected by the secretary of state, provided that the identification mark of motor vehicles of the type commonly called motorcycles shall consist of a placard, the size of which shall be prescribed by the secretary of state."

Section 6301 of the General Code, as amended (106 O. L., 335), which relates to the manufacturers' and dealers' application is as follows:

> "A manufacturer or dealer in motor vehicles shall make application for registration, in like manner as hereinbefore provided, of each gasoline,

steam, electric or other make of motor vehicles so manufactured and dealt in, and shall pay or cause to be paid a registration fee of five dollars for each make of motor bicycles, motorcycles, and motor tricycles named in such said application, and a registration fee of ten dollars for each make of other motor vehicles named therein. Thereupon, the secretary of state shall assign to each make of motor vehicles therein described a distinctive number, which must be carried and displayed by each motor vehicle of such like make in the manner provided in this chapter while it is operated on a public highway until it is sold or let for hire. Such manufacturer or dealer so registering a make of motor vehicle may procure certified copies of such registration certificate upon the payment of a fee of one dollar for each such copy. With each of such certified copies the secretary of state shall furnish two placards with the same numbering as provided in the original registration certificate."

Section 6298 of the General Code, as amended (103 O. L., 764), is as follows:

"Upon the filing of such application in the office of the secretary of state, and the payment of the registration fee provided for, the secretary of state shall assign to such motor vehicle a distinctive number, and, without expense to the applicant, issue and deliver to the owner, in such manner as the secretary of state may select, a certificate of registration in such form as the secretary of state shall prescribe, and two number plates, duplicates of each other, at the post or express office within the state of Ohio named in said application."

From a reading of the sections of the General Code quoted above it will be seen that it is made the duty of the secretary of state to procure automobile license plates for delivery to licensees for the granting of licenses under the law regulating the operation of motor vehicles.

Sections 2228, 2229 and 2230 of the General Code are as follows:

"Section 2228. The board of managers of the Ohio penitentiary, the board of managers of the Ohio state reformatory, or other authority, shall make no contract by which the labor or time of a prisoner in the penitentiary or reformatory, or the product or profit of his work, shall be let, farmed out, given or sold to any person, firm, association or corporation. Convicts in such institution may work for, and the products of their labor may be disposed of, to the state, or a political division thereof, or for or to a public institution owned or managed and under the control of the state, or a political division thereof, for the purpose and according to the provisions of this chapter.

"Section 2229. The board of managers of the penitentiary and the board of managers of the reformatory, so far as practicable, shall cause all prisoners serving sentences in such institutions, physically capable, to be employed at hard labor for not to exceed nine hours of each day, other than Sundays and public holidays.

"Section 2230. Such labor shall be for the purpose of the manufacture and production of supplies for such institutions, the state or political subdivisions thereof; for a public institution owned, managed and controlled by the state, or a political division thereof; for the preparation and manufacture of building material for the construction or repair of a state institution, or in the work of such construction or repair; for the purpose of industrial training and instruction, or partly for one and partly for the other of such purposes; in the manufacture and production of crushed stone, brick, tile and culvert pipe, suitable for draining wagon roads of the state, or in the preparation of road building and ballasting material."

Under the provisions of section 2229 of the General Code, supra, the duty of keeping prisoners serving sentences in the penitentiary or reformatory at hard labor for a period of not to exceed nine hours per day, when practicable, and when the physical condition of the prisoner permits, is enjoined on the Ohio Board of Administration.

In section 2228 of the General Code, supra, it is provided, among other things, that convicts in the penitentiary and reformatory may work for, and the products of their labor may be disposed of to the state.

In section 2230 of the General Code, supra, it is also provided, among other things, that

> "such labor shall be for the purpose of the manufacture and production of supplies for such institutions, the state or political subdivisions thereof. * *"

Section 41 of article II of the constitution of Ohio, which is one of the amendments adopted September 3, 1912, is as follows:

> "Laws shall be passed providing for the occupation and employment of prisoners sentenced to the several institutions and reformatories in the state, and no person in any such penal institution or reformatory, while under sentence thereto, shall be required or allowed to work at any trade, industry or occupation, wherein or whereby his work, or the product or profit of his work, shall be sold, farmed out, contracted or given away; and goods made by persons under sentence to any penal institution or reformatory without the state of Ohio, and such goods made within the state of Ohio, excepting those disposed of to the state, or any political subdivision thereof, or to any public institution owned, managed or controlled by the state, or any political subdivision thereof, shall not be sold within this state unless the same are conspicuously marked 'prison made.' Nothing herein contained shall be construed to prevent the passage of laws providing that convicts may work for, and that the products of their labor may be disposed of, to the state, or any political subdivision thereof, or for or to any public institution owned or managed and controlled by the state, or any political subdivision thereof."

The primary purpose of the constitutional amendment quoted, as shown by the explanation of its purpose when submitted to the people, is as follows:

> "This amendment will eliminate the elements of private profit from the labor of inmates of prisons and reformatories of Ohio. It will permit the employment of prisoners, in the production of things needed by any state, county or municipal institution, or in the building of public roads."

Section 6309, of the General Code, as amended (104 O. L., 6), in part, is as follows:

> "The revenues derived by registration fees provided for in this chapter shall be paid by the secretary of state weekly into the state treasury. Any surplus of such revenues which may remain after the payment of the expenses incident to carrying out and enforcing the provisions of this chapter shall be used for the repair, maintenance, protection, policing and patroling of the public roads and highways of this state, under the direction, supervision and control of the state highway department."

From a reading of section 6309, of the General Code, as amended, supra, it will be observed that any surplus of revenues derived from registration fees remaining after defraying the expenses incident to carrying out the provisions of the law is to

be paid into the state treasury weekly. Any surplus of such revenues is to be used for the repair, maintenance, protection, policing and patroling the public roads and highways of the state under the direction, supervision and control of the state highway department.

With the exception of the duplicate license plates which are issued by your office to replace lost or destroyed license plates and for which, I learned upon inquiry of your office a nominal charge is made, none of the license plates used by you in carrying out the provisions of the law are sold, it being expressly provided in section 6298, of the General Code, as amended, supra, that such license plates are to be issued without expense to the applicant

Specifically answering your question, it is my opinion that there is ample provision in sections 2228, 2229 and 2230 of the General Code, supra, to authorize the employment of convict labor in the penitentiary and reformatory to manufacture automobile license tags to be supplied to the state if the Ohio Board of Administration finds such a course to be practicable, there being nothing in the provisions of section 41 of article II of the Ohio Constitution, supra, to forbid such a course. On the contrary, the spirit of the constitutional amendment, as well as of all recent enactments, is to find employment for prisoners along lines of work the product of which will be consumed by the state, its institutions and political subdivisions.

The foregoing answers your question as asked. However, there are several matters of detail that become important in this connection. In the first place it should be pointed out that under section 1846, of the General Code, the Ohio Board of Administration would not have the right to charge more than the usual market price for such plates, and whether or not the board could install the necessary machinery and furnish the plates at the usual market prices where the only work of this character that the board had was this particular contract, is a question to be determined in the first instance at least by the Ohio Board of Administration.

Section 1847, of the General Code, provides, in part:

> "* * * Whenever the board shall give *written notice* to any official or officials having lawful authority to purchase such article or articles that it is prepared to supply them from any institution under its control, such official or officials shall make any needed purchases of said article or articles from such institution unless the chief officer thereof, or the board, having been requested to furnish such article or articles shall give notice in writing that the same cannot be furnished within thirty days from the date of the request. * * *"

Section 6 of house bill No. 701 (106 O. L., 826), which is the current appropriation bill, provides, in part, as follows:

> "Section 6. The moneys appropriated in sections 2 and 3 of this act shall be drawn upon a requisition or voucher presented to the auditor, approved by the head of the department. * * * Such requisitions or vouchers shall set forth in itemized form and specify the classification of the service rendered, material furnished, or expenses incurred, and the date of purchase or time of service, and show that *competitive bids* were secured, unless otherwise provided by law; or unless in the judgment of the board provided in section 4 herein, it is impracticable because of the peculiar nature or location of the work to be done, in which case the above mentioned board may in writing authorize the department affected to proceed to do the work, or that it was an emergency requiring purchase; * * *"

Inasmuch as the Ohio Board of Administration is not at the present time equipped to furnish these license tags it is not necessary to determine what effect, if any, the provisions of section 6, of the current appropriation bill, requiring competitive bidding would have upon section 1847, of the General Code.

I am, however, of the opinion that if you were to enter into an arrangement with the Ohio Board of Administration whereby they were to equip to furnish these tags at current market prices it would be necessary to secure the approval of the board named in section 4 of said appropriation bill to dispense with competitive bidding. I apprehend that said board could legally make the necessary finding and that it would give the necessary consent.

It should be further borne in mind that under section 3 of the current appropriation bill it is provided that the money therein appropriated shall not be expended to pay liabilities or deficiencies existing prior to July 1, 1916, and that, therefore, any obligation entered into for the 1917 license tags should be contracted subsequent to July 1, 1916.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1653.

BOARD OF EDUCATION—RURAL SCHOOL DISTRICT WHICH MAINTAINS NO HIGH SCHOOL—PUPILS ATTEND SCHOOL IN ANOTHER DISTRICT—WHEN BOARD OF FORMER DISTRICT IS REQUIRED TO PAY TUITION OF SUCH HIGH SCHOOL PUPILS.

A rural school district which maintains no high school and has no agreement with another district maintaining a high school for the schooling of its high school pupils, is required to pay the tuition of such high school pupils by section 7747, G. C., 104 O. L., 125, when the notice of the attendance of such pupils is given as required by section 7750, G. C.

COLUMBUS, OHIO, June 3, 1916.

HON. B. A. MYERS, *Prosecuting Attorney, Celina, Ohio.*

DEAR SIR:—Yours under date of May 20, 1916, is as follows:

> "Calling your attention to section 7747 and section 7748, of the General Code of Ohio, I submit the following question at the request of the board of education of Celina, Ohio.
>
> "Certain pupils holding diplomas and residing in Montezuma special school district, where they have no high school, are attending the Celina high school, and Montezuma special school district claim that all funds raised or permitted by law in their district are necessary for the support of the schools of such district, and upon this theory refuse to pay the tuition of the pupils who are attending the Celina high school. The parents of the pupils insist that the Celina board of education collect their money from the Montezuma school district under section 7747, of the General Code.
>
> "Can the Montezuma board of education be compelled to pay this tuition?"

It is stated that the Montezuma special school district, which is now a rural school district by virtue of section 4735, G. C., 104 O. L., 133, has no high school and it is assumed that the board of education of such rural district has no agreement with

any other board of education maintaining a high school for the schooling of the high school pupils of the Montezuma district under the provisions of section 7750, G. C.

Section 7747, G. C., 104 O. L., 125, to which you refer, provides as follows:

> "The tuition of pupils who are eligible for admission to high school and who reside in rural districts in which no high school is maintained, shall be paid by the board of education of the school district in which they have legal school residence, such tuition to be computed by the month. An attendance any part of the month shall create a liability for the entire month. No more shall be charged per capita than the amount ascertained by dividing the total expense of conducting the high school of the district attended, exclusive of permanent improvements and repair, by the average monthly enrollment in the high school of the district. The district superintendent shall certify to the county superintendent each year the names of all pupils in his supervision district who have completed the elementary school work, and are eligible for admission to high school. The county superintendent shall thereupon issue to each pupil so certified a certificate of promotion which shall entitle the holder to admission to any high school. Such certificates shall be furnished by the superintendent of public instruction."

The provisions of this section clearly impose upon the board of education which maintains no high school the obligation to pay the tuition of the pupils who reside in such rural school district and who are eligible for admission to a high school to the district in which such pupils attend high school. The obligation here referred to is subject, however, to the modification effected by the provisions of section 7750, G. C., as follows:

> "A board of education not having a high school may enter into an agreement with one or more boards of education maintaining such school for the schooling of all its high school pupils. When such agreement is made the board making it shall be exempt from the payment of tuition at other high schools of pupils living within three miles of the school designated in the agreement, if the school or schools selected by the board are located in the same civil township, as that of the board making it, or some adjoining township. In case no such agreement is entered into, the school to be attended can be selected by the pupil holding a diploma, if due notice in writing is given to the clerk of the board of education of the name of the school to be attended and the date the attendance is to begin, such notice to be filed not less than five days previous to the beginning of attendance."

If then, as it is assumed, the Montezuma district has no such agreement as is here authorized for schooling its high school pupils, the provisions of section 7747, G. C., supra, are limited or modified only by the latter provision of section 7750, G. C., which requires notice shall be given in writing to the clerk of the board of education of the name of the school to be attended and the date the attendance is to begin, not less than five days previous to the beginning of attendance.

This provision was considered in opinion No. 675, addressed to Hon. Hugh F. Neuhart, prosecuting attorney of Noble county, under date of August 2, 1915, found at page 1381 of the opinions of the attorney-general for the year 1915, in which it was held that tuition could not be collected from the resident district of a high school pupil unless notice of the attendance of such pupils be first given in accordance with the provision here referred to.

If the notice of attendance was duly filed as required by section 7750, G. C., then under the facts stated by you and in the absence of such agreement for schooling high

school pupils as is authorized by the same section, the board of education of the Montezuma rural school district would be liable for the tuition of the high school pupils residing in that district and who attended high school in another district.

You state that it is claimed by the board of education of the Montezuma district that they are exempt from paying such tuition for the reason that "all the funds raised or permitted by law in their district are necessary for the support of the schools of such district."

It is presumed that this contention is based upon the provision of section 7748, G. C., 104 O. L., 125, hereafter noted. This section is quite lengthy and need not be quoted in full. This section deals only with districts which maintain or provide a high school or high schools of some recognized grade and provides, among other things, that a board providing a second grade high school shall pay the tuition of its pupils who graduate at such high school for one year at a first grade high school. This provision is modified by the exception following:

> "except that, a board maintaining a second or third grade high school is not required to pay such tuition when the maximum levy permitted by law for such district has been reached and all the funds so raised are necessary for the support of the schools of such district."

It is perfectly clear from the language of this exception that it can have no application to a rural district which does not maintain a second grade high school and could not, therefore, have any application to the district in question which it is stated maintains no high school. I am aware of no statutory provision, other than those above referred to, by force of which the Montezuma rural school district would be exempted from the provisions of section 7747, G. C., supra.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1654.

COUNTY COMMISSIONER—FORM OF PRIMARY BALLOT FOR NOMINATION OF CANDIDATES FOR COUNTY COMMISSIONER TO FILL AN UNEXPIRED TERM.

COLUMBUS, OHIO, June 3, 1916.

HON. J. H. MUSSER, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—Yours under date of May 20, 1916, is as follows:

> "One of the Auglaize county commissioners resigned, and thereupon the auditor, probate judge, and recorder, proceeded to fill the vacancy until the next election.
>
> "The question has now arisen as to how the person, who might be a candidate to fill this vacancy, shall be desiganted on the ballot in the primary.
>
> "As I understand it, the person who was appointed to hold until the next regular election, and until his successor is elected and qualified, desires to be a candidate, and I would like to have your opinion as to whether he should be designated on the ballot as a candidate for the 'unexpired term' of the former commissioner, or whether he should be designated as candidate for county commissioner 'short term.' "

It is provided by section 2397, G. C., that when a vacancy occurs in the office of county commissioner, more than thirty days before the next election of state and county officers, or within that time, and the interest of the county requires that the vacancy be filled before the election, the probate judge, auditor and recorder shall appoint a commissioner who shall hold his office until his successor is elected and qualified. Section 10, G. C., provides that such successor shall be elected for the unexpired term. Under the provisions of section 2395, G. C., there is required to be elected three county commissioners in each county at the next November election for the term of two years beginning on the third Monday of September, 1917. Under the facts stated there is then required to be elected in your county at the coming November election three county commissioners for the regular term of two years and one county commissioner for the remainder of the unexpired term of the commissioner who resigned.

While the same person may be elected to fill the unexpired term and for a regular term, there must be a separate election to each such term, so that there may be nominated at the primary election to be held in August of this year, for the nomination of state and county officers, candidates for both the regular and the unexpired term. In the very nature of things it is necessary to distinguish as between candidates for these two different tenures, both in the primary and in the election.

There is no statutory method prescribed for indicating such distinction upon the ballot. Such method should, however, be adopted as will readily and clearly indicate to the voter the term for which a person or persons are candidates. I can see little, if any, ground for preference as between the expressions "unexpired term" and "short term." It seems to me that they would be equally intelligible and sufficiently indicate the distinction, and that either phrase might with propriety be used.

It is provided by section 4976, G. C., that primary tickets "shall conform, as nearly as practicable, to the form of the ballot provided in this title for the use of electors in the election of public officers."

Since, for the regular term there are to be three candidates nominated, and for the short, or unexpired term, there is to be but one candidate nominated, that distinction should also be noted.

I therefore advise that if the primary ballot is in all other respects as required by law, it will be sufficient as to nominations for candidates for county commissioner for the unexpired or short term if the names of the candidates for such unexpired term be placed upon the primary ballot under the title of the office of county commissioner in the form substantially as follows:

	County Commissioner for the unexpired term. Vote for one.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1655.

ROADS AND HIGHWAYS—TOWNSHIP TRUSTEES ARE NOT AUTHORIZED TO LOAN ROAD BUILDING MACHINERY OWNED BY TOWNSHIP—RECOVERY MAY BE HAD ON CONTRACT WHEN SAME IS UNLAWFULLY LEASED—NO AUTHORITY UNDER SECTION 7033, G. C., FOR EXPENDITURES OF TOWNSHIP FUNDS IN CONSTRUCTION OF SWITCH—RIGHTS OF PARTIES WHO HAVE ENTERED INTO CONTRACT WHEN SAME HAS BEEN CONSTRUCTED.

Township trustees are not authorized to loan road building machinery and tools owned by the township, neither are they authorized to rent or hire such machinery to contractors or other persons. Where township trustees have unlawfully leased road machinery and the lessee has had the use of the machinery and the contract has been fully completed, recovery may be had on the contract. Where such machinery is unlawfully loaned, the trustees and the person using the same are liable in damages to the township.

There was no authority under old section 7033, G. C., et seq., for the expenditure of township funds in the construction of a switch or trade spur leading from a switch belonging to a stone crushing company. Where such a switch was constructed and was leased to a contractor and the contract has been executed and the lessee has had the use of the switch, the agreed rental may be recovered from him. Where a contractor is allowed by the trustees to use the switch free of charge, both the trustees and the contractor are liable in damages if any damage resulted from such use.

COLUMBUS, OHIO, June 3, 1916.

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

GENTLEMEN:—I have your request for an opinion under date of April 24, 1916, which request reads as follows:

"We would respectfully request your written opinion upon the following questions:

"(1) Where a township owns road-building machinery and tools, have the trustees of such township a right to loan such machinery to contractors or to permit the use of such machinery and tools by any one other than the officials of the township?

"(2) Have the trustees of such township a right to rent or hire such machinery to contractors and others, and if so must a rate, determined upon by such trustees and made a matter of record, be adhered to, or may such rate be modified or suspended by verbal agreement only?

"(3) If the trustees have a right to rent or hire such machinery, etc., to contractors and others, have they a right to fix a rate to one person, different from that given to another?

"(4) If the trustees have a right to hire such machinery, etc., can recovery be enforced against the trustees and the contractor when the rate fixed by such trustees is less than the reasonable rental value of such appliances?

"(5) If the trustees have no right to loan such machinery, etc., can recovery be enforced against the trustees and the contractor for the reasonable rental value thereof where its use without cost has been permitted under a verbal agreement?

"The trustees of a township, when beginning the construction of a road improvement, the funds for which were derived from the sale of bonds, desired for use in that connection a trade spur from a switch belonging to a

stone crushing company. By agreement with such company the spur was built, the said company furnishing the steel rails and the trustees performing the labor, etc., and agreeing to pay said company the sum of $2.00 for each car delivered thereon.

"The trustees then passed a resolution by which a charge of $6.00 per car was to be made against any contractor or other person using said spur.

"(1) Can the proceeds of a bond sale for road construction purposes be used in this manner?

"(2) Can the general township funds be used for such purposes?

"(3) Can the rate of $6.00 per day, as fixed by the trustees, be collected from the contractor using the switch?

"(4) Can a finding for recovery of the above, or any other amount, be enforced against the contractor who used the switch free of charge by verbal agreement with the trustees?"

In reply to the first question submitted by you it would not be contended that where a township owns road building machinery and tools, the trustees of such township would have a right to make a gift of such machinery to a contractor, or to a private individual, and thereby divest the township of its ownership thereof.

I am unable to distinguish in principle between an absolute gift of the machinery, which would divest the township of its title to the same, and a loan of the machinery to persons desiring to use the same, and in my opinion a loan of road building machinery and tools owned by a township is wholly unauthorized. The township authorities have no right to permit the use of such machinery and tools by any persons other than the township officials, or employes of the township, with one exception that will be hereinafter noted.

Prior to the going into effect of the Cass highway law on September 6, 1915, this matter was covered by an express statutory provision found in section 3275, G. C., which section authorized the trustees to purchase road machinery "for the use of the township," and provided that such machinery should "be used exclusively for that purpose."

Section 3275, G. C., was repealed by the Cass highway law, which law authorizes the purchase of road machinery by township trustees, but so far as I have been able to discover contains no express provision to the effect that such machinery may be used only for township purposes. I am of the opinion, however, that the absence of such a statutory provision does not serve to alter the rule. Where a township owns a road roller, or other road building machinery, for which there is no present need in the prosecution of work by force account, it would be proper for the trustees, in advertising the letting of road work to be done by contract, to stipulate in the advertisement that the successful bidder will be permitted to use the machinery in question. Such an arrangement does not amount to a loan or a lease of the machinery, and at the same time places all contractors on the same basis.

Coming now to consider the right of township trustees to rent or hire such machinery to contractors and others, it should be observed that the authority and powers of officers are determined by the law. Public officers have no powers except such as are expressly given by statute, or such as are implied from those expressly given.

> "Express grants of power to public officers are usually subjected to a strict interpretation, and will be construed as conferring those powers only which are expressly imposed or necessarily implied."
>
> "Mechem on Public Officers and Offices, Section 511."

As before observed, township trustees, both under the Cass highway law and under the former statute repealed by that law, were authorized to purchase road ma-

chinery. As before indicated, the former statute provided expressly that such machinery should be used exclusively for township purposes, but even in the absence of such a provision I am unable to say that the authority to purchase road machinery carries with it by implication the right to rent or hire such machinery to contractors and other private persons. I think the necessary inference is that such machinery may be used only by the officers and employes of the township when engaged in the construction, improvement, maintenance or repair of roads by force account, with the one exception heretofore noted, and therefore advise you, in answer to your second question, that township trustees are not authorized to rent or hire to contractors or other persons road machinery belonging to the township. The answer to the first branch of your second question renders it unnecessary to answer the second branch of that question, and this is also true as to your third question.

While there is authority for the proposition that a municipal corporation, township or other similar political subdivision cannot maintain an action upon an ultra vires contract, yet the proposition that where a contract has been fully executed, a party who has obtained the full benefits thereof will not, when called upon to pay, be permitted to plead that the contract is ultra vires, also finds support in the authorities, and the last stated rule is the more equitable and just. See the case of Adelphi v. Swinhart, 3 O. D. R., 551. It is therefore my view that where township trustees have unlawfully leased road machinery, and the lessee has had the use of the machinery, and the contract has been fully completed, recovery may be had on the contract. When the rate fixed in the contract is substantially less than the reasonable rental value of the machinery, the township may, if it so desires, ignore the contract, and maintain an action in damages against the trustees and the person using the machinery. The measure of damages would be the depreciation in value of such machinery by reason of its use by the person in question.

Where the machinery is unlawfully loaned the trustees and the person using the same are liable in damages to the township, and in this case the measure of damages would also be the depreciation in value of the machinery by reason of its unlawful use. Where machinery is leased for an unconscionably small consideration, or where it is loaned, the law would not, however, imply a promise to pay the reasonable rental value thereof, and an action for the same could not be maintained. I believe the above constitutes an answer to your fourth and fifth questions.

Coming now to consider the second group of questions submitted by you, I am informed that in the particular instance referred to by you, the township trustees, in constructing the road improvement in question, were assuming to act under authority of section 7033, G. C., et seq., which sections were repealed by the Cass highway law. Your questions will, therefore, be answered with reference to the sections of the General Code under which the township trustees were attempting to operate. There was no authority for force account work under the sections of the General Code in question, and the trustees were required to carry forward the work of improving roads under these sections by contract.

Upon well established principles of law relating to the powers of public officers, which principles have been hereinbefore referred to, I advise you that there was no authority in law for a contract between the township trustees and the stone crushing company for the construction of a spur upon any terms, and the first and second questions relating to this matter must, therefore, be answered in the negative.

In answering your third and fourth questions relating to this matter, I assume that the unauthorized arrangement between the township trustees and the stone crushing company contemplated the exclusive use or control of the switch by the trustees. In accordance with what has already been said, I am of the opinion that where a contractor actually used the switch under an express contract to pay the township an agreed rental therefor, such contractor, after having had the full benefit thereof, would not in a suit for the recovery of the agreed rental be heard to say that

the contract was ultra vires. In the absence of an express contract the action of the trustees in passing a resolution fixing the rental to be charged would have to be brought to the knowledge of a contractor before he could be charged the rate fixed in the resolution. Where a contractor used the switch without actual knowledge of the resolution and without any contract, he could not be held for the rate fixed in the resolution, and this is also true where he used it under an agreement that no charge was to be made. Under such circumstances the only remedy of the township is an action for damages in case the switch was actually damaged or depreciated in value by the use to which it was put.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1656.

COUNTY BOARD OF SCHOOL EXAMINERS—MEMBERS OF SUCH BOARD ARE NOT "COUNTY OFFICERS" AND SAID BOARD IS NOT "COUNTY BOARD" WITHIN MEANING OF SECTION 2917, G. C., AND PROSECUTING ATTORNEY IS NOT REQUIRED TO ACT AS LEGAL ADVISER OF SAID BOARD.

The members of the county board of school examiners are not "county officers" and said board is not a "county board" within the meaning of section 2917, G. C., and the prosecuting attorney of the county, as such, is not therefore required by the provisions of said section to act as legal adviser of said board.

COLUMBUS, OHIO, June 3, 1916.

HON. E. A. SCOTT, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR:—Yours under date of May 5, 1916, is as follows:

> "Under section 2917, the prosecuting attorney is made the legal adviser of all county officers, etc.
>
> "Is the prosecuting attorney the legal adviser of the board of school examiners?"

That part of section 2917 which is pertinent to your inqury is as follows:

> "The prosecuting attorney shall be the legal adviser of the county commissioners and all other county officers and county boards and any of them may require of him written opinions or instructions in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board may direct or to which it is a party, and no county officer may employ other counsel or attorney at the expense of the county except as provided in section twenty-four hundred and twelve. * * *"

The county board of school examiners is established under the provisions of section 7811, G. C., as follows:

> "There shall be a county board of school examiners for each county, consisting of the county superintendent, one district superintendent and one other competent teacher, the latter two to be appointed by the county board of education. The teacher so appointed must have had at least two years' experience as teacher or superintendent, and be a teacher or supervisor in the public schools of the county school district or of an exempted village school district. Should he remove from the county during his term, his office thereby shall be vacated and his successor appointed."

Since none of the several members of the board of county school examiners are elected, it is clear that they cannot be held to be county officers without contravening the provision of section 1 of article X of the constitution, which requires that all county officers shall be elected.

The prosecuting attorney, however, is not only made the legal adviser of all county officers, but of all county boards as well. If, then, it be determined that the board of school examiners is a county board, the prosecuting attorney is by the terms of said section 7811, G. C., supra, unquestionably, by virtue of his office, the legal adviser of such board.

While the board in question is specifically designated a "county board" by the terms of the statute under which the same was created, that, of itself, is not conclusive of the question whether it is a "county board" in contemplation of section 2917, G. C., supra.

Since the incumbent of an appointive position may not be a county officer, we are confronted with the question: May there be, within the terms of section 2917, G. C., supra, a county board, the members of which are not county officers?

It was held in opinion No. 336, under date of May 6, 1915, found at page 664, of the opinions of the attorney-general for the year 1915, and also in opinion No. 1615, addressed to Hon. J. W. Watts, prosecuting attorney, under date of May 24, 1916, that the county board of education, since its members were not elected and therefore not county officers, was not a county board within the terms of section 2917, G. C.

This rule, it would seem, must be equally and as clearly applicable to the county board of school examiners. I am therefore of opinion, in answer to your inquiry, that the prosecuting attorney is not, by the provisions of section 2917, G. C., made the legal adviser of the county board of school examiners.

I am enclosing herewith copy of opinion No. 1615, above referred to and not yet printed.

Respectfully,

EDWARD C. TURNER.

Attorney-General.

1657.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY CITY OF FINDLAY, OHIO.

COLUMBUS, OHIO, June 3, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the city of Findlay, in the amount of $2,100.00, issued in anticipation of the collection of special assessments to improve Glendale avenue from the west end of the present pavement to the west line of Washington avenue, being one bond of three hundred dollars and nine bonds of two hundred dollars each."

I have examined the transcript of proceedings of the council and other officers of the city of Findlay, Ohio, relative to the above bond issue; also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted, and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of said city.

Respectfully

EDWARD C. TURNER,

Attorney-General.

1658.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY CITY OF FINDLAY, OHIO.

COLUMBUS, OHIO, June 3, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the city of Findlay, in the sum of $2,085.00, in anticipation of the collection of special assessments for the improvement of Greenlawn avenue from the east end of the present pavement to the west line of Washington avenue, being one bond of two hundred and eighty-five dollars and nine bonds of two hundred dollars each."

I have examined the transcript of proceedings of the council and other officers of the city of Findlay, Ohio, relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted, and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of the city of Findlay. Respectfully,

EDWARD C. TURNER,

Attorney-General.

1659.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY CITY OF FINDLAY, OHIO.

COLUMBUS, OHIO, June 3, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the city of Findlay, Ohio, in the amount of $8,550.00, issued in anticipation of the collection of special assessments for the improvement of Laquineo street from North Main street to the T. & O. C. Ry. Co. tracks, being one bond of nine hundred dollars and nine bonds of eight hundred and fifty dollars each."

I have examined the transcript of the proceedings of council and other officers of the city of Findlay, relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted, and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of the said city.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1660.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY POLAND TOWNSHIP RURAL SCHOOL DISTRICT, MAHONING COUNTY, OHIO.

COLUMBUS, OHIO, June 3, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Poland township rural school district, Mahoning county, Ohio, in the sum of $35,000.00, to erect and furnish two school buildings, being thirty-five bonds of $1,000.00."

I have examined the transcript of the proceedings of the board of education and other officers of Poland township rural school district relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted, and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of the said rural school district.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1661.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF VILLAGE OF LONDON, MADISON COUNTY, OHIO.

COLUMBUS, OHIO, June 5, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the village of London, Madison county, Ohio, in the sum of $2,500.00, in anticipation of the collection of special assessments for the improvement of East First street from Main street to Maple street, by laying cable and erecting and equipping standards for cluster lights, being five bonds of five hundred dollars."

I have examined the transcript of the proceedings of the council and other officers of the village of London relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted, and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of the village of London, Ohio. Respectfully,

EDWARD C. TURNER,
Attorney-General.

1662.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF VILLAGE OF LONDON, MADISON COUNTY, OHIO.

COLUMBUS, OHIO, June 5, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of London, Madison county, Ohio, in the sum of $30,000.00, being ten bonds of $500.00 each to pay the village's portion, and fifty bonds of $500.00 each to pay the property owner's portion of the cost and expense of improving West High street from Main street to the Big Four Railroad Company's right of way."

I have examined the transcript of the proceedings of the council and other officers of the village of London relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted, and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of the village of London, Ohio. Respectfully,

EDWARD C. TURNER,
Attorney-General.

1663.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY CITY OF WOOSTER, OHIO.

COLUMBUS, OHIO, June 6, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the city of Wooster, in the amount of $11,738.00, issued in anticipation of the collection of special assessments for the improvement of south Bever street between the south line of East South street and the east line of Madison avenue, being one bond of $238.00, and twenty three bonds of $500.00 each."

I have examined the transcript of the proceedings of the council and other officers of the city of Wooster relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted, and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of the city of Wooster.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1664.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY MADISON COUNTY, OHIO.

COLUMBUS, OHIO, June 6, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Madison county, Ohio, in the sum of $15,680.00 in anticipation of the collection of assessments for ditch construction as follows:

"Foster ditch,	5 bonds of	$ 80 each	$ 400
"Gordin ditch	8 bonds of	500 each	4,000
"Vallery ditch,	6 bonds of	500 each	3,000
"T. C. Gregg ditch,	3 bonds of	360 each	1,080
"Grogan ditch,	3 bonds of	400 each	1,200
"Chrisman ditch,	1 bond of	300	300
"Chrisman ditch,	9 bonds of	500 each	4,500
"Harrod ditch,	3 bonds of	400 each	1,200."

I have examined the several transcripts of the proceedings of the county commissioners and other officers of Madison county relative to the above bond issue, also

the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted, and signed by the proper officers, will, upon delivery, constitute valid and binding obligations of Madison county, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1665.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY MUSKINGUM COUNTY, OHIO.

COLUMBUS, OHIO, June 7, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Muskingum county, Ohio, issued to secure funds to improve certain inter-county highways within said county in the amount of $23,000.00, being forty-six bonds of five hundred dollars each."

I have examined the transcript of the proceedings of the county commissioners and other officers of Muskingum county, relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted, and signed by the proper officers, will, upon delivery, constitute valid and binding obligations of Muskingum county.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1666.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY JACKSON TOWNSHIP RURAL SCHOOL DISTRICT, JACKSON COUNTY, OHIO.

COLUMBUS, OHIO, June 7, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Jackson township rural school district, Jackson county, Ohio, in the sum of $3,000.00, to purchase a site and erect two new school houses therein, being twelve bonds of $500.00 each."

I have examined the transcript of the proceedings of the board of education and other officers of Jackson township rural school district, relative to the above bond

issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted, and executed by the proper officers, will upon delivery, constitute valid and binding obligations of said school district.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1667.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, PAULDING COUNTY, OHIO.

COLUMBUS, OHIO, June 10, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Paulding county, Ohio, in the amount of $19,500.00 to pay the cost and expense of Lehman pike improvement bonds, being 19 bonds of one thousand dollars each, and 1 bond of five hundred dollars."

I have examined the transcript of the county commissioners and other officers of Paulding county, relative to the above bond issue, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the provisions of the General Code and the resolutions of the county commissioners authorizing their issuance, and signed by the proper officers, will, upon delivery, constitiute valid and binding obligations of Paulding county.

As no bond and coupon form is attached to the transcript an opportunity should be given me to examine the bonds when presented to the treasurer of state for delivery.

Respectfully
EDWARD C. TURNER,
Attorney-General.

1668.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, PAULDING COUNTY, OHIO.

COLUMBUS, OHIO, June 10, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Paulding county, Ohio, in the sum of $30,000.00 to pay the cost and expense of the Wabash-Canal pike improvement, being 30 bonds of one thousand dollars each."

I have examined the transcript of the county commissioners and other officers of Paulding county, relative to the above bond issue, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the provisions of the General Code and the resolutions of the county commissioners authorizing their issuance, and signed by the proper officers, will, upon delivery, constitute valid and binding obligations of Paulding county.

As no bond and coupon form is attached to the transcript, an opportunity should be given me to examine the bonds when they are presented to the treasurer of state for delivery.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1669.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, PAULDING COUNTY, OHIO.

COLUMBUS, OHIO, June 10, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Paulding county, Ohio, in the sum of $13,000.00, to pay the cost and expense of Yenser-Klein pike improvement, being 13 bonds of one thousand dollars each."

I have examined the transcript of the county commissioners of Paulding county, and other officers of said county, relative to the above bond issue, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the provisions of the General Code and the resolutions of the county commissioners authorizing their issuance, and signed by the proper officers, will, upon delivery, constitute valid and binding obligations of Paulding county.

As no bond and coupon form is attached to the transcript an opportunity should be given me to examine the bonds when presented to the treasurer of state for delivery.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1670.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, ZANE TOWNSHIP RURAL SCHOOL DISTRICT, LOGAN COUNTY, OHIO.

COLUMBUS, OHIO, June 10, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Zane township rural school district, Logan county, Ohio, in the sum of $6,000.00, for the purpose of finishing and furnishing Zane township rural school building, being 12 bonds of $500.00 each."

I have examined the transcript of proceedings of the board of education and other officers of Zane township rural school district, Logan county, Ohio, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted, and signed by the proper officers, will, upon delivery, constitute valid and binding obligations of the said school district.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1671.

FOREIGN CORPORATION—WHEN SAME QUALIFIES TO DO BUSINESS IN THIS STATE AND STILL OWNS PROPERTY IN THIS STATE,, BUT NO LONGER IS "DOING BUSINESS" IN STATE—REQUIRED TO PAY MINIMUM FEE OF TEN DOLLARS IN COMPLIANCE WITH SECTION 5503, G. C.—WHEN CORPORATION MAY RETIRE FROM THIS STATE AND CONTINUE TO HOLD PROPERTY HERE.

Where a foreign corporation, qualified to do business in this state, and owning property herein, is no longer "doing business" in the state within the meaning of section 5503, G. C., and is not, therefore, "using" any of said property in the state within the meaning of said section 5503, G. C., but has not filed the certificate referred to in section 5520, G. C., and provided for in section 11976, G. C., such corporation is only required, each year, to pay the minimum fee of $10.00 in compliance with the provision of said section 5503, G. C.

Said corporation may retire from this state by filing the aforesaid certificate, and continue to hold its property here without violating any provision of the statutes.

COLUMBUS, OHIO, June 12, 1916.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—In your letter under date of May 10th you request my opinion as follows:

> "The Pittsburgh Block Coal Company, a foreign corporation qualified to transact business in Ohio, after which it purchased property, and for several years transacted business in this state. It then ceased to transact business in this state and leased its property to another company. The company now owns no property except that in Ohio, and does not transact business anywhere. The amount of its authorized capital stock is $50,000.00.
>
> "Is this company required to pay an annual franchise fee in order to maintain its charter rights in this state? If so, upon what amount should the fee be based?
>
> "Can the above company retire from this state and continue to hold its property here without violating the laws of Ohio?"

I have on file in this office the affidavit of John Kennedy Ewing, Jr., of Pittsburgh, Pa., who is the president and treasurer of the above mentioned company. From his sworn statement of facts it appears that The Pittsburgh Block Coal Company was organized under the laws of the state of New Jersey in December, 1902, and began doing business in the state of Ohio in February, 1903, in Harrison County, where all of its capital is invested; that it continued to do business until the first of December, 1907, at which time its mines were shut down, and no further business was transacted until October 1, 1909, when the property was leased to The Oliver Coal Company, a Pennsylvania corporation, which operated it until March 1, 1914, at which time that company failed and gave up the lease, and that since then the property has not been operated owing to the long continued strike in the Eastern Ohio coal fields and the want of capital to operate after the strike. It further appears that the said John Kennedy Ewing, Jr., owns nearly all of the stock and other securities of The Pittsburgh Block Coal Company, and that his purpose in keeping the corporation *qualified* in the state of Ohio is that it will enable him to sell the property more readily, or the company in its entirety.

Mr. Ewing's statement of facts is in keeping with that contained in your letter as above set forth.

It is contended by the representative of the aforesaid company that since said date of March 1, 1914, the aforesaid company has not been transacting business in Ohio, and that for the purpose of merely owning property in this state said company is not *required* to qualify to transact business in this state under section 178, G. C., which provides that before a foreign corporation for profit "transacts business in this state" it shall procure from the secretary of state the certificate of admission as therein prescribed, and under section 183, G. C., which provides that:

> "Before doing business in this state a foreign corporation organized for profit, and owning or using a part or all of its capital or plant in this state, shall make and file with the secretary of state in such form as he may prescribe, a statement under oath of its president, secretary, treasurer, superintendent or managing agent in this state,"

containing the statement of facts required by said statute; that its compliance with said sections was erroneous and that such compliance relieves it of the liability for any fees except the minimum fee of $10.00 required by provision of section 5503, G. C., attention being called to the opinion of my predecessor, Hon. U. G. Denman (Annual report of the attorney-general for the year 1909, page 84), in which it was held that the foreign corporation, under consideration in said opinion, was indebted to the state for at least ten dollars per year from the time it filed its application for admission to do business in Ohio, but that it would not be liable for any more than that amount during any year in which it had no property or business in Ohio, and that it was not necessary that said company should both own property and do business in the state in order that it be required to pay this tax; that it was sufficient if it owned property located in the state *or* did business alone in the state. Reference to this opinion will hereafter be made.

It is further contended by the representative of The Pittsburgh Block Coal Company that a foreign corporation is not "doing business" in Ohio within the meaning of the statutes, unless it is engaged in the principal enterprise for which it was organized, attention being called to an opinion of my predecessor, Hon. Timothy S. Hogan (Annual report of the attorney-general for the year 1912, at page 526), in which it was held that under the above provision of section 183, G. C., the mere ownership of property and the mere use of the capital stock of a foreign corporation in this state otherwise than in the "doing of business" does not impose any obligation upon such foreign corporation; numerous authorities being cited in support of the proposition that a company is not "doing business" within the meaning of statutes like section 183, G. C., unless it is engaged in the principal enterprise for which it was organized.

From the statement of facts as above set forth it appears that the principal enterprise for which the above named company was organized is mining and selling coal. It further appears that for several years said company transacted such business in this state; that during the years from October 1, 1909, to March 1, 1914, the property of said company was leased to the Ohio Coal Company, a foreign corporation; that since said latter date no business has been transacted in Ohio or elsewhere by The Pittsburgh Block Coal Company or its lessee, but said company continues to own the property hereinbefore referred to located in this state and has an authorized capital stock of $50,000.00.

In determining the answer to your first question I call your attention to the following provisions of the statutes to be considered in connection with the provisions of the statutes and the holdings of my predecessors hereinbefore set forth.

Section 5499, G. C., provides:

> "Annually, during the month of July, each foreign corporation for profit, doing business in this state, and owning or using a part or all of its

capital or plant in this state, and subject to compliance with all other provisions of law, and in addition to all other statements required by law, shall make a report in writing to the commission in such form as the commission may prescribe."

Section 5500, G. C., provides for the verification of said report and section 5501, G. C., prescribes what said report shall contain.

Section 5502, G. C., provides:

"Upon the filing of the report, provided for in the last three preceding sections, the commission, from the facts thus reported and any other facts coming to its knowledge bearing upon the question, shall, on the first Monday in September, determine the proportion of the authorized capital stock of the company represented by its property and business in this state. On the first Monday of October, the commission shall certify the amount of the proportion of the authorized capital stock of each such company represented by its property and business in this state, as determined by it, to the auditor of state."

And section 5503, G. C., provides:

"On or before October fifteenth, the auditor of state shall charge for collection, as herein provided, annually, from such company, in addition to the initial fees otherwise provided for by law, *for the privilege of exercising its franchises in this state,* a fee of three-twentieths of one per cent. upon the proportion of the authorized capital stock of the corporation *represented by the property owned and used and business transacted in this state, which fee shall not be less than ten dollars in any case.* Such fee shall be payable to the treasurer of state on or before the first day of the following December."

Under provision of section 178, G. C., it will be observed that before a corporation for profit transacts business in this state it must secure the certificate of admission required by said section; that "before doing business in this state" such foreign corporation must file with the secretary of state the sworn statement of facts required by section 183, G. C.

Under provision of section 5499, G. C., it is only when a foreign corporation "does business" in the state and owns or uses a part or all of its capital or plant in this state that such corporation is required to file the report therein mentioned, upon the filing of which your commission is required to determine the proportion of the authorized capital stock of the company represented by its property and business in Ohio, and certify this valuation to the auditor of state as required by the provisions of section 5502, G. C., supra, and upon which valuation the auditor of state charges for collection the annual fee prescribed by section 5503, G. C., for the privilege of transacting business in this state, which fee shall in no case be less than ten dollars.

In view of the foregoing provisions of the statutes it seems clear to my mind that said provisions only apply to a foreign corporation which does business in this state and which owns or uses a part or all of its capital or plant in the state and that said statutes impose no obligation on a foreign corporation which does not do business in the state and does not use a part or all of its capital or plant in the state in the transaction of its business.

I am unable, therefore, to agree with my predecessor, Mr. Denman, in holding that, generally speaking, a foreign corporation is subject to the provisions of section 178, et seq., of the General Code, if it merely owns property in the state without doing business in the state.

The courts have frequently had under consideration the question of what constitutes "doing business" within the meaning of the above or similar provisions of the statutes.

In the case of Insurance Company v. Sawyer, et al., 44 Wis., 387, it was held that compliance with the statute of the state of Wisconsin is not necessary to enable a foreign insurance company to take securities in that state for debts due to it by residents of said state.

A foreign corporation may institute and prosecute suits in the courts of Alabama without complying with the constitutional and statutory provisions of that state regulating its right to do business in said state. See Christian v. American Freehold Land Mortgage Co., 89 Ala., 198.

To the same effect see:

Cook v. Rome Brick Co., 98 Ala., 409;
Railway Co. v. Fire Association, 55 Ark., 174;
Powder R. C. Co. v. Commissioners Custer County, 90 Mont., 145.

"The words 'doing business in this state' in the statute, limiting the powers of foreign corporations, refer to the business for which the foreign corporation is organized and not to its doings with its own members or its resort to the courts to enforce liabilities."

Mandel v. Swan Land Co., 154 Ill., 177.

"A foreign corporation is not doing business within the state, within laws 1892, page 1805, C. 687, section 15, requiring it in such instance to obtain a certificate from the secretary of state, by making a contract within the state, no sales being made or other business done there."

Commercial Wood & Cement Co. v. Northern Portland Cement Co., 84 N. Y. Supp., 38.

"Whether a foreign corporation is carrying on business in the state must be determined by what it has done, *or is doing*, rather than by what it may hereafter do under powers reserved to it in existing contracts, but not yet exercised. For one person to supply the means to another to do business with or on is not the doing of that business by the former."

U. S. v. Bell Telephone Co., et al., 29 Fed. 17.

This latter case arose under the Ohio statutes.

In the case of The Toledo Commercial Company v. The Glen Manufacturing Company, 55 O. S., 217, the syllabus provides:

"The act of May 19, 1894 (91 Ohio Laws, 355-6), which provides 'that no foreign stock corporation, other than a banking and insurance corporation, shall do business in this state without first having procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this state,' etc., and that no such 'corporation doing business in this state without such certificate, shall maintain any action on this state upon any contract made by it in this state until it shall have procured such certificate,' etc., does not apply to a foreign corporation whose business within the state consists merely of selling through traveling agents, and delivering goods manufactured outside of the state."

In view of the foregoing provisions of the statutes and authorities cited, I concur with my predecessor, Mr. Hogan, in his conclusion that the mere ownership of property and the mere use of the capital stock of a foreign corporation in this state otherwise than in the "doing of business" does not impose any obligations upon such foreign corporation under the provisions of sections 178 and 183, G. C., supra.

It appears, however, that The Pittsburg Block Coal Company qualified under the provisions of section 178, et seq., of the General Code, and for several years transacted, in this state, the business for which said corporation was organized. In this connection I call your attention to section 5520, G. C., which provides:

> "The mere retirement from business or voluntary dissolution of a domestic or foreign corporation, without filing the certificate, provided for in sections eleven thousand nine hundred and seventy-four, eleven thousand nine hundred and seventy-five and eleven thousand nine hundred and seventy-six of the General Code, shall not exempt it from the requirements to make reports and pay fees or taxes in accordance with the provisions of this act."

Inasmuch as The Pittsburg Block Coal Company is qualified to do business in this state and still owns property in this state, but is no longer "doing business" in this state within the meaning of the above provisions of the statutes, and is of course not "using" any of the aforesaid property, it is evident that under the holding of the court in the case of State v. Coal Company, 17 O. N. P. (n. s.) 60, the basis for the calculation of the percentage under the above provision of section 5503, G. C., reduces to zero, but inasmuch as said company has not filed the certificate referred to in section 5520, G. C., it is still liable for the minimum fee of ten dollars provided for in said section 5503, G. C.

I am of the opinion, therefore, in answer to your first question, that said company is only required, each year, to pay the minimum fee of ten dollars in compliance with the provision of said section 5503, G. C.

In view of what has already been said in answer to your first question, I am of the opinion that said company may retire from this state by filing with the secretary of state the certificate required by section 11976, G. C., and continue to hold its property here without violating any provision of the statutes. Your second inquiry is therefore answered in the affirmative.

The foregoing answers your separate inquiry under date of May 10th in re The American Plaster Company, a foreign corporation, qualified to transact business in Ohio, which company owns property in this state, does not own any other property and has not transacted business anywhere. Respectfully,

EDWARD C. TURNER,
Attorney-General.

1672.

DISAPPROVAL, RESOLUTIONS FOR IMPROVEMENT OF SIX ROADS IN HANCOCK COUNTY.

COLUMBUS, OHIO, June 12, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of June 7, 1916, transmitting to me for examination final resolutions relating to the following roads:

> "Hancock county—Sec. 'F,' Lima-Sandusky road, Pet. No. 2426.
> "Hancock county—Sec. 'F,' Lima-Sandusky road, Pet. No. 2426.

"Hancock county—Sec. 'G,' Lima-Sandusky road, Pet. No. 2426.
"Hancock county—Sec. 'G,' Lima-Sandusky road, Pet. No. 2426.
"Hancock county—Sec. 'H,' Lima-Sandusky road, Pet. No. 2426.
"Hancock county—Sec. 'H,' Lima-Sandusky road, Pet. No. 2426."

I note that main market road funds are to be used in the construction of the improvements referred to in all of the above resolutions, but it does not appear on the face of the resolutions or by attached certificate that the roads to be improved have been designated as main market roads. I am, therefore, returning the final resolutions in question without my approval.

If, as a matter of fact, the roads referred to in these resolutions have been designated as main market roads and a certificate reciting that fact and signed by you is attached to or endorsed on each of the resolutions, the same will be in such form as to be entitled to approval.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1673.

APPROVAL, RESOLUTION FOR IMPROVEMENT OF CERTAIN ROADS IN CHAMPAIGN, MONTGOMERY, PERRY, PREBLE, ROSS AND SHELBY COUNTIES.

COLUMBUS, OHIO, June 12, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of June 7, 1916, transmitting to me for examination final resolutions relating to the following roads:

"Champaign county—Sec. 'K,' Troy-Urbana southern road, Pet. No. 2154.
"Montgomery county—Sec. 'H,' Dayton-Greenville road, Pet. No. 2727.
"Montgomery county—Sec. 'I,' Dayton-Covington road, Pet. No. 2725.
"Montgomery county—Sec. 'L,' Dayton-Indianapolis road, Pet. No. 2721.
"Perry county—Sec. 'Q,' New Lexington-Athens road, Pet. No. 2799.
"Perry County—Sec. 'Q,' New Lexington-Athens road, Pet. No. 2799.
"Preble county—Sec. 'F,' Dayton-Indianapolis road, Pet. No. 2835.
"Preble county—Sec. 'F-2,' Eaton-Richmond road, Pet. No. 2836.
"Ross county—Sec. 'O,' Portsmouth-Columbus road, Pet. No. 2874.
"Shelby county—Sec. 'D,' Sidney-Wapakoneta road, Pet. No. 2928."

I find these resolutions to be in regular form, and am, therefore, returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1674.

DEPUTY STATE SUPERVISORS AND INSPECTORS OF ELECTIONS—EXPENSE FOR OFFICES IN REGISTRATION CITIES IS REQUIRED TO BE PAID BY SUCH CITY FROM ITS GENERAL FUND—LORAIN—ELYRIA.

The cost of the rent, furnishing and supplies for rooms hired by deputy state supervisors and inspectors of elections for offices in registration cities is required to be paid by such city from its general fund.

COLUMBUS, OHIO, June 12, 1916.

HON. C. F. ADAMS, *Prosecuting Attorney, Lorain, Ohio.*

DEAR SIR:—Yours under date of May 25, 1916, is as follows:

"The board of elections of Lorain county have requested of this office an opinion on the following facts:

"In Lorain county are two registration cities, to wit: City of Lorain with eighteen precincts, and the city of Elyria with eleven precincts; outside of these cities are thirty-five precincts.

"The clerk of the board has charge of the Lorain office, which is used only for such business as pertains to the city of Lorain as a registration city.

"The Elyria office is the regular office of the county board, all meetings being held there, and it being the distributing point for all supplies.

"For several years past the distribution of expense, other than salaries, has been as follows:

"Lorain city pays all expense for fixtures, furniture, rent and maintenance of the Lorain office. Similar expenses of the Elyria office have been divided between Lorain and Elyria in proportion to the number of precincts in each city, or as eleven is to eighteen.

"The board wish to know if any expenditure for furniture, fixtures, rent or maintenance of the Elyria office would be a proper charge against the county, and if not, would this expense be a proper charge against both Lorain and Elyria cities?"

Section 4942, G. C., provides for the payment of additional compensation to deputy state supervisors of elections in counties containing cities in which registration is required, and that the same shall be paid monthly from the city treasury. Section 4944, G. C., prescribes the compensation of registrars of electors. Section 4946, G. C., 103 O. L., 545, provides as follows:

"The additional compensation of members of the board of deputy state supervisors and of its clerk in such city hereinbefore specified, the lawful compensation of all registrars of electors in such city, the necessary cost of the registers, books, blanks, forms, stationery and supplies provided by the board for the purposes herein authorized, including poll books for special elections, and the cost of the rent, furnishing and supplies for rooms hired by the board for its officers and as places for registration of electors, and the holding of elections in such city, shall be paid by such city from its general fund. Such expense shall be paid by the treasurer of such city upon vouchers of the board, certified by its chief deputy and clerk and the warrant of the city auditor. Each such voucher shall specify the actual services rendered, the items of supplies furnished and the price or rates charged in detail."

By the terms of this section it is specifically provided that "the necessary cost of the registers, books, blanks, forms, stationery and supplies provided by the board for the purposes of registration, and the cost of the rent, furnishing and supplies for rooms hired by the board for its offices and as places for registration of electors, and the holding of elections in such city, shall be paid by such city from its general fund. It will be observed that it is only the cost of rent, furnishing and supplies for rooms hired by the board for its offices in such city which shall be paid by such city. It is equally clear that the cost of rent, furnishing and supplies of the Elyria office should be paid from the general fund of that city. From the provisions of this section it clearly follows that the expense and cost of rent, furnishing and supplies of the office in Lorain are properly chargeable to the city of Lorain as stated in your inquiry. I find, however, no authority for charging any part of the rent or maintenance expense of the Elyria office against the city of Lorain as such.

It was held in an opinion of my predecessor, Hon. Timothy S. Hogan, found at page 200, 212, of the report of the attorney-general for the year 1912, that under the provisions of section 4696, G. C., supra, the general office expense of the board of deputy state supervisors of elections in registration cities must be borne by the city. That is to say, the general expense of rent, furnishing and supplies of the office rooms of the board of deputy state supervisors of elections, when located within a registration city, shall be paid by the city from its general fund. In this opinion I fully concur. If the general office of the board were located elsewhere in the county than in a registration city, then the rent, furnishing and maintenance of such office would be chargeable to neither nor to both of said cities as such. The expense of the rent, furnishing and maintenance of such general office, if necessary, would then be payable under the provisions of section 4821, G. C., which are as follows:

> "All proper and necessary expenses of the board of deputy state supervisors shall be paid from the county treasury as other county expenses, and the county commissioners shall make the necessary levy to provide therefor. In counties containing annual general registration cities such expenses shall include expenses duly authorized and incurred in the investigation and prosecution of offenses against laws relating to the registration of electors, the right of suffrage, and the conduct of elections."

The general provisions of this section must, however, give way to the special provisions of section 4696, G. C., supra, particularly applicable to the class of expenses under consideration, viz: expenses of offices in the particular class of cities therein referred to.

I am therefore of opinion, in answer to your inquiry, that no part of the cost of the rent, furnishing or supplies of the Elyria office is a proper charge against the county, nor would any part of the same be a proper charge against the city of Lorain.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1675.

DITCHES—AUTHORITY OF DITCH SUPERVISOR TO SELL THE WORK OF CLEANING OR REPAIRING SECTION OF DITCH WHERE NOTICE, AS REQUIRED BY SECTION 6694, G. C., HAS BEEN GIVEN, AND TEMPORARY RESTRAINING ORDER GRANTED BUT LATER DISSOLVED—FURTHER NOTICE NOT REQUIRED.

After the notice required by section 6694, G. C., has been given to lot and land owners, corporate roads, railroads, townships and counties therein referred to, further notice is not thereby required, by reason of a temporary restraining order granted by a court pending litigation in which it is sought to enjoin the sale of the work of cleaning a township ditch by the ditch supervisor when such injunction is refused, and temporary restraining order dissolved upon final termination of such action.

COLUMBUS, OHIO, June 12, 1916.

HON. GEORGE W. PORTER, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—Yours under date of June 3, 1916, is as follows:

> "In 1914 the ditch supervisor of this township served notice on the property owners along a ditch for a cleanout; that afterwards the apportionments were adjusted by the township trustees and the ditch supervisor ordered to sell the ditch after the thirty days notice required; that before the ditch supervisor could sell the same he was enjoined from proceeding any further with the improvement. This suit was decided in favor of the ditch supervisor this year; the time elapsing between the commencement of the proceedings to improve and up to the present time being about two years. All of this time this injunction has been in force.
>
> "Thirty days after the court of appeals rendered its decision, the ditch supervisor proceeded to sell said improvement; the question now arises as to whether or not this ditch supervisor had a right to sell said ditch improvement without additional notices to the property owners to clean out the ditch, and, could he proceed to sell said improvement without further notice to parties assessed."

By sections 6691, 6692 and 6693, G. C., provision is made for the apportionment of township ditches to the land owners, corporate roads, railroads, township and county, according to the benefits received, for the purpose of cleaning or keeping the same in repair.

Section 6694, G. C., provides as follows:

> "When the apportionment of a ditch provided for in the next three preceding sections is completed, the ditch supervisor, within ten days thereafter, shall notify in writing each of the lot and land owners, corporate roads, railroads, township and county assessed thereon of the portion assigned to them, and of the date of the completion thereof."

Section 6695, G. C., provides in part as follows:

> "Each lot and land owner, corporate road, railroad, township and county, so notified, shall clean the portion or section of the ditch or watercourse as fixed by such apportionment, or if changed by the township trustees as fixed

by them, to its full depth and capacity as originally constructed, and when necessary reclean such portion without further notice. * * *"

By section 6705, G. C., it is provided that if the parties to whom the sections of such ditch are assessed neglect or refuse to clean or keep them in repair, the ditch supervisor may sell the work and certify the cost to the county auditor who is required to place the same upon the tax duplicate and the same becomes a lien upon the land and is collected as other taxes This section must, however, be read in connection with the succeeding section, which provides as follows:

"Sec. 6706. If a land owner, corporate road, railroad, township or county, notified to clean the ditch or water course under the provisions of this chapter, neglects or refuses to comply therewith within thirty days, the ditch supervisor, after giving ten days' notice by posting notices in three conspicuous places in said township, shall sell the work of cleaning said section or sections to the lowest responsible bidder, take a bond as provided in the next preceding section, and certify the cost thereof to the county auditor, as provided therein. The ditch supervisor shall certify the amount due the contractors, for the work done to the township trustees, who shall order it paid out of the township fund."

I gather from your inquiry that at least some of the land owners against whom some of the apportioned sections of the township ditch had been assessed, had neglected or refused to clean or repair the same within the prescribed thirty days and that by reason thereof the ditch supervisor sought to sell the work of cleaning or repairing such sections pursuant to order of the township trustees and at this point in the proceedings an action was brought against the ditch supervisor and a temporary restraining order procured, preventing such sale, pending the litigation in which it was sought to permanently enjoin the proposed sale by the ditch supervisor.

The notice required by section 6694, G. C., supra, and the lapse of the thirty-day period thereafter, prescribed in section 6706, G. C., supra, are essential to the authority of the ditch supervisor to sell the work of cleaning or repairing the sections of such ditch in question. After the expiration of the thirty-day period the right of the land owners to perform the work of cleaning or repairing the sections of such ditch assessed against them, to the exclusion of the sale of such work by the ditch supervisors, ceased. At this point the proceedings by the ditch supervisor were suspended by reason of the order of the court in the pending litigation. Since the court must have found the proceedings regular and legal up to and including the service of the notice required by section 6694, and that the thirty-day period thereafter had elapsed, every right of the land owner to notice must have been fully protected and there is now neither requirement nor occasion for the further service of the notice prescribed therein.

The only notice now required to be given by the ditch supervisors is the ten days' notice of the sale of the work required by section 6706, G. C., supra.

Respectfully,

EDWARD C. TURNER,
Attorney-General.

1676.

COUNTY BOARD OF EDUCATION—TRANSFER OF TERRITORY—BOARD MAY TRANSFER TO AN EXEMPTED VILLAGE SCHOOL DISTRICT —SEE SECTION 4696, G. C., 106 O. L., 396—TRANSFER PURSUANT TO SECTION 4692, G. C., 106 O. L., 396—DUTY OF BOARD TO WHICH TERRITORY IS TRANSFERRED TO LEVY TAXES TO PAY INDEBTEDNESS SO APPORTIONED TO IT.

Territory may not be transferred by the county board of education to a village school district other than an exempted village school district, pursuant to the provisions of section 4696, *G. C.*, 106 *O. L.*, 396.

Where territory is transferred by the county board of education, pursuant to section 4692, *G. C.*, 106 *O. L.*, 306, *the ten days' notice therein required is jurisdictional and the same must therefore be given as required.*

Where transfer of territory is made by the county board of education, pursuant to section 4692, *G. C., supra, and the indebtedness of the territory is divided by the board as therein authorized, it then becomes the duty of the board of education of the district to which such territory is transferred to levy taxes to pay the indebtedness so apportioned to it.*

COLUMBUS, OHIO, June 12, 1916.

HON. ELI H. SPEIDEL, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—Yours under date of May 20, 1916, is as follows:

"I have been requested by the county board of education and the county superintendent of schools, to ask for your opinion as to the right or duty of the county board of education to transfer territory from one school district to another, in the following instances and under the following circumstances:

"Goshen township, in this county, forms one rural district. Prior to the enactment of the present school code, all of the subdistricts in that township, with the exception of three, were abandoned and the pupils hauled to a central school at Goshen, in said township. Beginning with the school year 1916, or about September 1, 1916, the three remaining subdistricts were abandoned and since that time all of the pupils of school age in said township have been transported from their homes to said central school at Goshen, in said township. I might add that while the district was never centralized in the sense that it was authorized by a vote of the people, it was made under an arrangement with the township board and the various subdistricts. A petition has been filed by a Mr. Cox and two other residents of Goshen township, who live about six miles from Goshen, to transfer their three farms from the *Goshen* township rural district to the *Loveland village* district, their farms, together with a portion of the Baltimore & Ohio Railroad right of way, which is included in this petition, being nearer to Loveland, where the Loveland village school is located, than to Goshen.

"In the first place, *is it mandatory on the part of the county board of education*, under the provisions of section 4696, to transfer this territory from the Goshen rural district to the Loveland village district? Secondly, if it is not mandatory on the part of the county board of education to transfer such territory, have they the power and authority so to do, and if they have, is the notice provided for in section 4692, a condition precedent which must be first complied with before it can be so transferred?

"We also desire your opinion on the following statement of facts:

"The Branch Hill special school district and the Paxton special school district, both of which are located in Miami township, this county, and in which, within the last three years a bond issue was carried by a vote of the people and a new school house with proper equipment constructed therein, are located adjacent to the Loveland village school district, which is located partly in Clermont, Hamilton and Warren counties. A petition has been filed by more than 75 per cent. of the electors in a certain territory, which is a part in each instance of the Branch Hill district and the Paxton district, asking the county board of education to transfer such territory from the respective districts in which it is now located, to the Loveland village district. In fact it is reported to the county board of education, and the petition shows, that all of the electors in each of the respective territories to be transferred have signed the petitions asking therefor.

"Under these circumstances, is it compulsory on the part of the board of education to transfer this territory, and if it is not, have they the power so to do? And if they have, is the notice required by section 4692, a condition precedent, which must be complied with, before the transfer is made?

"If it is compulsory on the part of the county board of education to transfer the territory from these two respective districts to the Loveland district, or if they may so transfer such territory, what provision should be made relative to the assessment for taxes of the territory so transferred, which territory is now irrevocably pledged for the payment of the school house bonds and interest, as the same respectively fall due?

"An opinion at your earliest convenience, on these questions, will be very much appreciated, as the condition with reference to this territory is at present in a very unsettled state and all persons interested are very anxious to have the matter determined by your department."

Section 4696, G. C., 106 O. L., 396, mentioned in your inquiry provides as follows: –

"Section 4696. A county board of education may transfer a part or all of a school district of the county school district to an adjoining exempted village school district or city school district, or to another county school district, provided at least fifty per centum of the electors of the territory to be transferred petition for such transfer. Provided, however, that if at least seventy-five per cent. of the electors of the territory petition for such transfer, the county board of education shall make such transfer. No such transfer shall be in effect until the county board of education and the board of education to which the territory is to be transferred each pass resolutions by a majority vote of the full membership of each board and until an equitable division of the funds or indebtedness be decided upon by the boards of education acting in the transfer; also a map shall be filed with the auditor or auditors of the county or counties affected by such transfer."

Your first inquiry as to whether the provisions of section 4696, G. C., are mandatory is answered in opinion No. 903, addressed to Hon. Milton Haines, prosecuting attorney, Marysville, Ohio, under date of October 8, 1915, which may be found at page 1937 of the opinions of the attorney-general for 1915, in which it is held that:

"The provision of section 4696, G. C., as amended in 106 O. L., 397, that 'if at least seventy-five per cent. of the electors of the territory petition for such transfer, the county board of education shall make such transfer' is directory."

It follows without argument that if this provision is directory only the further provision for transfer upon a petition of a less number of electors would not be mandatory. Although it is not mandatory upon the county board of education to make a transfer upon petition under section 4696, G. C., there is by its provisions power conferred upon the county board of education to make the transfer of territory therein referred to upon compliance with its provisions as to the filing of petition, subject, however, to the further provision that the boards of education pass resolutions by a majority vote of the full membership of each; that an equitable division of the funds and indebtedness be decided upon and a map filed with the auditor or auditors of the counties affected by the transfer.

There is no provision for notice in section 4696, G. C., nor does the reason for notice in proceedings under 4692, G. C., 106 O. L., 396, exist in case of transfers made under 4696, G. C.

The manifest purpose of the notice required by section 4692, G. C., is to give opportunity for protest against the transfer proposed by a majority of the electors of the territory transferred provided for therein. No such protest is authorized under section 4696, nor would the same be possible. No purpose would therefore be served by giving the notice required by section 4692, G. C., and I am of opinion that no notice of the transfer of territory pursuant to the provisions of section 4696, G. C is required to be given.

It will be observed, however, that transfers may be made pursuant to section 4696, G. C., supra, only to an adjoining exempted village school district, a city school district or to another county school district. I find upon investigation that the Loveland village school district is not an exempted village district within the meaning of section 4696, G. C., supra, and therefore falls in neither of the classes of school districts to which that section may be applied. In other words a transfer of territory to Loveland village school district may not be effected under the provisions of section 4696, G. C.

The authority of the county board of education to transfer the territory in question is then limited to that conferred by section 4692, G. C., 106 O. L., 396, referred to by you, which provides as follows:

> "Section 4692. The county board of education may transfer a part or all of a school district of the county school district to an adjoining district or districts of the county school district. Such transfer shall not take effect until a map is filed with the auditor of the county in which the transferred territory is situated, showing the boundaries of the territory transferred, and a notice of such proposed transfer has been posted in three conspicuous places in the district or districts proposed to be transferred, or printed in a paper of general circulation in said county, for ten days; nor shall such transfer take effect if a majority of the qualified electors residing in the territory to be transferred, shall, within thirty days after the filing of such map, file with the county board of education a written remonstrance against such proposed transfer. If an entire district be transferred the board of education of such district is thereby abolished or if a member of the board of education lives in a part of a school district transferred the member becomes a nonresident of the school district from which he was transferred and ceases to be a member of such board of education. The legal title of the property of the board of education shall become vested in the board of education of the school district to which such territory is transferred. The county board of education is authorized to make an equitable division of the school funds of the transferred territory either in the treasury or in the course of collection. And also an equitable division of the indebtedness of the transferred territory."

It will be first observed that the power to transfer here conferred is limited to territory within the county school district. It is learned upon investigation that the Loveland village school district is a part of the Clermont county school district. The county board of education of Clermont county may then transfer territory of such county district to the Loveland village district pursuant to said section 4692, G. C., supra. It will be noted, however, that in proceedings under section 4692, G. C., no petition of electors is required or authorized. Such petition would therefore neither serve to make compulsory nor to give jurisdiction to the county board to transfer any territory therein referred to. Such petition could serve no other purpose than to bring to the attention of the county board the desirability of such transfer on the part of the petitioners.

If it is sought to make transfer of the territory mentioned in the petitions referred to within the Clermont county school district to the Loveland village school district by the Clermont county board of education, since the same may be done only pursuant to the provisions of section 4692, G. C., supra, it follows that all the provisions of said section must be complied with, and that therefore the notice therein required must be given. It is unnecessary to say that the provision of the first sentence of said section 4692, G. C., is enabling only, and not mandatory.

When transfer of territory is made under said section 4692, G. C.,

> "The county board of education is authorized to make an equitable division of the school funds of the transferred territory either in the treasury or in course of collection. And also an equitable division of the indebtedness of the transferred territory."

When the funds and indebtedness of the districts affected by the transfer are so divided by the county board of education, the indebtedness apportioned to the several districts becomes the obligation thereof, and it becomes the duty of the board of education of such district to levy taxes for the payment of the same.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1677.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, CITY OF FREMONT, OHIO.

COLUMBUS, OHIO, June 12, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

> "RE:—Bonds of the city of Fremont, Ohio, in the sum of $10,300.00, for the improvement of Franklin avenue from the south line of Lucky street to the south line of North street, being 20 bonds of $515.00 each."

I have examined the transcript of the proceedings of council and other officers of the city of Fremont relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted, and signed by the proper officers, will, upon delivery, constitute valid and binding obligations of the city of Fremont, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1678.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY CITY OF FREMONT, OHIO.

COLUMBUS, OHIO, June 12, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the city of Fremont, Ohio, in the sum of $32,900.00, for the improvement of East State street, being 20 bonds of $1,645.00 each."

I have examined the transcript of the proceedings of the city council and other officers of the city of Fremont relative to the above bond issue, also the bond and coupon form, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted, and signed by the proper officers, will, upon delivery, constitute valid and binding obligations of the city of Fremont.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1679.

CORPORATION—SECRETARY OF STATE ADVISED TO ACCEPT COPY OF CERTIFICATE OF SUBSCRIPTION OF THE DEERFIELD OIL AND GAS COMPANY, MILLERSBURG, OHIO.

Secretary of state advised to accept and record sworn copy of the certificate of subscription of the Deerfield Oil & Gas Company in order to complete the record in the office of the secretary of state relative to said corporation.

COLUMBUS, OHIO, June 12, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of June 7, 1916, in which you request my opinion as follows:

"We are enclosing certificate of reduction of capital stock of "The Deerfield Oil & Gas Company," together with certificate of subscription of the same company, checks to the amount of $7.00, and a ten-cent internal revenue stamp, and would like your opinion on the question as to whether or not the said certificate of subscription is in conformity with section 8633 of the General Code, and should the same be filed and recorded by this department."

The certificate of subscription referred to in your letter, which The Deerfield Oil and Gas Company seeks to file, is as follows:

"THE DEERFIELD OIL AND GAS COMPANY CERTIFICATE OF SUBSCRIPTION.

"MILLERSBURG, Ohio, April 6, 1909.

"To the Secretary of State, Columbus, Ohio.

"We, the undersigned incorporators of The Deerfield Oil and Gas Company, do hereby certify, that on the 6th day of April, 1909, all the incorpo-

rators of said company did order, in writing, that books be opened for subscription to the capital stock of said company, at Millersburg, Ohio, on the sixth day of April, 1909, at 1 o'clock, p. m., and at the same time did waive, in writing, the notice by publication of the time and place of such opening of books of subscription, required by law; and further, said books having been opened at the time and place ordered, that ten percent. of said capital stock of said company has been subscribed.

"(Signed) .....

"STATE OF OHIO, HOLMES COUNTY, ss:

"Carl Schuler, being first duly sworn according to law, deposes and says that he is the secretary of The Deerfield Oil and Gas Company, and that the foregoing is a true copy of the certificate of subscription of said company, as the same appears upon its record of the proceedings of the incorporators, page 6.

"(Signed) Carl Schuler.

"Sworn to and subscribed in my presence, this 27th day of May, 1916.

"(Signed) H. E. Howenstine,

"Notary Public."

From the correspondence attached to your letter it appears that The Deerfield Oil and Gas Company is now and has been since April 6, 1909, exercising its corporate franchise. The records in your office fail to show, however, that the incorporators filed a certificate in compliance with section 8633 of the General Code, which is as follows:

"When ten per cent. of the capital stock is subscribed, the subscribers to the articles of incorporation, or a majority of them, at once shall so certify in writing to the secretary of state."

Such a certificate was apparently prepared and executed by the incorporators, because the certificate which The Deerfield Oil and Gas Company now seeks to file, signed by its secretary under oath, recites that it is a true and correct copy taken from the record of the proceedings of the incorporators. For some unknown reason this certificate does not appear upon the records of your office, and the company now seeks to supply the omission in the record.

As a corporation organized under the laws of Ohio does not in reality become a corporation and is not authorized to act as such until the certificate required by section 8633 is filed in your office, it is important that this record should be made. As the purpose in filing this certificate is to establish a public record of the facts recited therein, and as a sworn copy of this certificate is perhaps as good evidence as can at this time be had, I am of the opinion that it should be accepted and recorded by you.

I return herewith the enclosures referred to in your letter, also the correspondence which you have since handed to me. Respectfully,

EDWARD C. TURNER,
Attorney-General.

1680.

OFFICES INCOMPATIBLE—JUSTICE OF PEACE—COUNTY CORONER.

COLUMBUS, OHIO, June 12, 1916.

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

GENTLEMEN:—I am in recipt of a letter from W. T. Warner, a justice of the peace at Manchester, Ohio, requesting my opinion as to whether one person may at the

same time hold the office of justice of the peace and the office of county coroner. I deem this question of sufficient general interest to address my opinion on the same to your bureau.

I find no provision of the constitution or statutes expressly prohibiting a person from holding both of said offices at the same time. It remains to be determined, therefore, whether said offices, because of the duties incident to their exercise, are incompatible. In other words, would the performance of the duties of one office in any case be inconsistent with the performance of the duties of the other?

Section 11, G. C., provides:

> "No person shall hold at the same time, by appointment or election, more than one of the following offices: sheriff, county auditor, county treasurer, clerk of the court of common pleas, county recorder, prosecuting attorney, probate judge, and justice of the peace."

Section 2835, G. C., provides:

> "In an action wherein the sheriff is a party, or is interested, process shall be directed to the coroner. If both these officers are interested, the process shall be directed to, and executed by, a person appointed by the court or judge."

In connection with the performance by the coroner of the duties of the sheriff under the conditions prescribed in the above provision of section 2835, G. C., I note that Throop on Public Officers, at section 31, states that a coroner does not vacate his office by acting in place of a sheriff where the latter is disqualified, citing Powell v. Wilson, 16 Texas, 59.

Section 2857, G. C., relates to the findings and proceedings of the coroner in case of an inquest and provides:

> "The coroner shall draw up and subscribe his finding of facts in writing. If he finds that the deceased came to his or her death by force or violence, and by any other person or persons, so charged, and there present, he shall arrest such person or persons, and convey him or them immediately before a proper officer for examination according to law. If such persons, or any of them, are not present, the coroner forthwith shall inform one or more justices of the peace, and the prosecuting attorney, if within the county, of the facts so found, in order that the persons may be immediately dealt with according to law."

Section 1745, G. C., provides that:

> "When the office of coroner becomes vacant by death, resignation, expiration of the term of office, or otherwise, or when the coroner is absent from the county, or unable from sickness or other cause to discharge the duties of his office, a justice of the peace of the county shall have the powers and duties of the coroner *to hold inquests.*"

It will be observed that while a justice of the peace may act for the coroner under the conditions prescribed in section 1745, G. C., supra, the jurisdiction thus vested in such justice of the peace by the provisions of said section, in performing the duties of the coroner under said conditions, is limited to holding inquests, and I find no statutory provision vesting in a justice of the peace the authority to act in place of the coroner in serving civil process.

It should be observed in connection with what has already been said that a justice of the peace in performing the duties of the coroner within the limitation of the statute above referred to and under the conditions therein imposed, only acts in specific cases and is not vested with general authority to act in place of the coroner in the performance of the duties incident to the coroner's office under the conditions hereinbefore mentioned.

While it cannot be said that the provisions of section 11, G. C., read in connection with the provisions of section 2835, G. C., by their terms prohibit the holding of the two offices in question by one person at the same time, it seems clear that the reason for the prohibition contained in section 11, G. C., against a person holding both the office of justice of the peace and sheriff at the same time applies with equal force where the coroner performs the duties of the sheriff under the conditions mentioned in section 2835, G. C., and in view of the provisions of section 2857, G. C., and the limitation imposed by section 1745, G. C., on the authority of a justice of the peace to act in place of the coroner under the conditions prescribed in said latter section, I am of the opinion that the offices of justice of the peace and county coroner are incompatible and may not be held by one person at the same time. The question submitted must therefore be answered in the negative.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1681.

TAX COMMISSION—MAY NOT EXTEND TIME FOR COMPLETION OF WORK OF COUNTY BOARD OF REVISION AT ITS JUNE SESSION BEYOND FIRST MONDAY IN AUGUST OF SAID YEAR—AUTHORITY CONFERRED BY SECTION 5613, G. C., IS LIMITED TO YEARS IN WHICH AN ORIGINAL APPRAISEMENT HAS BEEN MADE.

The tax commission may not, in any year, extend the time for the completion of the work of the county board of revision at its June session, required by section 51, *of the Parrett-Whittemore law, section* 5605, *G. C., beyond the first Monday in August of said year, the date fixed by the statute for the beginning of the August session of said board.*

The tax commission is limited in the exercise of the authority conferred upon it by provision of section 76, *of the Parrett-Whittemore law, section* 5613, *G. C., to the year in which an original appraisement has been made in accordance with the order of said commission in the exercise of the authority conferred upon it by provision of the first part of section* 55 *of said law,* section 5548. *G. C.*

COLUMBUS, OHIO, June 13, 1916.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—In your letter of May 20th, you request my opinion upon the following grounds:

> "Section 40 of the Parrett-Whittemore law requires county boards of revision to hold sessions beginning on the second Monday in June and the first Monday of August respectively, and to convene at such other times as the tax commission of Ohio may order. It further provides that the board shall complete its work within such times as may be fixed by the tax commission. Section 51 of the same law provides that the board of revision shall not undertake the hearing of complaints or the exercise of any other

powers at its June session until its powers and duties under this section have been exercised and discharged.

"May the tax commission extend the time of the June session of the board beyond the first Monday of August, or must all of the work required by section 51 of the Parrett-Whittemore law be completed before that date?

"If the commission may legally extend the June session of the board beyond the first Monday of August, may complaints be filed within thirty days from the beginning of the second session of the board or must all complaints be filed before the first Monday in August or within thirty days thereafter regardless of the date from which the board begins its second session?

"May the authority conferred upon the tax commission by section 76 of the Parrett-Whittemore law be exercised by it as to real estate which has not been assessed or reassessed for the current year?"

Section 40 of the Parrett-Whittemore law (section 5593, G. C., 106 O. L., 257), provides as follows:

"County boards of revision shall hold sessions beginning on the second Monday of June, and the first Monday of August respectively, and convene at such other times as the tax commission of Ohio may order. Such boards may adjourn from day to day and shall complete their work within such times as may be fixed by the tax commission of Ohio for the completion thereof."

Section 51 of said law (section 5605, G. C., 106 O. L., 259), provides:

"On the second Monday of June, 1916, and annually, thereafter, the county auditor shall lay before the county board of revision the statements and returns of property received by him for the current year, and such board shall forthwith proceed to examine and revise the statements and returns of all property, both real and personal, to see that the valuations thereof are equal and uniform throughout the county, and that all property, and each and every class, kind or description thereof, is valued for taxation throughout the county at its full and true value in money. If the board finds any statement or return of personal property to be erroneous, either in the amount of property, moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, listed in the name of any person, company, firm, partnership, association or corporation, or in the valuation of any item or items thereof, it shall correct such statement or return, by listing thereon any omitted property and giving to it, as well as to any property that has been listed therein but which has been incorrectly valued, the true value in money thereof, and by omitting therefrom property improperly listed thereon. The county auditor shall add to any such statement or return, any dog omitted therefrom. If the board finds that any tract, lot or parcel of land or any buildings, structures or improvements thereon, or any minerals therein or rights thereto have been improperly listed either in the name of the owner, the description or quantity thereof, or have been incorrectly valued, or have been omitted and not valued, it shall make the necessary corrections and shall give to each such tract, lot or parcel of land, or any buildings, structures or improvements thereon or any minerals therein or rights thereto, incorrectly valued or omitted, the true value in money thereof. The board of revision shall not undertake the hearing of complaints or the exercise of any other power at its June session, until its powers and duties under this section have been exercised and discharged. The county auditor shall not make

up his tax list and duplicate, as provided in section 56 of this act, nor advertise, as provided in section 58 of this act, until the board of revision has completed its work under this section and has returned to the auditor all the statements and returns laid before it with the revisions and corrections thereof, as made by it."

Section 52 of said law (section 5609, G. C., 106 O. L., 259), provides in part that

"Complaints against any valuation or assessment on the tax list for the current year may be filed with the county auditor before the meeting of the county board of revision on the first Monday of August, or within thirty days thereafter if the board remains in session so long. * * *"

Section 45 of said law (section 5598, G. C., 106 O. L., 258), which must be read in connection with the above provision of section 5609, G. C., provides as follows:

"The county board of revision shall have power to investigate all assessments on the tax list with respect to the amount of property listed, as well as with respect to the valuation at which the same is listed. The power of the board shall extend to all cases in which real or personal property has been assessed for taxation for the current year, but not to assessments, additions or corrections hereafter made by the tax commission of Ohio."

Section 5593, G. C., as above quoted, recognizes two separate sessions of the county board of revision, and fixes a definite time for the beginning of each of said sessions. While said county board of revision may be convened at such other times as the tax commission may order, the duty of said board to convene on the second Monday in June, and commence the performance of its duties as a board of equalization, under provision of section 5605, G. C., as well as its duty to convene on the first Monday of August for the performance of its duties as a board of complaints, under provision of section 5609, G. C., taken in connection with the provisions of sections 44 and 45 of the Parrett-Whittemore law (sections 5597 and 5598 of the General Code), is clearly prescribed by the foregoing provisions of the statutes, and in no way depends upon any order of the tax commission.

In my former opinion to your commission under date of January 14, 1916, I called your attention to the two separate and distinct functions of the county board of revision; first, that of equalizing valuations of property at its June session, and second, that of revising valuations of property on complaint at its August session, and in said opinion it was held that while section 51 of the Parrett-Whittemore law gives the county board of revision power to correct the amounts of valuations of any of the listings for the current year, and also gives it power to make any investigation in regard to said listings, it does not give to said board any authority to hear any complaints of said listings until after they have been revised and corrected by said board and have been returned to the county auditor to be thereafter reviewed upon complaint. And it was further held that at the August session the work of the county board of revision is confined to a review upon complaint of any valuation or assessment on the tax list for the current year as returned to the county auditor by said county board of revision after its work of equalization has been completed at its June session.

While I am inclined to the opinion, in view of the provision of the latter part of section 5593, G. C., supra, that your commission may, within the time intervening between the second Monday in June and the first Monday in August of any year fix the time for the completion of the work of the county board of revision at its June session, and in view of the provision of the latter part of section 5605, supra

it seems clear that after the duties of said county board of revision under said section have been exercised and discharged, said board may then undertake the hearing of complaints if any are filed with the county auditor at that time. In view of the plain provision of the statute definitely fixing the times for the beginning, respectively of the June and August sessions of said county board of revision, and in keeping with what has already been said in my former opinion with reference to the two separate and distinct functions to be performed by said board at said respective sessions, I am of the opinion in answer to your first question that your commission may not, in any year, extend the time for the completion of the work required by said section 5605 G. C., beyond the first Monday in August of said year, the date fixed by the statute for the beginning of the August session of said county board of revision.

This answer to your first question disposes of your second question.

Coming now to a consideration of your third question, it will be remembered that in my former opinion to your commission, above referred to, I held than an annual appraisement of real estate is not required by the Parrett-Whittemore law, and in answer to the question raised by me as to whether the tax commissiom may order an assessment of real estate in one county and not in another, in any year, I advised your commission that the only safe course to pursue is to order an assessment of real property in all counties of the state at the same time, i. e., in the same year. As has already been stated, your commission was further advised in said opinion that the county board of revision, at its June session in any year, is limited in its consideration of valuations of real property to the statements and returns for such year as placed before it by the county auditor in compliance with section 51 of the Parrett-Whittemore law, and that said board may not increase or decrease any valuation of real estate which has not been appraised during said year.

You were further advised in opinion No. 1614, rendered to your commission under date of May 2, 1916, that, in view of the distinction made in my former opinion, above referred to, between an original assessment or appraisement of real property, which may be ordered by your commission in all counties of the state in the same year, and a reassessment or reappraisement of real property, or any class thereof, in any taxing district or part thereof, which may be ordered by the county auditor under provision of the first part of section 55 of the Parrett-Whittemore law (section 5548, G. C.), or in the manner provided in the latter part of said section, or by the tax commission under provisions of sections 79 and 80 of said law (sections 5624-4 and 5624-5 of the General Code), taken in connection with the holding in said opinion as above set forth, county boards of revision, at their June session, may not increase or decrease the valuation of any real estate in any year unless there has been an original appraisement of real estate for said year. This latter holding has, doubtless, given rise to the question now under consideration.

Section 61 of the Parrett-Whittemore law (section 5612, G. C., 106 O. L., 262) provides:

> "On or before the first Monday of July, annually, each county auditor shall make out and transmit to the tax commission of Ohio an abstract of the real and personal property of each taxing district in his county, in which he shall set forth the aggregate amount and value of each class of real and personal property in such county as it appears on his tax list, or on the statement and returns on file in his office."

Section 76 of said law (section 5613, G. C., 106 O. L., 267), provides:

> "The tax commission of Ohio shall annually determine whether the real and personal property, and the various classes thereof, in the several counties, cities, villages and taxing districts in the state, have been assessed

at the true value thereof in money, and if it finds that the real or personal property, or any class of real or personal property, in any county, city, village or taxing district in the state, as reported by the several county auditors to it, is not listed at its true value in money, it may increase or decrease the aggregate value of the real property or of the personal property, or any class of real or personal property in any such county, township, city, village or taxing district, or in any ward or division of a municipal corporation, by such rate per cent., or by such amount as will place such property on the tax list at its true value in money, to the end that each and every class of real and personal property in the state shall be listed and valued for taxation by an equal and uniform rule at its true value in money."

The authority of your commission under the above provision of section 5613, G. C., to increase or decrease the aggregate value of the real or personal property or any class thereof, in any county, township, city, village or taxing district, or in any ward or division of a municipal corporation, by such rate per cent. on said aggregate value, is separate and distinct from its authority to order a reassessment of real or personal property or any class thereof in any district or subdivision thereof under authority of and in the manner provided by sections 79 and 80 of said Parrett-Whittemore law, above referred to, which latter authority in the tax commission, as has already been observed, is practically the same as that conferred upon the county auditor by provision of the first part of section 55 of said law (section 5548, G. C.) and by the latter part of said section upon the parties therein mentioned and referred to.

Without passing on the question as to whether a reassessment or reappraisement of real or personal property in any year presupposes an original appraisement of said property in that year, in view of my former holding that an original appraisement is not required but may be made in all the counties of the state in any year when ordered by your commission, I am inclined to the opinion that your authority to act under the above provision of section 5613, G. C., is limited to the years in which an original appraisement has been ordered by your commission and has been made in accordance with said order. In other words, as I view it, the linitation of your commission to act under provision of section 5613, G. C., supra, is practically the same as that limitation hereinbefore referred to as controlling the county board of revision in the performance of its duty at its June session under provision of section 5605 G. C., supra.

If the tax commission properly performs its duty under the above provision of section 5613, G. C., in a year in which an original appraisement has been made in accordance with the order of said commission, the occasion for the exercise of such authority will not again arise until an original appraisement has again been ordered.

I am of the opinion therefore, in answer to your third question, that the tax commission is limited in the exercise of the authority conferred upon it by provision of section 76 of the Parrett-Whittemore law (section 5613, G. C.) to the years in which an original appraisement has been made in accordance with the order of said commission in the exercise of the authority conferred upon it by provision of the first part of section 55 of said law (section 5548, G. C.).

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1682.

COUNTY COMMISSIONERS—WHEN "EMERGENCY" OCCURS IN REPAIR OF ROADS—LEVY MADE UNDER SECTION 7419, G. C., IS NOT SUBJECT TO FIFTEEN MILL LIMITATION PROVIDED BY SECTION 5649-5b, G. C.—SEE OPINION OF SUPREME COURT OF OHIO, 94 O. S.—STATE EX REL. MINNING ET AL. VS. ZANGERLE, AUDITOR, ETC.

A levy properly made under section 7419, G. C., under a proper resolution showing an emergency is not subject to the fifteen mill limitation provided by section 5649-5b, G. C., and may be made by county commissioners despite the fact that the effect of such levy, will be to increase the tax rate in one of the taxing districts of the county to the extent that, such tax rate will exceed fifteen mills.

COLUMBUS, OHIO, June 13, 1916.

HON. HENRY W. CHERRINGTON, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—I have your communication of June 1, 1916, which communication reads as follows:

> "I have before me your opinion No. 719, addressed to Hon. Forrest G. Long, prosecuting attorney, Bellefontaine, Ohio, and of date August 12, 1915.
>
> "Some of the principal highways of this county have become unfit for travel, and cause difficulty, danger and delay to teams passing thereon, by reason of the large amount of traffic, etc.
>
> "The present tax levy in the city of Gallipolis is fifteen mills. It will be fifteen mills this coming year, exclusive of any additional levies that may be made under the provisions of section 7419 G. C.
>
> "I take it from the opinion, above referred to, that the commissioners under these facts may make an additional levy to take care of the principal highways. They desire to levy two mills. This levy will make the tax rate exceed fifteen mills in Gallipolis city and in several taxing districts of this county. Am I correct in my assumption that they have authority to do so?
>
> "A prompt reply will be greatly appreciated, as the commissioners desire to act at their June session."

Replying to the above I advise you that where a levy is made under section 7419, G. C., such levy is not subject to the fifteen mill limitation prescribed by section 5649-5b, G. C. This is true by reason of the provision of section 5649-4, G. C., to the effect that for the emergencies mentioned in certain sections of the General Code including section 7419, G. C., the taxing authorities of any district may levy a tax sufficient to provide therefor, irrespective of any of the limitations of the Smith one per cent. tax law.

Since the rendition of opinion No. 719 of this department, referred to by you the matter of tax levies under section 7419, G. C., was considered and passed upon by the court of common pleas of Miami county, Ohio, in the case of State ex rel. Commissioners v. Staley, auditor. In this case it was held that the proper interpretation of section 5649-4, G. C., is that it is a legislative declaration that all levies made under the authority of the sections of the General Code, named in section 5649-4 G. C., are emergency levies. The decision of the common pleas court in this case has been affirmed by the court of appeals.

In view of the foregoing, I advise you that a levy properly made under section 7419, G. C., under a proper resolution showing an emergency is not subject to the fifteen mill limitation provided by section 5649-5b, G. C., and may be made by county commissioners despite the fact that the effect of such levy will be to increase the tax rate in one or more of the taxing districts of the county to the extent that such tax

rate will exceed fifteen mills. The only limitation upon levies made under section 7419, G. C., is that contained in the section in question which is in effect that the annual levy made under this section may not exceed five mills upon the dollar upon all taxable property of the county. Respectfully,

EDWARD C. TURNER,
Attorney-General.

1683.

MUNICIPAL CORPORATION—PLATS OF LANDS AND STREETS OUTSIDE OF SUCH MUNICIPAL CORPORATION—ABSENCE OF ACCEPTANCE BY PUBLIC AUTHORITIES—NOT REQUIRED TO IMPROVE OR REPAIR SUCH STREETS.

Where lands outside a municipal corporation have been platted, the streets shown on the plat do not, in the absence of an acceptance on the part of the public authorities, become public highways of the state within the meaning of section 7464, G. C., and in the absence of an acceptance the public authorities are not authorized or required to improve or repair the same.

COLUMBUS, OHIO, June 13, 1916.

HON. A. M. HENDERSON, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication of May 4, 1916 which communication reads as follows:

"I have had a number of inquiries since the enactment of the Cass highway law as found in Ohio Laws, Vol. 106, with which your office is already familiar, as to whether or not the portion of plats outside of municipalities dedicated as streets come within the term 'highways, streets or roads' as used in the Cass highway law; that is, where plats are laid out into lots and portions of said plats laid out as streets by the companies platting the land; whether these so-called streets or highways which abut upon township, county or state roads come within the term 'highway' as used in the Cass act so that the township trustees or the county commissioners may be required to repair and improve said portion of said platted lands as laid out for the purpose of streets in getting to and from said platted lots. It is understood, of course, that the plats referred to and the so-called streets referred to are outside of a municipality. So that you may have a better understanding of the most recent inquiry which we have received, I inclose herewith a copy of a letter from the township trustees of Coitsville township. In this connection I might say that I have taken the position that these so-called streets and highways of this kind which are simply platted according to statute and accepted by the platting commission of the city of Youngstown, where these plats are reasonably near the municipal boundaries, are not such public highways as come within the Cass act. You will, of course, understand that some of these streets in some of the plats in this county, extend to, and abut upon, the corporate limits of the city of Youngstown, whereas others are as far out as two or three miles away from the boundary line and are reached by suburban car lines.

"This question has been presented to township trustees in our county so frequently that the trustees believe that we should have your ruling going directly to the point in dispute, and for that reason I am taking the liberty of calling upon you for an opinion, in view of the fact that our position has been that these dedicated streets are not highways as indicated within the Cass highway act and the trustees and the county are not required to keep

them in repair or make improvements upon them; neither are they required to drag such highways under the dragging provisions of the Cass act. The inquiry becomes important of course because in time some of these so-called streets become very much out of repair and the trustees desire to know upon whom the responsibility for keeping them in repair rests so that they may govern themselves accordingly. Many of these so-called streets connect at right angles to improved highways, that is township or county roads. Our contention has always been that township roads must be viewed and established in the regular way by township trustees and viewed and established in the regular way by the county commissioners before they come within the terms of the Cass highway act and before the township or county can be made liable for failure to keep them in repair as required by law."

The copy of the letter from the township trustees of Coitsville township enclosed with your letter reads as follows:

"Section 241 of the new highway laws of Ohio as found on page 648 of the 1914-15 volume of session laws of Ohio, divides the public highways into three classes of which the third is as follows: 'Township roads shall include all public highways of the state other than state or county roads as hereinbefore defined, and trustees of each township shall maintain all such roads within their respective townships.'

"Section 7466 of the General Code of Ohio, which was repealed by the new highway code, formerly provided a method by which township trustees could accept streets either before or after they had been platted for the purpose of taking control of these and improving them.

"Our township is peculiarly made up in that the western half of it lying adjacent to the city of Youngstown is largely made up of now platted property much of which is built up as closely as city streets and by far the greatest proportion of taxes paid in the western portion of our township are paid by people living upon platted ground and whose properties abut such streets.

"We therefore have a great many of such streets in our township which never were accepted as provided by old section 7466 of the General Code and which of course now never can be and which need and require some attention from us as trustees for the purpose of repairing, improving and maintaining such streets.

"These plats all lie within the three mile limit of the city so that when the plats were dedicated the streets were made by the Youngstown city commission to conform to its ideas of the future development of Youngstown and said plats were duly accepted as provided by the statute by said platting commission before said plats and dedicated streets were admitted to record.

"We assume that these are 'Public Highways' within the meaning of section 241 of the new highway code and as such we suppose we have a right to go upon them and spend township funds in their proper maintenance, improvement and repair; and feel justified in so doing because the property abutting such streets is paying taxes on a much higher valuation than unplatted land surrounding same much of which unplatted land adjoins brick highways built by the township, county or state, but before actually expending any township funds upon such streets we would like to have the ruling of the attorney-general of the state on the question of our right so to do."

It is elementary that in order to make a dedication complete on the part of the public as well as the owner and to charge the public corporation having jurisdiction over highways with the duty to repair the way, there must be an acceptance of the dedication by the public or the proper local authorities. The acceptance on the part

of the public authorities may be either express or implied. An express acceptance is evidenced by some order of the body or officer possessing jurisdiction in such matters accepting the dedication in express terms. An implied acceptance arises in cases where the public authorities have done acts recognizing the existence of the highway and treating it as one of the public ways of the locality. The assumption of control by the public authorities may be evidenced in many ways but in order to constitute an acceptance it must be such as could be rightfully exercised over a highway only. Elliott on roads and streets, section 165, et seq.

Under section 7466, G. C., referred to by the trustees of Coitsville township, persons were authorized to dedicate a tract or strip of ground to the public use as a highway, either by plat or deed of gift to the county or township, filed with the county commissioners or township trustees, and by them recorded as road survey and other plats. The commissioners or trustees, if they deemed such road of sufficient public utility, were authorized to accept it by entry to that effect on their record, and upon such acceptance the tract or strip became a legally established highway. This section of the General Code was repealed by the Cass highway law, 106 O. L., 574, but authority for the dedication and acceptance of land for road purposes still exists. Under the former statute the acceptance might be either by the county commissioners or the township trustees, but under the present statute township trustees are not authorized to accept a dedication of land for road purposes, and the entire authority in this matter is lodged in the county commissioners. The matter is controlled by section 33 of the Cass highway law, section 6886, G. C., which section reads as follows:

> "Any person or persons may, with the approval of the county commissioners, dedicate lands for road purposes. A definite description of the lands to be dedicated, with a plat of the same thereto attached, and signed by the party dedicating the same, with the approval and acceptance of the commissioners endorsed thereon, shall be placed upon the proper road records of the county in which such road is situated. Provided, however, that if the lands so dedicated contemplate a change in an existing road, the same proceedings shall be had thereon, after the commissioners by proper resolution approve and accept the lands for such purpose, as are provided for in cases where the commissioners by unanimous vote declare their intention to locate, establish, widen, straighten, vacate or change the direction of a road without a petition therefor, but otherwise the proposal to dedicate land for road purposes, together with the acceptance of the grant by the commissioners, shall constitute the lands so dedicated a public road without any further proceedings thereon."

In view of the well established principle of law to the effect that the dedication of land for road purposes in order to be complete, and in order to charge the public authorities with any power or duty in respect to the land dedicated, must be accepted by the proper local authorities, it is my opinion that where lands outside a municipal corporation have been platted, the streets and other public grounds shown on the plat do not, in the absence of an acceptance on the part of the public authorities, become public highways of the state within the meaning of section 241 of the Cass highway law, section 7464, G. C., and that in the absence of an acceptance no power or duty to improve, maintain, drag or repair such streets or public grounds attaches either to the county commissioners or to the township trustees. If it is desired by either the township trustees or the county commissioners to improve or repair any of such streets or public grounds, the proceedings provided for by section 6886, G. C., supra should first be had by the owners and the county commissioners.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1684.

ROADS AND HIGHWAYS—PROVISION IN SPECIFICATIONS FOR CONCRETE CONSTRUCTION ON PUBLIC WORK FOR "BATCH MIXER" TO BE USED IS REASONABLE.

A provision in the specifications for concrete construction on public work, to the effect that all mixing shall be done with a batch mixer, is a reasonable and proper exercise of discretion on the part of the engineer preparing the specifications, and such a provision is therefore legal and may be incorporated in specifications for public work, and compliance therewith upon the part of a contractor may be required.

COLUMBUS, OHIO, June 13, 1916.

HON. THOMAS H. MOORE, *Prosecuting Attorney, Ashland, Ohio.*

DEAR SIR:—I have your communication of May 24, 1916, which communication reads as follows:

> "Will you please give me your opinion upon the following question?
>
> "Upon concrete construction on public work is it legal for a county surveyor to specify in his plans and specifications that the concrete work shall be done with a batch mixer, excluding all other types of mixers?
>
> "Would such a condition be an illegal discrimination, providing the other types of concrete mixers meet all other conditions in the specifications?
>
> "I contend that if specifying a batch mixer is but specifying a method, then it would not be a discrimination, but if it is the specifying a certain kind of a machine to the exclusion of others, then it would be."

In investigating the question submitted by you, it came to my attention that the standard specifications of the state highway department provide that all mixing of concrete materials shall be done with the type of mixer known as a batch mixer. I understand that there are two common types of mixers known as batch mixers and continuous force-feed mixers. I have inquired of the state highway department as to whether these two types of mixers operate by substantially different methods, and also whether there is reasonable ground for the opinion that from an engineering point of view a batch mixer is to be preferred over a continuous force-feed mixer. I am informed by a representative of the highway department that these two types of mixers do operate by substantially different methods.

In the batch mixer the ingredients, constituting a batch of concrete, are dumped in a revolving drum in the form of a complete batch, consisting of the proportions of cement, sand and coarse aggregate called for in the specifications. The batch remains in the drum until completely mixed, water being added in sufficient quantities during the mixing to make the concrete of the proper consistency. After this batch is properly mixed, the whole batch is dumped or discharged before another batch is placed in the mixing drum.

A continuous force-feed mixer is generally supplied with hoppers, one hopper for cement, one for sand and another for the coarse aggregate. These hoppers are kept filled by the workmen during the operation of the mixer. There is a mechanical device supplied to feed the different ingredients in the proper proportions continuously in the mixer. The concrete runs through continuously, and consequently is continuously discharged from the mixer. There is a device attached to the mixer whereby the proportions of the ingredients can be regulated according to the proportions desired in the concrete.

From the above brief statement of facts it will be seen that the two types of mixers operate upon quite different principles and by decidedly different methods.

While not taking the position that concrete cannot be well mixed in a continuous force-feed mixer, the official of the state highway department, answering my request for information, states that the state highway department much prefers to have its concrete mixed in a batch mixer, and says that the department is not without very good engineering authority for this stand. The position of the department is based in part on the ease and thoroughness with which the work of a batch mixer may be inspected, and the thoroughness of the operation when that type of mixer is used.

Basing my opinion upon the above facts furnished to me by the state highway department, it is my conclusion that a provision in the specifications for concrete construction on public work, to the effect that all mixing shall be done with a batch mixer, is a reasonable and proper exercise of discretion on the part of the engineer preparing the specifications, and that such a provision is therefore legal and may be incorporated in specifications for public work, and compliance therewith upon the part of a contractor may be required.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1685.

ROAD, LANE OR OUTLET ESTABLISHED BY SECTION 6887, G. C.—NOT PUBLIC HIGHWAYS—PUBLIC AUTHORITIES NOT AUTHORIZED TO CONSTRUCT OR REPAIR SUCH ROADS.

The public authorities are not authorized to construct or repair a road, lane or outlet established under authority of section 6887, G. C., et seq. Such roads, lanes or outlets are not to be regarded as public highways, and must be constructed, repaired and maintained by the petitioners therefor.

COLUMBUS, OHIO, June 13, 1916.

HON. HUGH F. NEUHART, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR SIR:—I have your communication of May 18, 1916, which communication reads as follows:

> "Section 36, Cass highway act, section 6889, G. C., among other things provides:
>
> " 'When the petitioner for said road, lane or outlet has paid to the owner or owners of lands through which said road, lane or outlet will pass, the amount found due them for compensation or damages by the county commissioners, he shall have full right and authority to enter upon said premises and *open up said road, lane or outlet.*'
>
> "Upon whom devolves the duty primarily of constructing said road, viz.: grading and placing culverts, and afterwards of repairing and maintaining same?
>
> "See attorney-general opinion No. 933—section 241 (c) Cass act— and DeForest v. Wheeler, 5 O. S., 286.
>
> "The outlet has been awarded, compensation paid and no appeal taken and the time limit up on the appeal."

The procedure outlined in section 6887, 6888 and 6889, G. C., is to be followed where it is desired by any person, firm or corporation to secure a road, lane or out-

let leading from any land owned by said person, firm or corporation, through the lands of any person or persons to a public highway. The language of the first part of section 6887, G. C., referring to a road, lane or outlet of this character as leading to a public highway, indicates that such road, lane or outlet was not intended by the legislature to be classified as a public highway. The provision of section 6889, G. C., quoted by you also indicates that the authority and duty of opening up the road, lane or outlet rests not upon the public authorities but upon the petitioner. Roads, lanes or outlets of this character are established for the exclusive convenience and benefit of the petitioner or petitioners, and there is no declaration in the statute that such roads, lanes or outlets are to be regarded as public highways, while as above pointed out, the language of the statutes indicates that all expenses incurred in connection with roads of this class are to be met by the petitioner or petitioners.

I therefore advise you that the public authorities have no authority to construct or repair roads of this class; that the same are not to be regarded as public highways and that they must be constructed, repaired and maintained by the petitioners.

The conclusion expressed in opinion No. 933, referred to by you and rendered to Hon. J. W. Watts, prosecuting attorney of Highland county, on October 14, 1915, was based on the express declaration of the statutes that roads of the class therein referred to were to be public highways.

The case of DeForest v. Wheeler, 5 O. S., 286, decided in 1855, must be read in the light of the statutes then in force and has no application to the situation presented by your inquiry.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1686.

COUNTY COMMISSIONERS—THEIR DECISION GRANTING OR REFUSING TO GRANT PRAYER OF PETITION ASKING FOR RECONSTRUCTION OR REPAIR OF PUBLIC ROAD IS NOT REVIEWABLE ON APPEAL.

The decision of the county commissioners, granting or refusing to grant the prayer of a petition asking for the construction, reconstruction or repair of a public road or part thereof, and presented to the board of county commissioners of a county, under authority of section 6907, G. C., is not reviewable on appeal, and the determination of the county commissioners, granting or refusing the petition, is final.

COLUMBUS, OHIO, June 13, 1916.

HON. B. A. MYERS, *Prosecuting Attorney, Celina, Ohio.*

DEAR SIR:—I have your communication of May 29, 1916, which communication reads as follows:

> "I am anxious for your opinion on the following question:
>
> "1st. Does the provision for an appeal under chapter 2, sections 37 and 38, of the Cass road law, apply to improvements provided for under chapter 5, sections 85, and following?
>
> "2nd. Our exact situation is this. We have a petition in our county with a majority of 40 signers out of a total of 95 resident parties to be assessed for the improvement. The petition was filed January 7, 1916. Our commissioners have not acted upon the petition for some reason, and the 60 days having passed for the viewing of the road, mandamus proceedings are threatened. If the commissioners would view the road and dismiss the petition, would there be an appeal from their action in so doing,or is their finding final?"

Inasmuch as chapter V of the Cass highway law refers to dragging unimproved roads and does not refer to improvements, and inasmuch as section 85 of the Cass highway law is found in chapter VI of that act, I assume that when you refer to chapter V you mean to refer to chapter VI.

Sections 37 and 38 of the Cass highway law, being sections 6890 and 6891, G. C. are the first two sections in chapter II of the act, which chapter relates to appeals in road cases. These sections immediately follow chapter I of the act, which chapter relates to locating, establishing, altering, widening, straightening, vacating or changing the direction of the road. The sections in question read as follows:

> "Section 37. No order of the county commissioners for locating, establishing, altering, straightening, widening or changing the direction of a public road, shall be executed until ten days have elapsed after the county commissioners have made their final order in the matter of compensation and damages, on account of said improvement. If, at the end of ten days, any person, firm or corporation interested, shall have effected an appeal, then said order shall not be executed until the matters appealed from shall have been disposed of in the probate court.
>
> "Section 38. Any person, firm or corporation interested therein, may appeal from the final order or judgment of the county commissioners made in the proceeding and entered upon their journal determining either of the following matters:
>
> "1. The compensation for land appropriated.
>
> "2. The damages claimed to property affected by the improvement.
>
> "3. The order establishing the proposed improvement.
>
> "4. The order dismissing or refusing to grant the prayer of the petition for the proposed improvement."

Inasmuch as these sections immediately follow the provisions of the act relating to locating, establishing, altering, widening, straightening or changing the direction of a road, the natural inference is that they are intended to apply only in such proceedings authorized by chapter I of the act. This inference and the conclusion that the sections have no application in any other proceedings unless adopted by specific reference, are strengthened by the provision of section 95 of the act, section 6916, G. C., found in the chapter relating to road construction and improvement by county commissioners to the effect that any person aggrieved by the finding of the commissioners upon any application for compensation or damages may appeal to the probate court by giving the notice provided for in the chapter of the act relating to appeals in road cases and by filing the bond therein provided, and that such proceedings shall be thereafter had upon such appeal as are provided for in said chapter.

I am therefore of the opinion that the decision of the county commissioners, granting or refusing to grant the prayer of a petition asking for the construction, reconstruction or repair of a public road or part thereof, and presented to the board of county commissioners of any county under authority of section 86 of the act, section 6907, G. C., is not reviewable on appeal, and that the determination of the county commissioners granting or refusing the petition is final.

Where, under authority of the provisions of chapter VI of the act a proceeding for the construction, reconstruction or repair of a public road is instituted by a petition, the only order of the county commissioners which is appealable is a finding by them upon an application for compensation or damages.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1687.

ROADS AND HIGHWAYS—WHERE COMMISSIONERS OF ROAD DISTRICT LET CONTRACT FOR PURCHASE OF STONE PRIOR TO GOING INTO EFFECT OF CASS HIGHWAY LAW—MAY CONTRACT AFTER LAW BECOMES EFFECTIVE FOR HAULING OF STONE WHERE PROPERTY OWNERS HAVE PERFORMED THEIR PART OF AN AGREEMENT TO IMPROVE THE ROADS.

Where prior to the going into effect of the Cass highway law the commissioners of a road district organized under section 7095, G. C., et seq., agreed to surface a certain road provided the abutting property owners would first grade the same, and the property owners carried out their agreement and the commissioners of the road district let a contract for the purchase of the stone to be placed on the road, such commissioners may after the going into effect of the Cass highway law lawfully make a contract for the hauling of the stone on the road in question.

COLUMBUS, OHIO, June 13, 1916.

HON. ALDRICH B. UNDERWOOD, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication of June 3, 1916, submitting for my opinion a question which, from your communication and from oral statements made by you to a representative of this department, I understand is as follows:

> "Certain townships in your county were, prior to the going into effect of the Cass highway law, organized into a road district under section 7095, G. C., et seq. One of the roads in this district was known as road No. 27, or the Bunker Hill road. Prior to the going into effect of the Cass highway law, on September 6, 1915, the road commission of the district in question entered upon its records an agreement to improve the Bunker Hill road by applying stone and slag provided the abutting property owners would first grade the road in a manner satisfactory to the road commission and its engineer, and abutting owners complied with these conditions and did the grading and laid the foundation for the road, and the road commission sought bids and let a contract for the purchase of the stone to be placed upon said road. All of the above occurred prior to the going into effect of the Cass highway law.
>
> "After the going into effect of the Cass highway law and in October, 1915, a contract was let by the road commission for hauilng the stone on the road in question. The performance of this latter contract has been held up pending a determination of the authority of the road commission to enter into the same.
>
> "You now inquire whether in view of the saving provisions of the Cass highway law the contract for the hauling of the stone on the road in question is one which the road commission had a right to enter into after the going into effect of the Cass highway law."

The pertinent provision of the Cass highway act is to be found in section 303 thereof, and reads as follows:

> "* * * wherever under any law repealed by this act any organization now exists for the purpose of improving, repairing or maintaining any public road or roads, such organization shall not be affected by this act and all officers of such organization or organizations shall continue to hold office and exercise the powers heretofore exercised by them. Their successors in

office with like powers shall be elected or appointed as heretofore till all contracts and obligations of such organization shall be fully met and complied with and all rights fully conserved. For such purposes such organization or organizations shall have all the rights heretofore exercised by them to hire necessary assistance, clerical or otherwise; to fund or refund any indebtedness and to levy and collect taxes or certify the same for levy and collection; to pay such debts and expenses together with salaries and other expenses of such organization or organizations; but no such organization or organizations shall contract any new obligation or obligations after the taking effect of this act, for the construction or repair of additional road or roads or the maintenance or repair of roads already improved. When all obligations existing at the time of the taking effect of this act have been fully met and complied with, such organization or organizations shall cease to exist and all property or funds of such organization or organizations shall be and become a part of the road fund of the county in which such organization or organizations exist. All roads macadamized or paved by any such organization shall be kept improved and in repair by the county highway superintendent at the cost of the county in which the same are located."

In opinion No. 1439, rendered to you on March 30, 1916, I held that road commissioners appointed under section 7095, G. C., et seq., now repealed, had no authority after the going into effect of the Cass highway law, on September 6, 1915 to enter into new contracts for the construction or repair of roads in their district.

The situation presented by your present inquiry is, however, a different one from that presented by your former inquiry in which you stated that it was the intention of the road commissioners to continue to do business and to enter into new contracts until the money belonging to the district had been used.

A careful examination of the above quoted provision of section 303 of the Cass highway law, while indicating that in a general way the road commissioners appointed under section 7095, G. C., et seq., were not authorized to enter into any new obligation or obligations after the taking effect of the Cass highway law, also estblishes the the fact that it was the intention of the legislature that all obligations existing at the time of the taking effect of that act should be fully met and complied with.

The road commissioners of the district, referred to by you, having agreed to surface a road provided the abutting land owners would grade the same, the land owners having acted upon this agreement and graded the road, and the stone necessary to complete the work having been purchased, I am of the opinion that there was thereby created an obligation on the part of the road commission to place the stone on the road in question, which obligation was in existence at the time of the going into effect of the Cass highway law.

The provision of the statute that no new obligation or obligations should be created after the going into effect of the Cass highway law, and the provision requiring the road commission to fully meet and comply with the existing obligations, must be read together, and under the state of facts disclosed by your inquiry I advise you that the road commission was authorized to make the contract for the placing of the stone in question upon the road already graded and that the contract in question may be lawfully executed by the road district.

The conclusion herein expressed is, however, limited to the facts of this particular case.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1688.

ARMORY SITE—FORM OF DEED FROM WEBB C. HAYES AND WIFE TO STATE FOR ARMORY AT FREMONT, OHIO.

COLUMBUS, OHIO, June 13, 1916.

HON. BYRON L. BARGAR, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—Under date of May 20th you submitted for my consideration the following:

"On April 20, 1916, I transmitted to you copy of a proposed deed from Colonel and Mrs. Webb C. Hayes to the state of Ohio, conveying an armory site to be donated to the state.

"The board's minutes of January 29, 1916, refer to the form of said deed in the following words:

" '*FREMONT ARMORY SITE.* A report on the Fremont site was made by the committee with regard to the acceptance of this site and thereupon it was unanimously

" '*RESOLVED.* Whereas, Colonel and Mrs. Webb C. Hayes, of Fremont, Ohio, have offered to donate to the state of Ohio an armory site situated in the city of Fremont, Ohio, county of Sandusky, state of Ohio, and bounded and described as follows:

" 'Beginning at the intersection of the proposed alley and Park Place; thence easterly 80 feet on north line of lot (Park Place); thence southerly on the east line of the lot 115 feet; thence westerly on the south line of the lot for a distance of 25 feet; thence south 55 feet on the east side of the lot to Court street; thence 30 feet westerly on the south line of the lot (Court street); thence north 55 feet on the west line of the lot; thence west 25 feet on the south line of the lot; thence north 115 feet on the west line of the lot to the place of beginning.'

"It was thereupon unanimously

" '*RESOLVED.* That said site be accepted for and on behalf of the state of Ohio, on the following conditions:

" '1. That a fee simple title, approved by the attorney-general be conveyed to the state thereof at no cost to the state.

" '2. That the deed evidencing such conveyance contain special covenants, requiring the construction of the buildings in the remainder of the plot, from which said site is deeded to the state, in the following manner namely:

" 'The buildings to be constructed in the same order or style of architecture as that used in the design of the armory.

" 'That the buildings to be constructed will not exceed four stories in height, of not more than ten feet in the clear of each ceiling.

" 'That the buildings to be built will only be to the south of the armory and that the east and west sides of the armory will not be built upon.

" 'That alley ways will be left all around the armory lot as contemplated.'

" 'I herewith transmit the plat showing the lands from which said site is carved by Colonel Hayes, and also showing two tracts of land which he contemplates donating for other public purposes; these two tracts comprising the remainder of his lands at that location. I also transmit a sketch showing the parts of the proposed armory site which will be covered with the proposed armory.

"The armory board requests that you redraw the deed proposed by Colonel Hayes in such a way as to protect the armory building from unsuitable structures on the Hayes tract (the parks marked Y. M. C. A. and technical school) and also to protect the armory from the character of business to be conducted on said school and Y. M. C. A. tracts and from the erection of buildings other than in conformity to the provision in the board's minutes of January 29, 1916."

In accordance with your request I have prepared a deed which, when executed, will, I believe, carry out the intentions of your board as expressed in your communication. Said form of deed is as follows:

"KNOW ALL MEN BY THESE PRESENTS: That WEBB C. HAYES and MARY MILLER HAYES, his wife, the grantors, for the consideration of one dollar ($1.00) received to their full satisfaction of the STATE OF OHIO, grantee, do GIVE, GRANT, BARGAIN, SELL and CONVEY unto the said grantee, its successors and assigns, the following described premises, situate in the city of Fremont, county of Sandusky and state of Ohio:

" 'Being a part of inlots numbered one hundred and eight (108) and one hundred and nine (109), bounded and described as follows:

" 'Beginning at the north-west corner of inlot one hundred and nine (109); thence easterly eighty (80) feet on the south line of Park Place; thence southerly one hundred and fifteen (115) feet parallel to the west line of inlot one hundred and nine (109); thence westerly twenty-five (25) feet parallel to the south line of Park Place; thence southerly parallel to the west line of inlot one hundred and nine (109) to the north line of Court street; thence west thirty (30) feet on the north line of Court street; thence northerly parallel to the west line of inlot one hundred and nine (109) to a point one hundred and five (105) feet south of the south line of Park Place; thence westerly twenty-five (25) feet parallel to the south line of Park Place; thence northerly one hundred and five (105) feet on the west line of inlot one hundred and nine (109) to the place of beginning.'

"TO HAVE AND TO HOLD the above granted and bargained premises, with the appurtenances thereof, unto the said grantee, its successors and assigns forever. And the said grantors do for themselves and for their heirs, executors and administrators, covenant with the said grantee, its successors and assigns, that they are well seized of the above described premises, as a good and indefeasible estate in fee simple, and have good right to bargain and sell the same in manner and form as above written, and that the same are free and clear from all incumbrances whatsoever, and that they will WARRANT and DEFEND said premises, with the appurtenances thereunto belonging, to the said grantee, its successors and assigns, against all lawful claims and demands whatsoever.

"And the said MARY MILLER HAYES does hereby remise, release and forever quit claim unto the said grantee, its successors and assigns, all her right and expectancy of dower in the above described premises.

"This deed is made subject, however, to the following provisions:

"*First.* That provision shall be made for an armory building by the state armory board on or before ————————————.

"*Second.* That the drill hall of said armory building shall be not less than fifty (50) feet in width by one hundred (100) feet in length, extending from the south line of Park Place.

"*Third.* That should the premises hereinafter described be deeded for the purpose of a technical school and a Y. M. C. A. building, access shall be given from the thirty (30) foot entrance area on Court street to said premises.

"Grantors reserve to themselves and assigns the right of possession and occupancy of the above described premises until the grantee, or its duly authorized officers or agents, has executed a valid contract for the erection and construction of a state armory thereon.

"Grantors further reserve to themselves and assigns the right to remove from said premises all buildings, fences, interior walks, shrubs and trees thereon within thirty (30) days after notice from grantee that it has executed said contract for the erection and construction of said armory.

"The grantors herein, for themselves, their heirs, executors, administrators and assigns, do hereby covenant with the grantee, its successors and assigns, that no building or buildings shall be erected on the premises hereinafter described, and which are now the property of grantors, that do not conform in style of architecture to that used in the design of the armory building to be built on the premises herein conveyed, and that such building or buildings shall not exceed four (4) stories in height, of not more than ten (10) feet in the clear of each ceiling; that any building or buildings built on the premises hereinafter described will only be to the south of the said armory; and further, that no intoxicating liquor shall ever be sold on the premises hereinafter described, nor shall the same be used in any way as to become an annoyance or nuisance to grantee herein, its successors or assigns, or to the neighborhood; said premises being as follows:

" 'Situated in the city of Fremont, county of Sandusky, and state of Ohio, and described as follows:

" '*First.* Beginning at the northeast corner of inlot one hundred and eight (108); thence westerly fifty-two (52) feet on the south line of Park Place to the northeast corner of lot herein deeded by Webb C. Hayes and Mary Miller Hayes, his wife, to the state of Ohio; thence southerly along the east line of said property one hundred and fifteen (115) feet; thence westerly parallel to the south line of Park Place twenty-five (25) feet; thence southerly parallel to the west line of inlot one hundred and eight (108) to the north line of Court street; thence east seventy-seven (77) feet on the north line of Court street; thence northerly on the east line of inlot one hundred and eight (108) one hundred and seventy-four (174) feet and four (4) inches to the place of beginning.

" '*Second.* Beginning at the northeast corner of Court street and Park avenue; thence along the north line of Court street sixty-six (66) feet and three (3) inches; thence northerly parallel to the west line of inlot one hundred and nine (109) sixty-nine (69) feet and four (4) inches; thence west parallel to the north line of Court street twenty-five (25) feet to the west line of inlot one hundred and nine (109); thence along said west line of inlot one hundred and nine (109) to a point twenty (20) feet north from the north line of inlot one hundred and ten (110); thence westerly twenty-two (22) feet and four (4) inches to a point; thence southwesterly twelve (12) feet and nine (9) inches to a point; thence westerly forty-six (46) feet and six (6) inches to the east line of Park avenue; thence southerly along the east line of Park avenue seventy-four (74) feet and eight (8) inches to the place of beginning.'

"Grantors for themselves, their heirs, executors, and administrators, further agree that in any and all deeds made by them for the two tracts of

land last above described, or either of them, they will place therein convenants to the same effect as herein contained relative to said property.

"IN WITNESS WHEREOF, the grantors herein have hereunto set their hands the ————————day of ————————————, A. D., 1916.

"Signed and acknowledged
in the presence of ————————————————

————————————————

————————————————

"THE STATE OF OHIO,
SANDUSKY COUNTY. } ss.

"Before me, a notary public in and for said county and state, personally appeared the above named WEBB C. HAYES and MARY MILLER HAYES, his wife, who acknowledged that they did sign the foregoing instrument, and that the same is their free act and deed.

"IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal, at Fremont, Ohio, this ———————— day of ————————————, A. D., 1916.

————————————————

"Notary Public."

I am retaining the plats which you submitted with your inquiry, but am returning to you the proposed deed submitted by you from Colonel Hayes and wife to the state. You understand, of course, that should the form of deed which I have prepared meet with the approval of yourself and the grantors, the title to the property will have to be examined in order to determine whether or not the state will receive a good title thereto. Therefore, an abstract of title should be submitted to this department for examination.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

————————————

1689.

OHIO PENITENTIARY COMMISSION—PROPOSAL OF ARCHITECTS NOT APPROVED—COVERS SERVICES IN SUPERVISION OF CONSTRUCTION OF BUILDINGS—CONSTRUCTION OF BUILDINGS UNDER JURISDICTION OF OHIO BOARD OF ADMINISTRATION.

Proposal of Messrs. Richards, McCarty and Bulford, Architects, made to the Ohio penitentiary commission not approved, since said proposal covers services in supervision of the construction of buildings. The construction of the buildings is placed under the jurisdiction of the Ohio board of administration.

COLUMBUS, OHIO, June 13, 1916.

HON. SAMUEL J. BLACK, *Sec'y Ohio Penitentiary Commission, Upper Sandusky, Ohio.*

DEAR SIR:—Under date of April 29th you wrote me to the following effect:

"The Ohio penitentiary commission, of which I am secretary, have selected Richards, McCarty & Bulford as the architects for the proposed

penitentiary, and Governor Frank B. Willis has approved said architects. At a meeting of this commission held on the 29th inst., a letter from the above named architects was submitted setting forth the terms covering their employment in this capacity, and the commission by unanimous vote accepted the proposition as submitted when approved by the attorney-general and the governor as provided by the law creating said penitentiary commission.

"I have been authorized by the commission to request from you a written opinion as to the legality of said proposition."

You have submitted to me the letter of Messrs. Richards, McCarty & Bulford to Mr. James A. Leonard, superintendent of Ohio state reformatory, under date of April 25, 1916, wherein it is stated as follows:

"We are enclosing herewith the original proposition which is intended to outline pretty fully the points necessary to consider in making a preliminary arrangement for our service. We have intended to draw this letter in such a manner as to make it a preliminary contract when accepted by you."

The letter referred to, and which when accepted is to constitute a preliminary contract according to the terms of the letter to Mr. Leonard, is one addressed to the Ohio penitentiary commission by Messrs. Richards, McCarty & Bulford, under date of April 25, 1916, submitting their proposition as a basis of the contract for their service as architects in connection with the proposed new penitentiary. After stating some preliminary matters, the letter contains five propositions, as follows:

"FIRST. We propose to place at your disposal our professional service including the service of our office force and organization for the purpose of making such preliminary investigations as you may see fit as to the best method of procedure in outlining the work to be done, up to such a point as will enable you to determine to just what stage in the progress of the plans and specifications for the proposed institution it would be wise and equitable for you to enter into a contract with us, upon a per diem basis as follows, viz.:

"For the time of a member of the firm outside of the office, either in traveling or attending meetings of the commission at points other than Columbus, there will be charged against this work twenty-five dollars ($25.00) per day plus actual traveling expenses; traveling expenses to include such items as transportation of all kinds, necessary hotel bills and proper incidental items due to being away from the home office.

"For the time of a member of the firm spent in the office engaged in this work a charge will be made of two dollars ($2.00) per hour.

"For the time of draftsmen and employes of this office a charge will be made of the actual cost to us of the draftsmen's time as shown by the records filed in this office each day the draftsmen work on this institution.

"If after starting the investigation it develops that you are not satisfied with our service and wish to make a settlement with us, you will be at liberty so to do upon paying to us the gross amount of the charges as shown by our books at the rates above listed up to the date of dispensing with our service plus an amount equal to twenty-five per cent. (25%) of the gross amount of said charges to cover our overhead cost in connection with the work.

"SECOND. Should it be determined by you to proceed with us to such a point as will complete the general preliminary drawings for the entire institution, consisting of the following, viz. plats and maps of the ground showing roads, sewers, water lines, buildings, grouping and arrangement of buildings and departments, the necessary sections, elevations and perspectives showing

not only the entire institution and the assembling of its various departments, but in addition to this, showing preliminary plans of the individual buildings composing the institution together with the necessary sections, elevations and perspectives of the same, with such descriptions and explanations as will set forth in a general way the material to be employed and the character of construction to be used throughout, together with a general estimate of the entire cost of the institution complete, then and in that event the service to be rendered by us shall extend to the completion of such preliminary plans and information as is above outlined, and if it is desired by you to settle with us and dispense with our service upon such completion of such preliminary plans, due to any dissatisfaction with our service rendered, you will be at liberty so to do upon payment to us of an amount equal to one and two-tenths per cent. (1.2%) of the estimated cost of the work for which such preliminary plans, descriptions and estimates have been prepared, plus our actual traveling expenses outside of the state of Ohio caused by making investigation regarding this work.

"It is further understood that should our service with you extend to the point of the completion of the preliminary studies and estimates above outlined and for which a charge of one and two-tenths per cent. of the estimated cost is to be made, then and in that event the amount fixed for compensation for preliminary studies includes all of the items mentioned in the per diem charge except the item of traveling expense outside of the state of Ohio, and any amount that shall have been paid us on our per diem charges, either for members of the firm in or out of the office, or for draftsmen or employes of the firm, shall be credited as a partial payment on the one and two-tenths per cent. charged for the preliminary studies.

"THIRD. Should you desire to employ our service beyond the preliminary stage last above mentioned to such a point as will complete the working drawings and specifications for the entire institution, or for any of the separate buildings or units thereof, ready to submit to the contractors for bids, having us prepare all working plans and specifications, bills of material and estimates, attend the letting, tabulate the bids, prepare the contracts with the contractors, in a word, render fully professional service up to the point of actually starting construction of the buildings, not including the supervision of the construction, our compensation for this last mentioned service shall be an amount equal to two and four-tenths per cent. (2.4%) of the lowest responsible bids received on such completed plans and specifications as we have prepared.

"FOURTH. Should you desire to retain our service to supervise the construction of the work or any portion thereof and render full professional service to the completion of the construction of the same, then and in that event our compensation for this last mentioned service shall be an amount equal to two and four-tenths per cent. (2.4%) of the actual cost of the work executed under our supervision and direction.

"FIFTH. It is understood that for full professional service in connection with this work the gross amount paid us for preliminary studies, working plans and specifications, detailed drawings, estimates, bills of material and supervision of the construction, shall not exceed an amount equal to six per cent. (6%) of the cost of the work complete, divided and apportioned approximately as above outlined for the various stages of the work as it progresses, except that we shall be entitled to receive in addition to the six per cent. mentioned our actual traveling expenses outside of the state of Ohio caused by making investigation regarding this work."

And then follows a summary.

Before coming to consider the various propositions submitted in the letter heretofore referred to, it would be well to consider the legislation passed in 1913 in "An act to provide for the appointment of a commission to acquire a site, and to prepare and adopt plans for the erection thereon of a new penitentiary" (103 O. L., 247).

The said act, after specifying the manner in which the state shall acquire the site upon which the new penitentiary is to be erected, provides as follows:

Section 11 provides that the commission shall prepare ground plans of and plans for the erection of a new penitentiary; that is shall, by visitation or otherwise, secure information, employ a competent architect, and do whatever else may be necessary and essential to obtain the best possible plans for this purpose; that the commission is to fix the fee of the architect, which shall, together with other expenses incident to the preparation of such plans, be paid in the same manner as other expenses of the commission. The employment and compensation of the architect is subject to the approval of the governor.

Section 12 provides:

> "Before any ground plans or plans for the erection of a new penitentiary, or building or groups of buildings constituting part or units of the same, are finally approved and adopted by the commission, such plans shall be exhibited in the state house for not less than fifteen days, and any criticism of the same shall be considered by such commission in determining whether such plans shall be finally adopted."

Section 13 provides:

> "Such commission shall determine what ground plans and plans for the erection of the new penitentiary shall be adopted by formal vote of the commission at a public meeting. The plans adopted by the commission shall thereupon be submitted to the governor for his approval; if approved by him such plans shall be the final plans for the erection of the new penitentiary, and thereafter shall not be changed except when necessary, and then upon the consent of the governor, the penitentiary commission and the board of administration."

Section 14 provides that upon the final approval of such plans, the board of administration is to construct the new penitentiary, such construction in all things to conform to and be governed by the plans approved as before provided for; and that after the final approval of the plans the penitentiary commission shall, until relieved by the governor, continue to act in an advisory capacity to the board of administration.

From the above provisions of the statute it is clear that the commission is to employ an architect to cause to be prepared ground plans, which must undoubtedly mean the location of the various buildings upon the penitentiary site and plans for the erection of the various buildings to be located thereon; but that before any ground plans or any plans for the erection of any building or buildings are finally approved and adopted they shall be exhibited in the state house for not less than fifteen days for criticism; that after such ground plans and plans for the erection of the various buildings have been so exhibited the commission shall, by formal vote, adopt the same at a public meeting, shall thereupon submit the same to the governor for his approval, and, when approved, such plans shall be *final* plans for the erection of the building or buildings.

The proposal of the architects is, first, that they should make preliminary investigations, for which they are to be paid certain per diem fees.

Second. After the preliminary investigation has been conducted, if the result thereof is satisfactory, the architects are to proceed to complete "general preliminary drawings for the entire institution, consisting of the following, viz: plats and maps of the ground showing roads, sewers, water lines, buildings, grouping and arrangement of buildings and departments, the necessary sections, elevations and perspectives showing not only the entire institution and the assembling of its various departments, but in addition to this showing preliminary plans of the individual buildings, together with the necessary sections, elevations and perspectives," and a general estimate of the entire cost of the institution; for which the architects are to receive one and two-tenths per cent. of the estimated cost plus actual traveling expenses outside of the state.

Third. Should final plans and specifications then be made, the architects are to receive two and four-tenths per cent. of the lowest responsible bid received on such completed plans and specifications.

Fourth. Should the architects supervise the buildings determined to be built, they are to receive two and four-tenths per cent. of the actual cost of the work; the architects, however, under no circumstances, to receive more than six per cent. of the cost of the work complete.

A reading of the entire proposal made by the architects shows that it is their desire to cover the complete work of construction and supervision of the new penitentiary, but the question to be decided is whether the penitentiary commission can enter into such an arrangement.

At the beginning of their letter of April 25th they state that it is understood that if their proposition be accepted it shall not be construed as binding the state of Ohio to pay a sum in excess of _____ "until such an amount shall have been appropriated for this purpose by the general assembly of the state of Ohio."

I have ascertained from the auditor of state that the amount still available for the purposes of the commission on May 18, 1916, was $9,899.46.

There is no doubt that if a proper investigation and preliminary studies be made for the new penitentiary it will be determined that several buildings should be built, and preliminary plans for said several buildings will be made and the cost thereof estimated. The commission now has a little less than $10,000 for all purposes, and said amount will under no circumstances be sufficient, should the commission determine after the preliminary investigation has been made to proceed with the preliminary plans, to pay the one and two-tenths per cent. which would be due the architects upon completion of said preliminary plans.

The proposal provides that should the proposition be accepted and the preliminary work meet the approval of the Ohio penitentiary commission " a contract or contracts will be entered into as soon as sufficient facts and data can be determined upon, and that these contracts will provide for our employment to such a point as will carry through to completion one or more of the various stages of the work hereinafter described."

It seems to be recognized throughout the proposal that no contract or contracts, as above specified, can be entered into until an appropriation has been made. This, as I construe the matter, is sufficiently clear not to bind the state of Ohio until a proper appropriation has been made. The same is true as to the various other stages of the work.

However, in the fourth proposition submitted by the architects they undertake to contract with the penitentiary commission as to the compensation that is to be paid to them for services in supervising the building or buildings during construction. Under the law as hereinbefore set out, after the final plans and specifications have been duly approved, they are then turned over to the board of administration, which said board is to proceed with the construction in accordance with such plans and specifications. While it is true that, unless relieved by the governor, the penitentiary

commission shall continue to act in an advisory capacity to the board of administration, yet I do not believe that the continuing of said commission in an advisory capacity would authorize it to enter into a contract with any architects to supervise the construction of said building after the final plans and specifications are adopted. Therefore, so far as the fourth proposition contained in the architects' proposal is concerned, it would be entirely outside of the scope of the powers of the commission to enter into any such arrangement.

For the foregoing reason, therefore, I am of the opinion that the proposition submitted by the architects to your commission is not such a proposition as can be accepted by your commission.

The conclusion reached above need not, as I view it, interfere with the main purpose of the employment. My suggestion in order to carry out the plain intention of the proposal would be that the same should be addressed both to the Ohio penitentiary commission and the board of administration; and that when so addressed the said proposal should be accepted by both of the above boards.

(1) So far as the first step, to wit, the preliminary investigation, is concerned, as before stated, there is now to the credit of the Ohio penitentiary commission something over $9,000, and as the preliminary investigation is to be conducted on a per diem basis, I am of the opinion that the services of the architects can be accepted in regard to the preliminary investigation to the extent that there is money now available to pay them for such services, and when a further appropriation shall have been made by the general assembly for such purpose, may be continued to the extent of such appropriation.

(2) After the investigation has been made, if the commission determines to continue the services of the architects, the contract provided for in the preliminary contract should be entered into between the architects and the Ohio penitentiary commission, embodying all terms and conditions that should be properly embodied in such a contract, as soon as the legislature has appropriated sufficient money to pay the architects the percentage agreed upon in such contract.

(3) After the general preliminary drawings have been made, if the commission determines to continue the services of the architects and determines to have final plans of some or all of the proposed buildings completed, the contract provided for in the preliminary contract should be entered into between the architects and the Ohio penitentiary commission, embodying all terms and conditions necessary in such a contract to carry the same into effect, when the legislature has appropriated money sufficient to pay the architects for their services at the completion of said work.

(4) After the final plans have been legally approved and the same turned over to the board of administration to be used in construction, the contract provided for in the preliminary contract should be entered into between the architects and the board of administration, embodying all the terms and conditions necessary to be embodied in such contract, for the supervision of such construction, and specifically containing the proposal of the architects that the entire cost to the state, including the amount already received by them from the Ohio penitentiary commission, should not exceed the six per cent. provided for.

A slight change in the proposal submitted by the architects and which upon being accepted is to constitute the preliminary contract will, I believe, suffice to carry out the plain intention of the parties and, when accepted, will be legal and binding.

As the question of the rate of compensation to be paid the architects is not before me, I desire it to be fully understood that I do not in any way pass upon the rate of compensation provided for in the proposal, but only to the legality of employing architects in the manner set out therein.

Under section 11 of house bill No. 556 (103 O. L., 247-249) it is provided that the employment and compensation of the architect "shall be subject to the approval of the governor." Therefore, not only is the employment, but likewise the compensa

tion to receive the approval of the governor. In your letter of April 29th you state that your commission has selected Richards, McCarty & Bulford as the architects and that the governor has approved said architects, but there is no statement in your letter that the governor has likewise approved the compensation. Therefore, as soon as your commission and the Ohio board of administration have accepted the proposal, revised as herein suggested, the same should receive the approval of the governor.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1690.

BOARD OF LIBRARY COMMISSIONERS—WHERE BOARD REMAINED IN QUARTERS AFTER EXPIRATION OF TWO YEAR LEASE—HOW LONG LEASE IS EXTENDED.

The board of library commissioners, having continued in its present quarters after the expiration of its two-year lease, the date of expiration being April 10, 1916, *and having paid rent for April and May, the landlord accepting the same, and the adjutant general not having prior to the expiration of the term of the lease provided other quarters for said board, the term of said lease was thereby extended to April* 10, 1917.

COLUMBUS, OHIO, June 13, 1916.

HON. BENSON W. HOUGH, *Adjutant General of Ohio, Columbus, Ohio.*

DEAR SIR:—A few days ago your department submitted to me copy of a lease between the Central Ohio Paper Company and the board of library commissioners of Ohio, together with certain correspondence had by you with said Paper Company, and asked my opinion as to whether or not the contention made by the Paper Company is correct, or whether you are now at liberty to make a lease with the Stoneman Realty Company for quarters in its building, to be taken possession of immediately by the board of library commissioners.

The lease submitted is one made on the 4th day of April, 1914, between the Central Ohio Paper Company and the board of library commissioners of Ohio, for the term of two years from April 10, 1914, fully to be completed and ended April 10, 1916, the amount of the rental to be paid being $100.00 per month for the first year and $125.00 per month for the second year. One of the covenants of the lease is as follows:

> "It is also agreed and understood by the parties of this lease or contract, and the same is unders ood that said party of the second part is hereby given option to extend, at its own will and desire, the term of this lease for an additional term of 1, 2 or 3 years as it may desire upon the same conditions as are provided herein for the definite term of two years.
>
> "It is also agreed and understood, however, that if the party of the second part desires to extend the terms for an additional year, it must give the lessor ninety days notice of such desire before the expiration of the two year term."

It appears that the library commissioners have occupied the premises up to the present time, being after the original term of two years as fixed by the lease, and that no notice was served on the lessor, within the ninety days specified, of its intention of continue in the premises.

From the correspondence enclosed it appears that on June 1, 1916, you notified Mr. Orland Miller, of the Central Ohio Paper Company, as follows:

> "This is to notify you that on or before July 1, 1916, the room in your building occupied by the traveling library, will be vacated.
>
> "This move is not made necessary through any action on your part as owner of the building, but rather with a view of saving money for the state of Ohio."

In reply to the said letter is a letter to the following effect:

> "Acknowledging your esteemed favor of the 1st: I have to advise that we hold a lease, signed by the board of library commissioners for the room occupied by the traveling library, which does not expire until April 10, 1917, and can not consent to cancellation of said lease before that time. The payment of the rent in April and May of this year by the board of library commissioners was in effect a renewal of the lease for one year from April 10, 1916."

There can be no question raised in this matter as to the appropriation, as that matter was fully determined in the case of State ex rel. Ross et al. v. Donahey, auditor, 93 O. S., 414.

The law of Ohio relative to the holding over by a tenant under a lease for a term of years is set out in the second branch of the syllabus in the case of Railroad Co. v. West, 57 O. S., 160, which is as follows:

> "Where, after the expiration of the term, the tenant holds over and pays rent for a part of another year, without any new agreement with the landlord, he becomes a tenant for that year at the same rent, and cannot terminate the tenancy before the end of the year without the landlord's consent."

The court, at page 165, says:

> "And when, after the expiration of the term, he holds over into another year without any new agreement or arrangement with the landlord, the latter may treat him as a tenant for that year at the same rent and upon the terms and conditions of his prior occupancy, or, as a trespasser at his election; but if the landlord accept the rent, or acquiesce in such holding over for a considerable time, his election will be regarded as made in favor of the tenancy, and then it cannot be terminated before the end of the year by either party without the consent of the other."

It is true that in the lease submitted there is an option given to the lessee, provided it is exercised within ninety days before the expiration of the original term to extend the term, and that such an option was not exercised in this case. That, however, will in no way estop the landlord from electing, should the tenant hold over, to treat him as a tenant for another year, or as a trespasser and oust him.

Such is the law of Ohio in regard to leases between private individuals. The lease in question was made by the board of library commissioners, at a time when said board was fully authorized to enter into a lease.

Section 146 of the General Code was amended in May 14, 1915 (106 O. L., 319). Said amendment provided that the adjutant general shall have "full control and supervision of fixing and placing all offices, commissions, departments and bureaus of the

state in offices, buildings and rooms outside the state house when the same cannot be placed therein." And further provides:

> "He shall rent all offices, buildings and rooms for all officers, commissions, departments and bureaus of the state located outside the state house and execute all leases in writing for the same on behalf of the state subject to the approval of the governor * * *."

I do not think that this provision of the statute in any way changes the rule of law as laid down in the case of Railroad Co. v. West, supra. The library commissioners having held over after the two year term, and rent having been paid and received for such holding over, their tenancy is referable to the original lease, and the original lease being valid in its inception and their tenancy referable thereto, I do not believe that the contract so entered into can be abrogated.

For that reason I am of the opinion that the contention made by the lessor in this case is correct, and that there is a valid lease for the premises now occupied by the traveling library up until April 10, 1917.

I am returning herewith the lease and other papers submitted by you.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1691.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY UNION COUNTY, OHIO.

COLUMBUS, OHIO, June 14, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

> "RE:—Bonds of Union county, Ohio, in the sum of $12,300.00 to pay the cost of improving the Moore-Williamson road, being one bond of one hundred dollars, and 20 bonds of six hundred and ten dollars each."

I have examined the transcript of the proceedings of the county commissioners and other officers relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of Union county.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1692.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, UNION COUNTY, OHIO.

COLUMBUS, OHIO, June 14, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Union county, in the sum of $270.00 for Moore ditch No. 1065 improvement in Claibourne township, being one bond of $70.00 and two bonds of one hundred dollars each."

I have examined the transcript of the proceedings of the county commissioners and other officers relative to the above bond issue, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the provisions of the General Code, and the resolutions of the county commissioners authorizing the issuance of the same, and executed by the proper officers will, upon delivery, constitute valid and binding obligations of Union county.

As no bond and coupon form was attached to the transcript I should have an opportunity of examining the bonds when presented to the treasurer of state for delivery.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1693.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY UNION COUNTY, OHIO.

COLUMBUS, OHIO, June 14, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Union county, Ohio, in the sum of $1,570.00, for Westlake ditch No. 1057 improvement in Paris and Taylor townships, being one bond of five hundred and thirty dollars, and two bonds of five hundred and twenty dollars each."

I have examined the transcript of the proceedings of the county commissioners and other officers relative to the above bond issue, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the provisions of the General Code, and the resolutions of the county commissioners authorizing their issuance, and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of Union county.

As no bond and coupon form was attached to the transcript I should have an opportunity of examining the bonds when presented to the treasurer of state for delivery.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1694.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY UNION COUNTY, OHIO.

COLUMBUS, OHIO, June 14, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Union county, Ohio, for Kunz ditch No. 1064 in York township, amounting to $1,520.00, being one bond of $320.00, and four bonds of $300.00 each."

I have examined the transcript of the proceedings of the county commissioners and other officers relative to the above bond issue, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the provisions of the General Code, and the resolutions of the county commissioners authorizing their issuance, and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of Union County.

As no bond and coupon form was attached to the transcript I should have an opportunity of examining the bonds when presented to the treasurer of state for delivery.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1695.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY UNION COUNTY, OHIO.

COLUMBUS, OHIO, June 14, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:

"RE:—Bonds of Union county, Ohio, for Haner ditch No. 1060 improvement in Washington township, in the sum of $1,050.00, being 3 bonds of $350.00 each."

I have examined the transcript of the proceedings of the county commissioners and other officers relative to the above bond issue, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the provisions of the General Code, and the resolutions of the county commissioners authorizing their issuance, and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of Union county.

As no bond and coupon form was attached to the transcript I should have an opportunity of examining the bonds when presented to the treasurer of state for delivery.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1696.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY UNION COUNTY, OHIO.

COLUMBUS, OHIO, June 14, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Union county for McMahon ditch No. 1059 improvement, in the sum of $950.00, being one bond of $310.00, and two bonds of $320.00 each."

I have examined the transcript of the proceedings of the county commissioners and other officers relative to the above bond issue, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the provisions of the General Code, and the resolutions of the county commissioners authorizing their issuance, and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of Union county.

As no bond and coupon form was attached to the transcripts I should have an opportunity of examining the bonds when they are presented to the treasurer of state for delivery.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1697.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY UNION COUNTY, OHIO.

COLUMBUS, OHIO, June 14, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Union county for Brown ditch No. 1066 improvement in Jerome township, in the sum of three hundred dollars, being three bonds of $100.00 each."

I have examined the transcript of the proceedings of the county commissioners and other officers relative to the above bond issue, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the provisions of the General Code, and the resolutions of the county commissioners authorizing their issuance, and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of Union county.

As no bond and coupon form was attached to the transcripts I should have an opportunity of examining the bonds when presented to the treasurer of state for delivery.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1698.

COMBINED NORMAL AND INDUSTRIAL DEPARTMENT OF WILBERFORCE UNIVERSITY—LIABILITY FOR TUITIONS PAID BY STUDENTS TO WILBERFORCE UNIVERSITY WHICH BELONG TO SAID ABOVE NAMED DEPARTMENT.

The combined normal and industrial department of Wilberforce university should not pay to Wilberforce university amount due to such university for teaching service to students of the C. N. and I. department until said university has paid to said department the amount of fees which said university received belonging to said department.

COLUMBUS, OHIO, June 15, 1916.

HON. WILLIAM A. JOINER, *Financial Officer, C. N. and I. Department, Wilberforce University, Wilberforce, Ohio.*

DEAR SIR:—I am in receipt of your letter of June 5, 1916, requesting an opinion as follows:

"In the interest of correct office procedure and proper accounting as financial officer for the combined normal and industrial department at Wilberforce university, I have the honor to request an opinion in the case following:

"Statement of facts:

"The combined normal and industrial department offers to students, resident in Ohio, normal and vocational instruction free of tuition, and to students registering from other states a small fee is charged.

"When such non-resident students take literary work in Wilberforce university said students pay also to said university a term fee.

"In September, 1915, K. Carpenter and E. Matthews registered under C. N. and I. department as special students in domestic science; M. Thompson and M. M. Symore registered in C. N. and I. department as special students in carpentry.

"All four were assigned to take some literary work and each paid to the office of the secretary of Wilberforce university a term fee of $6.25, and into this office a like fee of $6.25, making full tuition fee of $12.50 (All being non-residents). Amount of fees collected in this office was duly forwarded to state treasurer as receipts.

"The second term fees were paid in like manner by Carpenter and Matthews, Symore became a 'labor' student (working for his tuition) while the secretary of Wilberforce university collected from Thompson the entire tuition $12.50, i. e., $6.25 due the university office and $6.25 due this office, which, upon request, they declined to surrender.

"At the opening of third term, the university collected the entire fee $12.50 from Carpenter, Matthews and Thompson, Symore remaining a labor student. All students are required to register first at office of president, whence they are sent to their respective departments.

"The books of this office show one-half the above mentioned tuitions collected by the university office due and payable to this office as revenue of the state, to wit, $25.00.

"This department pays to Wilberforce university monthly for teaching service to students of this C. N. and I. department, the sum of $500.00, the last of which payments for the present fiscal year will soon be due; so also

will be due to the state from this C. N. and I. department all tuitions, revenues, etc. (vide Mooney bill).

"Question:

"Is this office liable for these tuitions, to wit: $25.00 due this department and collected and held by Wilberforce university?

"If so, should amount be deducted from amount due from this department to Wilberforce university; or should payment be withheld till settlement is made? Or what steps should be taken to collect same?"

The Wilberforce university and the combined normal and industrial department are two separate and distinct institutions, the latter being a state institution and the former a private institution.

You state in your letter that you charged the persons named, being non-residents a term tuition fee of $6.25, which amount was paid in by the persons mentioned; that the second term fees of two of the parties named were paid direct to you, the third becoming a "labor" student and therefore not required to pay a tuition fee; that the fourth paid his entire tuition fee to the secretary of Wilberforce university, being the fee charged by the university as well as the fee charged by your department, and that upon request the said university refused to surrender the same to you; that at the opening of the third term the university collected the entire fee, both due to the university and to your department, from the three students named who are required to pay the fee, and that the university refuses to turn over to your department its proportionate share therof. You ask whether your office is liable for the tuition, by which I understand you to mean whether or not you are liable to the state for the tuitions in question, you not having received the same.

I do not believe you are liable to the state for those fees which you did not receive. It is, of course, the policy of the state that fees due the state should first be paid before the services are rendered; in other words, that the state does not do a credit business. However, in this instance it seems that the students have done all that was in their power to do, and presumed that they had paid properly when they paid the entire fee to the university proper.

Since your department pays to Wilberforce university monthly for teaching service to students a certain sum, I am of the opinion that you should not pay any further sums to said university until said university has settled with you for so much of said fees received by it as your department is entitled to receive.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1699.

MUNICIPAL CORPORATION—SECTION 4564, G. C., REQUIRES THAT WHERE A MUNICIPAL CORPORATION OWNS ITS WORKHOUSE AND PRISON, IMPRISONMENT FOR VIOLATION OF ORDINANCES SHALL BE IN SAID WORKHOUSE OR PRISON.

Where a municipal corporation owns and operates a city workhouse and a city prison, the first part of section 4564, G. C., requires that imprisonment under the ordinances of such municipal corporation shall be in said workhouse or prison.

COLUMBUS, OHIO, June 15, 1916.

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

GENTLEMEN:—In your letter of May 15th you request my opinion on the following question:

> "Did the judge of the police court of the city of Columbus, Ohio, (1914-1915), have authority to sentence persons convicted of the violation of the city ordinances to the Franklin county jail, said city of Columbus, Ohio, at the time owning and operating its own city prison and work house in the absence of a contract between the city of Columbus (through its director of safety) and Franklin county (through the county commissioners), if, at the time said sentences were imposed, there was sufficient accomodations in the city prison or the work house for the confinement of prisoners therein?"

I call your attention to section 4564, G. C., which provides as follows:

> "Imprisonment under the ordinances of a municipal corporation shall be in the workhouse or other jail thereof, if the corporation is provided with such workhouse or a jail. Any corporation not provided with a workhouse, or other jail, shall be allowed, for the purpose of imprisonment, the use of the jail of the county, at the expense of the corporation, until it is provided with a prison, house of correction, or workhouse. Persons, so imprisoned in the county jail shall be under the charge of the sheriff of the county, who shall receive and hold such persons in the manner prescribed by the ordinances of the corporation, until discharged by due course of law."

From your statement of facts it appears that during the years mentioned in your inquiry the city of Columbus owned and operated a city prison and city workhouse. In view of this fact it is clear that under provision of the first part of section 4564, G. C., supra, the imprisonment of the persons, referred to in your inquiry, should have been in the prison or workhouse of said city. It follows that the director of public safety of the city of Columbus could not have entered into a valid contract with the commissioners of Franklin county for the maintenance of the aforesaid persons at the county jail at the expense of said city. There is, therefore, no liability on the part of said city for said maintenance.

If, however, the city has paid the county for said maintenance, I am of the opinion that said county cannot be required to refund to said city the amount so paid by it.

In view of the foregoing your question must be answered in the negative.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1700.

COUNTY RECORDER—NO FEE MAY BE CHARGED BY SUCH OFFICER FOR FILING AN OIL MAP.

No fee may be charged by a county recorder for filing an oil map under the provisions of section 973, G. C.

COLUMBUS, OHIO, June 15, 1916.

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

GENTLEMEN:—I have your letter of June 13, 1916, submitting the following inquiry:

> "Is the county recorder legally entitled to charge a fee for the filing of the map required to be filed with him by the provisions of section 973, General Code?"

The provisions of section 973, G. C., to which you refer in your foregoing inquiry, in so far as they are pertinent to said inquiry, are as follows:

> "Any person, firm or corporation causing to be drilled any well for oil or gas or elevator well or any test well within the limits of any coal producing county of this state, must give notice, in writing, of such fact to the chief inspector of mines, stating the location of the land upon which such well is to be drilled.
>
> "It shall be the duty of any such person, firm or corporation to make or cause to be made an accurate map on a scale of one inch to four hundred feet, showing on said map the location and number of wells, the property lines of the property upon which located in the township, section and quarter section in which the same is being drilled, together with a measurement from the section line and also from the quarter section line, together with the sworn statement of the person, firm or corporation making said map, the same to be kept on file in the office of the state mining department and shall be open for inspection by the public at all reasonable hours. The original map shall be retained by the owner or surveyor and one blue print filed with the chief inspector of mines and one with the recorder of the county in which such well is located within sixty days after the passage and approval of this act, or after commencing to drill any oil or gas well, and if drilling is still continued on the property already surveyed, a complete blue print shall be made and filed at the end of each year.
>
> "No oil or gas well shall be drilled nearer than three hundred feet to any opening to a mine used as a means of ingrees or egress for the persons employed therein, nor nearer than one hundred feet to any building or inflammable structure connected therewith and actually used as a part of the operating equipment of said mine. * * *
>
> "The property owner or owners shall report to the chief inspector of mines of the commencing to drill of any well or wells for oil or gas on his or their property and shall report at the end of each year thereafter if drilling is continued the number of wells drilled on his or their property, the date drilled and by whom drilled.
>
> "When any oil or gas well is to be abandoned, the person, firm or corporation having drilled or operated such well, shall notify the chief inspector of mines, at least ten days in advance so that he may direct one of his district inspectors to be present at the time of abandonment."

An inspection of the provisions of said statute aforesaid indicates that its primary purpose is to keep the state mining department, the chief inspector of mines and the public generally fully advised in respect to the operations of all persons, firms or corporations owning and controlling oil or gas wells within the limits of any coal producing county of the state. Its requirements are enacted for the protection of the public and to enable said mining department and chief inspector of mines to effectively enforce the laws for the protection of mining properties and all persons required to be in and about said properties in the operation thereof. It is a law, therefore primarily in the interest of the public and is a police regulation designed for the public's benefit. The legislature has provided no fee or charge for filing said map as in the case of filing a map of an abandoned coal mine, see section 937, G. C. This omission may have been made designedly because of the general purpose of the law as before noted, or it may have been merely an oversight on the part of the legislature. Regardless, however, of the cause of such omission the fact remains that neither in the section quoted nor in any section providing generally for fees or charges for filing an instrument with the county recorder may any provision be found fixing and requiring a fee or payment for the filing of such maps.

This being so, and because the law makes no provision for a fee or charge for filing oil maps under the provisions of said section 973, G. C., supra, I must advise that no fee or charge therefor may be made by the county recorder.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1701.

ROADS AND HIGHWAYS—FORMS FOR ORDINANCES WHERE STATE HIGHWAY COMMISSIONER EXTENDS ROAD IMPROVEMENT THROUGH VILLAGE AND CO-OPERATES DIRECTLY WITH VILLAGE.

COLUMBUS, OHIO, June 15, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*.

DEAR SIR:—I have your communication of May 4, 1916, which communication reads as follows:

> "Permit me to direct your attention to opinion 1317 from your department, in which you advised this department relative to the proper procedure where state aid is extended in improving an extension of an intercounty highway through a village with the co-operation of the county commissioners and township trustees.
>
> "In the last paragraph of your opinion you stated you would be pleased to advise us when necessary as to the proper course to pursue where neither the township or county is able to participate in the cost of such an improvement, and where the village and state desire to co-operate directly.
>
> "I am attaching hereto a copy of letter signed by the clerk of the village of Oak Hill, Jackson county, Ohio, in which the clerk quotes a resolution passed by the village of Oak Hill, agreeing to pay one-half of the cost of the improvement of Railroad street through that village, and requesting that the state pay one-half of the cost. In this case neither the county commissioners nor the township trustees are able to participate in the cost of the improvement, and we desire to co-operate direct with the village.

"I, therefore, respectfully request an opinion from your office as to the proper procedure in this matter."

The resolution heretofore passed by the council of the village of Oak Hill, as set forth in the communication of the clerk of that village, is as follows:

"Be it resolved by the council of the village of Oak Hill that the state highway department be and is hereby tendered the following proposition for paving with brick Railroad street from the north corporation line to the south corporation line through the said village as follows: That the village of Oak Hill pay one-half of the cost of said improvement and the state highway department pay one-half of said cost; that the width of the said improvement from the north corporation line southwardly to the B. & O. S. W. Railroad crossing be paved to a width of sixteen (16) feet; from the B. & O. S. W. Railroad crossing southwardly to the south line of Maple avenue to a width of twenty (20) feet; thence southwardly from the south line of Maple avenue to the south corporation line to a width of sixteen (16) feet."

Section 1231-3, G. C., being section 229 of the Cass highway law, is the section of the General Code relating to the extension of proposed intercounty highway or main market road improvements into or through a village where there is no co-operation by the county or township in which the village is situated. The section in question reads as follows:

"The state highway commissioner may extend a proposed road improvement into or through a village when the consent of the council of said village has been first obtained, and such consent shall be evidenced by the proper legislation of the council of said village duly entered upon its records, and said council may assume and pay such proportion of the cost and expense of that part of the proposed improvement within said village as may be agreed upon between said state highway commissioner and said council. The state highway commissioner may also enter into an agreement with the council of said village to improve any part of the road within said village to a greater width than is contemplated by the proceedings for said improvement, and the state highway commissioner and the council of said village shall be governed as to all matters in connection with said improvement within said village by the statutes relating to road improvements through municipalities by boards of county commissioners."

It will be noted from the above quoted section that the first step to be taken in the premises is the procuring of the consent of the council of the village in question. This consent should be by ordinance or resolution, which should, of course, be duly entered upon the records of the council of the village, and a certified copy of the ordinance should be forwarded to your department and preserved in the files of your office. The state may pay the entire cost of the work within the village, or the cost may be divided between the state and the village in such proportion as may be agreed upon between them. There is also a provision applicable where it is desired by the village that the road be improved to a greater width than is contemplated by the state highway department, but I am informed that it will not be necessary to invoke this provision in the present instance for the reason that the improvement, as contemplated by your department, is of the width desired by the village. It is further provided by section 1231-3, G. C., that the state highway commissioner and the council of the village shall be governed as to all matters in connection with the improvement within the village by the statutes relating to road improvements through municipalities by

boards of county commissioners. These statutes are sections 6949 to 6954, G. C., inclusive.

Section 6949, G. C., extends in terms to municipalities, but in view of the provision of the last sentence of section 6954, G. C., the word "municipality," occurring in this and the subsequent sections, must be read "village." Under section 6949, G. C., a board of county commissioners may extend a proposed road improvement into or through a village when the consent of the council of the village has been first obtained, this consent to be evidenced by the proper legislation of the council entered upon its records. The village may pay such part of the cost of the work within the village as may be agreed upon between the commissioners (state highway commissioner, in the procedure now under consideration) and the council.

It is clear from a consideration of sections 1231-3, G. C., and 6949, G. C., that where you desire to extend a proposed inter-county highway or main market road improvement into or through a village, the first step that must be taken is the action of the village council consenting to such proposed extension. An examination of the subsequent sections, relating to the improvement of roads through villages by county commissioners, which sections are by adoption made applicable to the proceedings which you now have in view, indicates that the agreement relating to the division of cost is to be made after the plans, specifications, profiles, cross sections and estimates have been made and approved by you and transmitted to the village. The action taken by the council of the village of Oak Hill is, therefore, somewhat premature and while the same would probably be regarded as in effect consenting to the making of the improvement, yet in view of the fact that it may be necessary to issue bonds to pay the portion of the cost assumed by the village, I suggest the advisability of starting the legislation anew and requiring the council of the village of Oak Hill to adopt a formal ordinance consenting to the making of the improvement, which ordinance may be in the following form:

"Ordinance No.....

Consenting to the extension by the state highway commissioner of a proposed road improvement through the village of Oak Hill.

"WHEREAS, it is desired by the state highway commissioner of the state of Ohio to extend the improvement of inter-county highway (main market road) No..... through the village of Oak Hill, Jackson county, Ohio, over the following described route, to wit: (Here describe the route through the village), and,

"WHEREAS, said village of Oak Hill is willing to pay one-half of the cost of said improvement within its corporate limits, NOW, THEREFORE,

"Be It Ordained by the council of the village of Oak Hill, state of Ohio,

"Section 1. That said village of Oak Hill, state of Ohio, hereby consents to the construction by and under the supervision of the state highway department of the state of Ohio, of said proposed road improvement through said village along the above described route.

"Section 2. That the clerk of said village be and he hereby is instructed to certify a copy of this ordinance to the state highway commissioner of the state of Ohio.

"Section 3. This ordinance shall take effect and be in force from and after the earliest period allowed by law."

Inasmuch as it is not desired by the council of the village of Oak Hill to improve the highway in question to a width greater than that contemplated by your department, section 6950, G. C., need not be considered.

The next step, after the council of the village has formally given its consent to the construction of the improvement by your department, will be the preparation of

the necessary plans, profiles, cross sections, specifications and estimates for the improvement of the road and the approval of the same by you. After these plans, etc., have been prepared and approved by you, you should certify a copy of the same to the village clerk. This action should be taken in order to conform to the provisions of section 6951, G. C.

Under the provisions of section 6952, G. C., it will be the duty of the council of the village, upon receipt of a certified copy of the plans, etc., to approve the same and enter into formal agreement looking toward the desired division of the cost and expense of the improvement. This action should be taken by ordinance, which ordinance may be in the following form:

"Ordinance No._____

Approving plans, specifications, profiles, cross sections and estimates for the improvement of_____road (street) and agreement with the state of Ohio as to the division of the cost and expense of said improvement.

"WHEREAS, the village of Oak Hill, Ohio, has heretofore consented to the extension, through said village by the state highway department of the state of Ohio, of a proposed road improvement along the following route, to wit: (Here describe the route of the proposed improvement, using the same language as in the former ordinance), and,

"WHEREAS, the state highway commissioner of the state of Ohio has prepared and approved plans, specifications, profiles, cross sections and estimates for said proposed improvement and has caused a certified copy thereof to be filed with the clerk of said village, NOW, THEREFORE,

"Be It Ordained by the council of the village of Oak Hill, state of Ohio,

"Section 1. That said plans, specifications, profiles, cross sections and estimates for said improvement, as prepared and approved by the state highway commissioner of the state of Ohio, be, and the same are hereby approved.

"Section 2. That it is hereby agreed that one-half of the estimated cost and expense of said proposed improvement to be made by and under the supervision of the state highway department of the state of Ohio, according to said plans, specifications, profiles, cross sections and estimates, shall be paid by said village and that all compensation and damages, on account of said improvement, shall be paid by said village.

"Section 3. That the clerk of said village be and he hereby is instructed to certify a copy of this ordinance to the state highway commissioner of the state of Ohio.

"Section 4. This ordinance shall take effect and be in force from and after the earliest period allowed by law."

After the adoption of the above ordinance, the council of the village will be required to cause notice to be given that said plans, etc., have been approved and said agreement entered into by one publication in some newspaper of general circulation in the village, and it is further required that the notice shall fix a time when claims for compensation and damages, on account of the proposed improvement, shall be filed. If any claims for compensation or damages are filed and the council is not able to agree upon the amount of the same with the persons filing such claims, the council must order proceedings to be instituted in a court of competent jurisdiction to inquire into such claims for compensation and damages. All compensation and damages, on account of the improvement, must be paid by the village and all questions of assessment are to be determined and all assessments made by the village. Bonds may be issued by the village, both in anticipation of the collection of special

assessments and in anticipation of taxes levied for the purpose of providing for the payment of that part of the village's share of the cost to be paid by general taxation. The above steps are to be taken by the village authorities and your department is not concerned in the exact procedure followed by the village in its legislation on these matters. Such legislation may be conducted under the supervision of the village solicitor and after the necessary funds have been provided, either by a bond issue by the village or otherwise, it will become the duty of the village to pay to the county treasurer of Jackson county its estimated proportion of the cost of the improvement, as fixed in the agreement set forth in the ordinance adopted by the village council. The funds paid by the village to the county treasurer are to be paid out by the treasurer upon the warrant of the county auditor, issued upon the requisition of the state highway commissioner. As evidence that payment has been made by the village, the village should forward to the state highway department the receipt of the county treasurer. You will be justified in letting a contract for the improvement when a certified copy of the ordinance of the village council, consenting to the extension of the proposed improvement through the village and a certified copy of the ordinance approving the plans, etc., and containing the agreement of the village as to the proportion of the cost to be paid by it, have been filed with you and when the village shall have paid to the county treasurer its estimated proportion of the cost of the improvement, as fixed in the ordinance adopted by its council, and forwarded to you the receipt of the county treasurer showing such payment.

I think the above suggestions will serve as a sufficient guide in all cases where it is not desired by the village to improve the highway to a greater width than is proposed by you.

Should a situation arise where it is desired by a village to improve the road to a greater width than is contemplated by you, the forms of ordinances above prescribed may be readily modified to meet the changed conditions. The following forms of ordinances, based on the assumption that you propose to pave to a width of sixteen feet and that the village desires a pavement twenty-four feet wide and is willing to pay one-half the cost of the sixteen-foot pavement and all the cost due to the widening of the pavement to twenty-four feet will serve as models.

The ordinance consenting to the extension of the improvement may be in the following form:

"Ordinance No_____

"Consenting to the extension by the state highway commissioner of a proposed road improvement through the village of_____.

"WHEREAS, it is desired by the state highway commissioner of the state of Ohio to extend the improvement of inter-county highway (main market road) No_____, through the village of_____, _____county, Ohio, over the following described route, to wit: (Here describe the route through the village), and,

"WHEREAS, it is proposed by the state highway commissioner of the state of Ohio to improve said road (street) to a width of sixteen feet and it is desired by said village that said road (street) be improved to a width of twenty-four feet, and

"WHEREAS, said village of_____is willing to pay one-half of the cost of improving said road (street) within its corporate limits to a width of sixteen feet and is willing to pay all of the cost of improving said road (street) to said additional width, NOW, THEREFORE,

"Be it ordained by the council of the village of_____, state of Ohio,

"Sec. 1: That said village of_____, state of Ohio, hereby consents to the construction by and under the supervision of the state

highway department of the state of Ohio of said proposed road improvement through said village along the above described route.

"Sec. 2: Said village hereby declares its intention to improve said road (street) to a width of twenty-four feet, being a width eight feet greater than that proposed by the state highway commissioner of the state of Ohio.

"Sec. 3: That the clerk of said village be and he hereby is instructed to certify a copy of this ordinance to the state highway commissioner of the state of Ohio.

"Sec. 4: This ordinance shall take effect and be in force from and after the earliest period allowed by law."

The ordinance approving the plans, etc., and agreeing as to the division of the cost and expense, may be in the following form:

Ordinance No.....

"Approving plans, specifications, profiles, cross sections and estimates for the improvement of.....road (street) and agreeing with the state of Ohio as to the division of the cost and expense of said improvement.

"WHEREAS, the village of....., Ohio, has heretofore consented to the extension through said village by the state highway department of the state of Ohio of a proposed road improvement along the following route, to wit: (here describe the route of the proposed improvement using the same language as in the former ordinance), and,

"WHEREAS, said village has heretofore indicated its willingness to pay one-half of the cost of improving said road (street) to a width of sixteen feet and has declared its intention of improving said road (street) to a width of twenty-four feet and has indicated its willingness to pay all the cost of improving said additional width of eight feet, and,

"WHEREAS, the state highway commissioner of the state of Ohio has prepared and approved plans, specifications, profiles, cross sections and estimates for said proposed improvement and has caused a certified copy thereof to be filed with the clerk of said village, NOW, THEREFORE,

"Be it ordained by the council of the village of....., state of Ohio,

"Sec. 1: That said plans, specifications, profiles, cross sections and estimates for said improvement, as prepared and approved by the state highway commissioner of the state of Ohio, be and the same are hereby approved.

"Sec. 2: That said improvement shall be made by and under the supervision of the state highway department of the state of Ohio, according to said plans, specifications, profiles, cross sections and estimates and it is hereby agreed that one-half of the estimated cost and expense of improving said road (street) to a width of sixteen feet, which estimated cost and expense amounts to..... dollars ($.....) shall be paid by said village and that all of the estimated cost and expense of improving said road (street) to said additional width of eight feet, which estimated cost and expense amounts to ..... dollars ($.....) and also all compensation and damages on account of said improvement shall be paid by said village.

"Sec. 3: That the clerk of said village be and he hereby is instructed to certify a copy of this ordinance to the state highway commissioner of the state of Ohio.

"Sec. 4: This ordinance shall take effect and be in force from and after the earliest period allowed by law."

I am returning herewith certain correspondence of your department, relating to an improvement through the village of Waverly, similar to that projected through the village of Oak Hill.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1702.

DISAPPROVAL, RESOLUTION FOR CERTAIN ROAD IMPROVEMENT IN FAYETTE COUNTY, OHIO.

COLUMBUS, OHIO, June 15, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of June 12, 1916, transmitting to me for examination final resolution relating to section "A" of the Cincinnati-Zanesville road in Fayette county, petition No. 2330, I. C. H. No. 10.

Permit me to call your attention to the fact that this resolution does not contain a recital of the total estimated cost and expense of the improvement. It also appears that main market road funds are to be used in part, but it does not appear, either upon the face of the resolution or by a certificate attached to or endorsed thereon, that the road in question is a main market road.

For these reasons I am returning the resolution in question without my approval.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1703.

APPROVAL, RESOLUTIONS FOR IMPROVEMENT OF ROADS IN TEN DIFFERENT COUNTIES.

COLUMBUS, OHIO, June 15, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communications of June 12 and June 14, 1916, transmitting to me for examination final resolutions relating to the following roads:

"Clermont county—Sec. 'H,' Cincinnati-West Union road, Pet. No. 2169, I. C. H. No. 30.

"Clermont county—Sec. 'L,' Bethel-Chilo road, Pet. No. 2177, I. C. H. No. 257.

"Clermont county—Sec. 'L,' Milford-Hillsboro road, Pet. No. 2168, I. C. H. No. 9.

"Harrison county—Sec. 'N,' Cadiz-Carrollton road, Pet. No. 2458, I. C. H. No. 371.

"Hocking county—Sec. 'I,' Chillicothe-Logan road, Pet. No. 2500, I. C. H. No. 363.

"Meigs county—Sec. 'L,' Pomeroy-Marietta road, Pet. No. 2676, I. C. H. No. 161.

"Meigs county—Sec. 'M,' Middleport-McArthur road, Pet. No. 2677, I. C. H. No. 163.

"Miami county—Sec. 'E,' Dayton-Troy road, Pet. No. 518, I. C. H. No. 61.

"Morgan county—Sec. 'H,' McConnelsville-Athens road, Pet. No. 2741, I. C. H. No. 162.

"Seneca county—Sec. 'A,' Fremont-Tiffin road, Pet. No. 2914, I. C. H. No. 269.

"Seneca county—Sec. 'A,' Fremont-Tiffin road, Pet. No. 2914, I. C. H. No. 269.

"Hancock county—Sec. 'F,' Lima-Sandusky road, Pet. No. 2426, I. C. H. No. 22.

"Hancock county—Sec. 'F,' Lima-Sandusky road, Pet. No. 2426, I C. H. No. 22.

"Hancock county—Sec. 'G,' Lima-Sandusky road, Pet. No. 2426, I. C. H. No. 22.

"Hancock county—Sec. 'G,' Lima-Sandusky road, Pet. No. 2426, I. C. H. No. 22.

"Hancock county—Sec. 'H,' Lima-Sandusky road, Pet. No. 2426, I. C. H. No. 22.

"Hancock county—Sec. 'H,' Lima-Sandusky road, Pet. No. 2426, I. C. H. No. 22.

"Wyandot county—Sec. 'A,' Forest-Upper Sandusky road, Pet. No. 3120, I. C. H. No. 233.

"Logan county (township trustees)—Sec. 'D,' Urbana-Bellefontaine road, Pet. No. 2587-T, I. C. H. No. 189, Liberty township."

I find these resolutions to be in regular form and am, therefore, returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1704.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY PAULDING COUNTY, OHIO.

COLUMBUS, OHIO, June 15, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Paulding county, Ohio, in the sum of $55,500.00, to pay the cost and expense of Minning pike improvement, being 55 bonds of one thousand dollars each, and one bond of $500.00."

I have examined the transcript of the proceedings of the county commissioners and other officers of Paulding county relative to the above bond issue, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the provisions of the General Code, and the resolutions of the county commissioners authorizing their issuance, and signed by the proper officers, will, upon delivery, constitute valid and binding obligations of Paulding county.

As no bond and coupon form is attached to the transcript an opportunity should be given me to examine the bonds when presented to the treasurer of state for delivery.

Respectfully
EDWARD C. TURNER,
Attorney-General

1705.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY PAULDING COUNTY, OHIO.

COLUMBUS, OHIO, June 15, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Paulding county, in the sum of $31,500.00, to pay the cost and expense of Hash-Hannenkratt pike improvement, being 31 bonds of one thousand dollars each, and one bond of $500.00."

I have examined the transcript of the proceedings of the county commissioners and other officers of Paulding county relative to the above bond issue, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the provisions of the General Code, and the resolutions of the county commissioners authorizing their issuance, and signed by the proper officers, will, upon delivery, constitute valid and binding obligations of Paulding county.

As no bond and coupon form is attached to the transcript an opportunity should be given me to examine the bonds when presented to the treasurer of state for delivery.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1706.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY PAULDING COUNTY, OHIO.

COLUMBUS, OHIO, June 15, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

RE:—Bonds of Paulding county, Ohio, in the sum of $23,000.00 to pay the cost and expense of Headlit pike improvement, being 23 bonds of one thousand dollars each.

I have examined the transcript of the proceedings of the county commissioners and other officers of Paulding county relative to the above bond issue, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the provisions of the General Code and the resolutions of the county commissioners authorizing their issuance, and signed by the proper officers, will, upon delivery, constitute valid and binding obligations of Paulding county.

As no bond and coupon form is attached to the transcript an opportunity should be given me to examine the bonds when presented to the treasurer of state for delivery.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1707.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, LOWELLVILLE VILLAGE SCHOOL DISTRICT, MAHONING COUNTY, OHIO.

COLUMBUS, OHIO, June 15, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Lowellville village school district, Mahoning county, Ohio, in the sum of $25,000.00 for the purpose of erecting and furnishing on the North side school grounds a fire-proof, two-story additional school building, being fifty bonds of five hundred dollars each.

I have examined the transcript of the proceedings of the board of education and other officers of Lowellville village school district relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted, and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of Lowellville village school district.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1708.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, TRURO TOWNSHIP RURAL SCHOOL DISTRICT, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, June 15, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Truro township rural school district of Franklin county, Ohio, amounting to $5,000.00, in anticipation of the income from taxes levied, being ten bonds of five hundred dollars each."

I have examined the transcript of the proceedings of the board of education and other officers of Truro township rural school district relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted, and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of the said school district.

Respectfully, EDWARD C. TURNER,
Attorney-General.

1709.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY SUGAR GROVE VILLAGE SCHOOL DISTRICT, FAIRFIELD COUNTY, OHIO.

COLUMBUS, OHIO, June 15, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Sugar Grove village school district in Fairfield county, Ohio, in the sum of $5,000.00, to complete the construction of a new school building, being ten bonds of five hundred dollars each."

I have examined the transcript of the proceedings of the board of education and other officers of Sugar Grove village school district relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted, and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of the said school district.

Respectfully, EDWARD C. TURNER,
Attorney-General.

1710.

BI-MONTHLY WAGES—BOARD OF EDUCATION IS NOT CONTROLLED BY SECTION 12946-1, G. C., FOR PAYMENT OF WAGES IN EACH CALENDAR MONTH.

Section 12946-1, *G. C.*, 103 *O. L.*, 154, *does not apply to or control a board of education in fixing the times when employes of the board are to be paid. The law in question applies to and is limited to the ordinary business of a commercial character.*

Section 12946-1, *G. C., is a criminal statute and is to be construed strictly.*

COLUMBUS, OHIO, June 16, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your request for an opinion relative to the law regulating the times of payment of wages with respect to the board of education of Columbus, Ohio,

has been received. The facts in the case are set out in the correspondence between your department and the board of education, which is as follows:

"June 9, 1916.

"MR. E. B. MCDADDEN, *Clerk Board of Education, Columbus, Ohio.*

"DEAR SIR:—It is reported to us that the Columbus board of education has not been paying the teachers and other employes wages twice in each calendar month as provided by law. It is reported to us that in one instance wages have not been paid for a period of five weeks.

"I am forwarding to you, under separate cover, pamphlet containing extracts from the General Code and will call your attention to section 1 page 137.

"Trusting you will arrange pay days in strict accordance with the law, and let us have a satisfactory report at an early date, I am,

"Yours very truly,
GEO. H. HAMILTON,
"Chief Deputy, Division of Workshops and Factories.

"June 9, 1916.

"MR. GEO. H. HAMILTON, *Chief Deputy, City.*

"DEAR SIR:—Your favor of the 9th inst. received this morning. Your information is correct. Neither the teaching corps nor the regular employes of the board of education are paid twice a month. The section of the law to which you refer very clearly applies to commercial institutions, since every term is purely a business term, whereas the school district is a *political subdivision* of the state of Ohio, and has nothing whatever to do with commercial affairs, and the legal advisor of the board of education has ruled the section in no way effects the right of the board to determine when pay-days occur. Besides it could not possibly apply to *teachers*, since the law determines what is a *school month*, which is in no way controlled by the calendar month. However, if this matter has been judicially determined will be very glad to know the fact.

"Respectfully,
"EDW. B. MCDADDEN,
"Clerk-Treas."

The act to provide for the payment of wages at least twice in each calendar month, which is section 12946-1 of the General Code (103 O. L., 154), is as follows:

"Section 1. That every individual, firm, company, copartnership, association or corporation doing business in the state of Ohio, who employ five or more regular employes, shall on or before the first day of each month pay all their employes engaged in the performance of either manual or clerical labor the wages earned by them during the first half of the preceding month ending with the fifteenth day thereof, and shall on or before the fifteenth day of each month pay such employes the wages earned by them during the last half of the preceding calendar month; provided, however, that if at any time of payment an employe shall be absent from his or her regular place of labor and shall not receive his or her wages through a duly authorized representative, such person shall be entitled to said payment at any time thereafter upon demand upon the proper paymaster at the place where such wages are

usually paid and where such pay is due. Provided nothing herein contained shall be construed to interfere with the daily or weekly payment of wages.

"Section 2. * * * Whoever violates the provisions of this act shall be punished by a fine of not less than twenty-five nor more than one hundred dollars."

It will be observed in the first place that the law under consideration is a criminal statute, which under the familiar and well-established rules of construction is to be strictly construed as it is limited in its operation by its exact provisions

There can be no question but that the provision.

"Every individual, firm, company, copartnership, association or corporation doing business in the state of Ohio."

refers to the doing of business in the ordinary commercial sense for a profit, and it cannot be held to include a board of education engaged in carrying out the provisions of the constitution relative to education throughout the state.

While the payment of wages twice a month by the board of education may be desirable and expedient, that matter rests entirely with the board, as it is my opinion that section 12946-1 of the General Code, supra, does not extend to and is not operative on the board of education.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1711.

BOND ISSUE—FLOOD EMERGENCY ACT, 103 O. L., 141—COUNTY COMMISSIONERS HAVE CONTINUING AUTHORITY TO ISSUE BONDS AND NOTES TO PROVIDE FUNDS TO REPAIR, REPLACE OR RECONSTRUCT PUBLIC PROPERTY OR WAYS, INJURED OR DESTROYED IN MANNER AND AT TIME DESCRIBED IN SAID SECTION 1 OF SAID FLOOD EMERGENCY ACT.

Under section 3 of the so-called flood emergency act, 103 O. L., 141, and in the manner provided in said act read in connection with the act of the general assembly amending section 1 of said flood emergency act, 104 O. L., 183, the commissioners of a county have continuing authority to issue bonds or notes of said county "as needed" to provide sufficient money in the flood emergency fund to meet the obligations of such county incurred in repairing, replacing or reconstructing public property or public ways injured or destroyed in the manner and at the time described in said section 1 of said flood emergency act.

COLUMBUS, OHIO, June 19, 1916.

HON. DON. C. PORTER, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—I have your letter of June 15th, which is in part as follows:

"By virtue of the 1913 flood emergency act, 103 Ohio Laws, pages 141 and 760, the commissioners of Coshocton county have heretofore issued bonds in the sum of two hundred thousand dollars for the purpose of repairing and replacing roads and bridges damaged by the 1913 flood. The fund so created has been exhausted but there still remains one bridge and a section of one of our principal highways destroyed by the 1913 flood which are in need of

immediate repair and improvement as a result of the damage caused by the flood. The commissioners state that at the time of the previous bond issue they believed that the fund so created would be sufficient to repair and replace all bridges and highways damaged by the 1913 flood, but that by reason of the increased cost of material and labor the fund is insufficient to complete the bridge and highway mentioned. Would it be proper at the present time to issue 1913 flood emergency bonds for the purpose of repairing and replacing the bridge and highway in question? If in your opinion we cannot lawfully issue bonds by virtue of the 1913 flood emergency act, will you kindly suggest the proper sections of the code to proceed under in order to issue bonds for such repairs and replacements without first submitting the same to a vote of the people."

While section 1 of the so-called flood emergency act (103 O. L., 141) was amended in 104 O. L., 183, so as to extend the provisions of said act to the repair, reconstruction and replacement of public property and public ways destroyed or injured by the floods occuring in July, 1913, and section 6 of said act as originally enacted was amended in 103 O. L., 761, for the purpose of correcting typographical errors, the only section of said act to which reference need be made for the purpose of answering your question is section 3 (103 O. L., 143), which provides as follows:

"For the purposes mentioned in sections 1 and 2 of this act, and for the permanent repair, reconstruction or replacement of public property or public ways destroyed or injured in the manner, and at the time described in section 1 of this act, any board of county commissioners, board of education, township trustees or council of any municipal corporation or the road commissioners of any road district may issue bonds or notes of the corporation, subdivision or district as needed. Resolutions or ordinances providing for the issuance of such notes or bonds shall not be published, shall not require the approval of the electors nor be subject to any referendum. Such resolution or ordinances shall state the facts bringing them within the terms of this act, so far as the emergency is concerned, shall require for their passage the votes of two-thirds of all members elected to such board or council and the recitals therein contained shall be conclusive evidence of the facts recited."

Under the above provisions of said section 3 of said flood emergency act, it will be observed that for the purpose therein mentioned and referred to, your board of county commissioners may issue notes or bonds of the county "as needed," in order to provide sufficient money in the flood emergency fund to meet the obligations incurred in the accomplishing of said purposes, and that this authority continues until the public property and public ways destroyed or injured by the floods of 1913 have been repaired, reconstructed or replaced.

From your statement of facts it appears that the flood emergency fund of your county is exhausted, and that one of the bridges of the county and a section of one of the principal highways of said county, destroyed by said floods, have not yet been reconstructed or replaced. In view of the above provisions of section 3 of said flood emergency act, I am of the opinion in answer to your question that your county commissioners may issue flood emergency bonds for the purpose of replacing or reconstructing the bridge and section of highway referred to in your inquiry, under authority of the provisions of said section 3 of said act and in the manner provided for in said act.

This answer to your first question disposes of your second question.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1712.

PUBLIC UTILITIES COMMISSION—RAILROADS AND PUBLIC UTILITIES CANNOT BE REQUIRED TO PAY ASSESSMENTS MADE UNDER SECTION 606, G. C., BEFORE FIRST DAY OF AUGUST, ANNUALLY.

Railroads and public utilities cannot be required to pay assessments made under section 606, G. C., before the first day of August, annually.

COLUMBUS, OHIO, June 19, 1916.

HON. R. W. ARCHER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—Under date of June 1, 1916, you requested my opinion as follows:

> "In regard to section 606 of the General Code, and Ohio Laws 102, page 550, with reference to the assessment for the maintenance of the Public Utilities Commission of Ohio:
>
> "The matter as to when this assessment should be paid has arisen. The railroads have been paying it on or before August 1st. While we have used this expiration date on our notices to the railroad companies, yet we have attempted to collect the money earlier. We would be glad to have your decision as to when the collection period on this assessment expires."

Section 606 of the General Code provides as follows:

> "For the purpose of maintaining the department of the public service commission of Ohio, and the exercise of police supervision of railroads and public utilities of the state by it, a sum not exceeding seventy-five thousand dollars each year shall be apportioned among and assessed upon the railroads and public utilities within the state by the commission, in proportion to the intrastate gross earnings or receipts of such railroads and public utilities for the year next preceding that in which the assessments are made.
>
> "On or before the first day of August next following, the commission shall certify to the auditor of state the amount of such assessment apportioned by it to each railroad and public utility, and he shall certify such amount to the treasurer of state, who shall collect and pay the same into the state treasury to the credit of a special fund for the maintenance of the department of such public service commission."

Since the statute provides that the Public Service Commission shall certify to the auditor of state on or before the first day of August next following the amount of the assessment, and that the auditor of state shall certify such amount to the treasurer of state, I am of the opinion that the governing date is the last date upon which the statute contemplates that the certification shall be made, and that, therefore, there is no authority in law to require the railroad companies to pay on or before the first day of August the assessment made against them under the provisions of section 606, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1713.

FOREIGN CORPORATION—WHERE SAME ENTERS INTO CONTRACT WITH OWNER OF LAND IN THIS STATE AND A TRUSTEE FOR SAID OWNER—WHEN SUCH FOREIGN CORPORATION IS DOING BUSINESS IN OHIO.

Where a foreign corporation qualifies to do business in this state, and enters into a contract with the owner of land in this state and a trustee for said owner, and by the terms of said contract it is agreed that the title to the land in question shall remain in the name of said trustee; that the trustee shall pay all taxes on said property as the same become due, and that the corporation shall proceed to subdivide said land and plat the same and sell the lots to individual purchasers, who shall receive a deed direct from the trustees upon the payment to said trustee of the consideration price, that the trustee out of the funds thus received by him shall pay to the original owner of the land the purchase price of each of the several lots so sold as agreed upon in said contract, and pay any balance to the corporation, and the title to said land as a whole or any of the lots when the same is subdivided is not to be conveyed to said corporation, and the corporation at no time owns said property, said foreign corporation in investing its capital in said enterprise for the foregoing purposes is "doing business" in this state within the meaning of the provisions of section 183, *G. C., and the money so invested by said corporation will represent the proportion of its capital stock used in transacting its business in this state in determining the foreign corporation tax required by provision of section* 184, *G. C. In investing its capital for said purpose, said corporation acquires an interest in said lots by the terms of said contract, and in this way its capital is invested and used in the business transacted in this state in the exercise of its corporate franchise.*

COLUMBUS, OHIO, June 20, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—In your letter of May 24th you request my opinion upon the following question:

> "A foreign corporation purchased land in the state of Ohio. The title to the land is held in the name of a trustee for the benefit of the seller, who has not been paid for his land by the corporation. The foreign corporation subdivides the land and plats the same to sell it to individual purchasers, who receive a deed from the trustee for the land upon the payment of the same. The trustee out of the funds received by it from individual purchasers pays the original owner of the land (the seller) the purchase price thereof, and any balance is turned over to the foreign corporation. Under these circumstances is the foreign corporation doing business in Ohio? If so, upon what amount of money must it pay the foreign corporation tax? Under the above circumstances is the foreign corporation merely a selling agent for the original owner of the land, and its commission for selling the land the difference between the purchase price and the aggregate price of the lots sold? Is the amount of money used by such foreign corporation in promoting the sale of such land and platting the same the amount of its capital stock used in this state upon which a foreign corporation tax must be computed?"

I am informed that the foreign corporation above referred to is the same as the one referred to in your request of April 12, 1916, in answer to which opinion No. 1521, of this department, was rendered to you under date of April 27, 1916.

It will be observed, however, that the facts stated in said former request are materially different from those stated in your request now under consideration as above set forth.

The question submitted by you in said former request reads as follows:

> "A foreign corporation purchases property in Ohio and conveys same to a trustee. The trustee pays the taxes on the property so that in effect the foreign corporation is not the owner of real estate in Ohio. Under such circumstances, must a foreign corporation, when it is qualified to do business in Ohio, consider the value of that real estate as capital of a foreign corporation, invested in Ohio?"

In said former request as above set forth it appears that the foreign corporation in question purchased property in this state and conveyed the same to a trustee for said corporation. While you state in your present inquiry that said corporation purchased land in this state, it further appears that the title to said land is held by a trustee for the benefit of the seller who has not been paid for his land by said corporation.

I am informed by the representative of said corporation that the title to said land was conveyed direct from the person referred to in your inquiry as the "seller" to the aforesaid trustee; that by the terms of a contract made and entered into between the seller, the trustee and the corporation, it is agreed that the title to the land in question shall remain in the name of the trustee for the benefit of the seller; that the trustee shall pay all taxes on said property as the same become due and that the corporation shall proceed, as set forth in your inquiry to subdivide said land, plat the same and sell the lots to individual purchasers who receive a deed direct from the trustee upon the payment to said trustee of the consideration price. The trustee, out of the funds thus received by him, pays the original owner of the land, the seller, the purchase price of each of the several lots so sold, as agreed upon in said contract, and any balance is turned over to the corporation. The title to said land as a whole or to any of the lots when the same is subdivided is not to be conveyed to said corporation by the terms of said contract and the corporation at no time owns said property.

In performing that part of the contract on its part to be performed, the only thing required by the terms of said contract to be done by said corporation, is to subdivide and plat the land in question into lots, develop the same by such improvements as it sees fit to make and sell said lots so developed. The paying of any money to the original owner, hereinbefore designated as the seller, is contingent upon the sale of said lots to individual purchasers, in which event, as has already been stated, the consideration agreed upon passes to said original owner direct from the trustee, and the only capital of said corporation used in said enterprise is that invested by it in the subdivision, platting and development of the aforesaid lots and in the sale of the same.

The provisions of the statutes applicable to the question now under consideration are found in section 183, et seq., of the General Code. Section 183, G. C., provides as follows:

> "Before doing business in this state, a foreign corporation organized for profit and owning or using a part or all of its capital or plant in this state shall make and file with the secretary of state, in such form as he may prescribe, a statement under oath of its president, secretary, treasurer, superintendent or managing agent in this state, containing the following facts: * * *
>
> "3. The value of the property *owned and used* by the corporation in Ohio, where situated, and the value of the property of the corporation owned and used outside of Ohio.

"4. The proportion of the capital stock of the corporation represented by property *owned and used* and by business transacted in Ohio."

Section 184, G. C., provides:

"From the facts thus reported and any other facts coming to his knowledge, the secretary of state shall determine the proportion of the capital stock of the corporation represented by its property and business in this state, and shall charge and collect from such corporation for the privilege of exercising its franchise in this state, one-tenth of one per cent. upon the proportion of its authorized capital stock represented by property owned and used and business transacted in this state, but not less than ten dollars in any case. Upon the payment of such fee the secretary of state shall make and deliver to such foreign corporation a certificate that it has complied with the laws of Ohio and is authorized to do business therein, stating the amount of its authorized capital stock and the proportion of such authorized capital stock represented in this state."

Section 185, G. C., relates to the filing of supplemental statements in the event of a change in proportion, etc., and provides:

"A corporation which has filed its statement and paid the fee prescribed by the preceding two sections and which thereafter shall increase the proportion of its capital stock, represented by property *used* and business done in this state, shall file within thirty days after such increase an additional statement with the secretary of state, and pay a fee of one-tenth of one per cent. upon the increase of its authorized capital stock represented by property owned and business transacted in this state."

Attention was called in my former opinion to the somewhat inconsistent use of the words "owning or using" found in the first part of section 183, G. C., supra, when compared with the use of the words "owned and used" as found in the latter part of the same section as well as in section 184, G. C., and the word "used" as the same appears in section 185, G. C.

It was observed in said opinion that while the trustees referred to in said inquiry may be, for many purposes, the "owner" of the trust property in question, nevertheless it is competent for the legislature to treat the beneficiary as the owner, at least, provided the trustee has himself no beneficial interest; that if the trustee has no beneficial interest the beneficiary is the one who is entitled to the "use" of the property; that the trustee administers and manages the property for the use of the beneficiary and that the beneficiary would be the one "using" the property, whether he would be regarded as the "owner" thereof or not, unless the trustee's interest were such as to entitle him also to a substantial use.

I quote the following from said opinion for the purpose of distinguishing the conclusion therein reached from the proper conclusion to be reached upon the facts now under consideration:

"You do not state the facts which you have in mind fully, but I am assuming that the trustee is managing the property for the use of the corporation and in furtherance of its corporate objects. If that is the case, then it is clear that the corporation is exercising its corporate powers and franchises by means of the confidence reposed in the trustee and with respect to the property in his mere legal custody and control. It will, of course, be assumed that the corporation has power so to conduct its business under

its charter or articles of incorporation. That being the case, it is, therefore, also clear that the corporation is exercising its corporate franchises with respect to the beneficial use and enjoyment of the property to an extent different in degree only, and not in substance, from that to which it would exercise its franchises if it actually owned the legal title to the property."

It was held in said former opinion that the corporation, upon the assumptions above made, is to be regarded as "owning and using" property in Ohio within the meaning of the Ohio statutes. It was further observed that the statute is aimed at two kinds of franchises or privileges which are granted by the state: First, the privilege of "having" and, second, the privilege of "doing," and that every possible corporate franchise that may be exercised in this state is intended to be comprehended within these two groups. The question was then raised as to whether the actual interest of the beneficiary under the circumstances named is to be regarded as proprietary, in the nature of the exercise of a property interest, or as the "doing of business" within the meaning of the above provision of the statute, and it was held that a beneficiary's interest and its exercise as to Ohio property, is to be regarded for the purpose of the statutes under consideration, as a property interest. In conclusion, it was held that when the corporation in question qualifies to do business in Ohio it must report the property in which it has the beneficial interest and the legal title to which is vested in a trustee, as property "owned" by it in this state.

It will readily be observed that my former opinion was based on the fact stated that the title to the land in question was held by the trustee in trust for the use and benefit of the corporation referred to in said former inquiry, and the assumption that the trustee was managing said property for the use of the corporation in the furtherance of its corporate objects.

It now appears that the corporation is not the owner of said property, within the meaning of that term as used in said former opinion, but that the trustee holds the title to said property in trust for the original owner, and in view of the terms of the above mentioned contract, as hereinbefore set forth, I am of the opinion that said corporation is not the "owner" of said property within the meaning of the provisions of section 183 et seq., of the General Code.

It is clear, however, that in subdividing the land in question into lots, in developing and selling said lots and in using its capital for these purposes said corporation is "doing business" in this state within the meaning of the provision of section 183, G. C., supra. Your first question must therefore be answered in the affirmative.

In view of what has already been said I am of the opinion in answer to your second question that the money invested by said corporation in the above mentioned purposes will represent the proportion of its capital stock used in transacting its business in this state in determining the foreign corporation tax required by provision of section 184, G. C., supra.

While one of the activities of the corporation in question, under its contract with the original owner of the aforesaid land and his trustee, is to sell the lots into which said land is subdivided, and, in the performance of said contract in this respect, the corporation acts as a selling agent for said trustee, it is evident that the relation of said corporation to said original owner and his trustee, created by the terms of said contract is more than that of a mere selling agent. The profit realized by said corporation in performing said contract results from the subdivision and platting of the land in question into lots and the development of the same by the improvements hereinbefore referred to. In investing its capital for these purposes said corporation acquires an interest in said lots by the terms of said contract and in this way its capital is invested and used in the business transacted in this state in the exercise of its corporate franchise. This is in answer to your third question.

Your fourth question has already been answered in an wering your second question.

In arriving at the conclusions above expressed in answer to the questions submitted by you, it is to be understood that said conclusions are based upon the facts stated in connection that said inquiries and are confined to the particular corporation in question and are not to be applied to the case of a foreign corporation holding the legal title to land in Ohio for the purpose of development and sale when subdivided into lots, or to a foreign corporation having an equitable title to land in this state to be developed and sold as aforesaid, the legal title being in a trustee for said corporation.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1714.

COUNTY COMMISSIONERS—SECTION 5649-3d, G. C., GENERALLY SPEAKING RENDERS SECTION 2571, G. C., INOPERATIVE—TRANSFER OF FUNDS UNDER SECTIONS 2296 AND 2297, G. C.—WHEN SUCH APPROPRIATION IS AVAILABLE IN VIEW OF LIMITATION FIXED BY SECTIONS 5649-3a AND 5649-3d, G. C.—ILLEGAL TRANSFER, HOW CORRECTED—WHERE COUNTY AUDITOR FAILED TO CHARGE BACK ELECTION EXPENSES DUE FROM POLITICAL SUBDIVISIONS—MAY PROCEED UNDER SECTION 2571, G. C., TO REIMBURSE FUND—COMMISSIONERS MAY BORROW MONEY TO PAY FOR COUNTY CHARGES IN INSTITUTION FOR FEEBLE MINDED—MAY NOT BORROW FOR OVERDRAFT UNDER AUTHORITY OF SECTION 5656, G. C. —COMMISSIONERS MAY NOT BORROW MONEY UNDER SAID SECTION TO PAY FOR LABOR ON ROADS—COUNTY HAS CONTINUING AUTHORITY TO ISSUE BONDS AND NOTES—FLOOD EMERGENCY ACT FOR PURPOSES MENTIONED IN SECTION 3 OF SAID ACT.

Generally speaking, the effect of the provisions of section 5649-3d, G. C., is to render the provisions of section 2571, G. C., inoperative.

Subject to the exception provided in section 2296, G. C., 103 O. L., 522, the respective boards or officers mentioned in said section may, under authority of its provisions and in compliance with the provisions of section 2297 et seq., G. C., transfer surplus money in one fund to another under their respective control, and when the transfer of money is made to one of the funds mentioned and referred to in sections 5649-3a and 5649-3d, G. C., said money, as found at the beginning of the fiscal half year, in the fund to which the same has been transferred, is available for appropriation in said fund by the board or officers having control of the same and, when appropriated, may be expended during said semi-annual period for the purposes for which said fund is established.

Where as a result of an attempted illegal transfer of funds by the county commissioners of a county, the books of the county auditor have been changed in conformity with such action, the commissioners of such county should by proper resolution correct their records and the books of the county auditor should be immediately corrected so as to show the true status of each of the several funds of the county, even though as a result of such correction one or more of said funds to which said board of county commissioners has illegally attempted to transfer money will show an overdraft.

Where the auditor of a county by inadvertence failed at the February, 1916, settlement to charge back the portion of primary and election expenses due from the several political subdivisions of said county for the year 1915, thus causing a deficit in said county election fund, the auditior, treasurer and commissioners of said county may proceed under authority of and in the manner provided by section 2571, G. C., to transfer from the undivided tax funds belonging to the several political subdivisions in said county, to said county election

fund, an amount of money sufficient to meet the expenses charged by law against said county election fund.

A charge against a county for the maintenance, in the custodial department of the institution for feeble-minded, of persons over the age of fifteen years and residents of said county, under provision of section 1898, *G. C., as in force prior to its repeal by the act of the general assembly as found in* 103, *O. L.*, 864-914 (*said provisions being now found in section* 1815-12, *G. C.*, 106, *O. L.*, 503) *is a valid, existing and binding indebtedness of the county until the same is paid and the commissioners of such county may, if there is no money in the county treasury available for such purpose, borrow money for said purpose under authority of and in compliance with the requirements of section* 5656 *et seq. of the General Code.*

County commissioners may not borrow money under authority of section 5656 *et seq., G. C., for the purpose of covering an overdraft in a county fund.*

While the claims of persons for labor performed on the highways of a county under the direction and approval of the commissioners, from March to September, 1915, *are moral obligations of the county which might be paid by said county commissioners out of the road repair fund of said county if there were money in the county treasury to the credit of said fund and available for said purpose, said claims are not valid, existing and binding obligations of the county for the payment of which said county commissioners may borrow money under authority of section* 5656, *G. C.*

Under provision of section 3 *of the so-called flood emergency act* (103 *O. L.* 141) *the board of county commissioners of a county has continuing authority to issue the necessary bonds or notes to provide sufficient money in the "Flood Emergency Fund" to meet the obligations of said county when the same become payable according to the terms of contracts duly made by said county commissioners for the purposes mentioned and referred to in said section* 3 *of said act.*

COLUMBUS, OHIO, June 20, 1916.

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

GENTLEMEN:—In your letter under date of April 19th you request my opinion on several questions involving the interpretation of a number of statutes governing the commissioners, auditor and treasurer of a county in the administration of their respective offices and in the performance of their official duties. Your questions will be considered in the order in which you have submitted them, your first question reading as follows:

> "1. Section 2571, G. C., authorizes the transfer of funds from the undivided general tax fund to a depleted or overdrawn fund.
>
> "Is not this section repealed by implication, or at least rendered of no avail, by the requirement of section 5649-3d, requiring semi-annual appropriations, and directing that all expenditures for the ensuing six months be confined to the sum so fixed for each fund?"

Section 2571, G. C., provides:

> "Section 2571. When any fund is exhausted the county auditor and treasurer shall make an estimate of the amount of money belonging to such fund which has been collected as taxes and credited to the undivided tax funds in the treasury. If the commissioners deem it advisable, by an order entered on their journal, they may authorize the auditor and treasurer to transfer from such undivided tax funds to the fund so exhausted an amount not to exceed three-fourths of the amount so estimated to belong to the exhausted fund. At the next semi-annual distribution of taxes the amount so trans-

ferred shall be deducted from the total amount found to be due such fund. The estimate shall be made in writing, signed by the auditor and treasurer, and recorded on the commissioners' journal."

Prior to the enactment of the provisions of section 5649-3d, one of the sections of the so-called Smith one per cent. law, it was the common practice of the auditor and treasurer of the county, acting under the direction of the county commissioners, to make "advances" to exhausted funds from the undivided tax funds, under authority of the above provisions of section 2571, G. C., and in the manner therein prescribed. This practice resulted in an extravagant expenditure of public funds by public officials, and the legislature, recognizing this prevailing tendency, enacted the provisions of the Smith law for the manifest purpose of limiting public officials in the expenditure of money, and compelling said officials in the administration of the duties of their respective offices to conduct the business of said offices practically on a cash basis, and to keep the expenditures for each semi-annual period from each particular fund within the amount of money realized in said fund from the semi-annual collection of taxes and all other sources of revenue and any balance in said fund at the beginning of such semi-annual period.

Section 5649-3d provides:

"At the beginning of each fiscal half year the various boards mentioned in section 5649-3a of this act shall make appropriations for each of the several objects for which money has to be provided from the moneys known to be in the treasury from the collection of taxes and all other sources of revenue, and all expenditures within the following six months shall be made from and within such appropriations and balances thereof, but no appropriation shall be made for any purpose not set forth in the annual budget, nor for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of receipts and balances."

The plain terms of the above provisions of said section 5649-3d, G. C., require that all expenditures for any fiscal half year from any fund must be confined to the appropriation made out of said fund for said period by the proper officials in charge of the same, and to any balance remaining in said fund at the beginning of said period.

I am of the opinion, therefore, in answer to your first question, that the effect of the provisions of said section 5649-3d, G. C., is to prevent the expenditure, during any semi-annual period, from any county fund, of money "advanced" to said fund during said period from the undivided tax funds by the county auditor and treasurer, under the direction of the county commissioners in the exercise of the authority vested in said officials by the above provisions of section 2571, G. C. In other words, the practical effect, generally speaking, of the provisions of said section 5649-3d, G. C., is to render the provisions of said section 2571, G. C., inoperative.

Your second question is as follows:

"2. Section 2296, et seq., as amended O. L. 103, page 521, authorizes the transfer of funds upon application to the court of common pleas.

"Can a transfer by this or any other means be made so as to be available for appropriation and expenditure in the fund to which transferred, in view of the limitations fixed by section 5649-3a and 5649-3d?"

Section 2296, G. C. (103 O. L., 522), provides:

"The county commissioners, township trustees, the board of education of a school district, or the council or other board having the legislative power

of a municipality, may transfer public funds, except the proceeds or balances of special levies, loans or bond issues under their supervision, from one fund to another, or to a new fund created under their respective supervision, in the manner hereafter provided, which shall be in addition to all other procedure now provided by law."

It will be observed that proceeds or balances of special levies, loans or bond issues may not be transferred under the above provision of section 2296, G. C., taken in connection with the provisions of section 2297, et seq., of the General Code. The disposition of such proceeds or balances is governed by section 5654, G. C. (103 O. L., 521), which provides:

"The proceeds of a special tax, loan or bond issue shall not be used for any other purpose than that for which the same was levied, issued or made, except as herein provided. When there is in the treasury of any city, village, county, township or school district a surplus of the proceeds of a special tax, or of the proceeds of a loan or bond issue, which cannot be used, or which is not needed for the purpose for which the tax was levied, or the loan made, or the bonds issued, all of such surplus shall be transferred immediately by the officer, board or council having charge of such surplus, to the sinking fund of such city, village, county, township or school district, and thereafter shall be subject to the uses of such sinking fund."

It seems clear, however, that subject to the exception provided in said section 2296, G. C., the respective boards or officers mentioned in said section may, under authority of its provisions, and in compliance with the provisions of section 2297, et seq., of the General Code, transfer surplus money in one fund to another under their respective control, if upon application to the court of common pleas of the county, and on the hearing of said application the court finds that the requirements of the statutes have been complied with, that the petition states sufficient facts, that there are good reasons, or that a necessity exists for the transfer, and that no injury will result therefrom, and orders the same to be made.

When a transfer of money is made to one of the funds mentioned and referred to in sections 5649-3a and 5649-3d, of the General Code, I am of the opinion, in answer to your second question, that said money as found, at the beginning of the fiscal half year, in the fund to which the same has been transferred, is available for appropriation in said fund by the board or officers having control of the same and, when appropriated, may be expended during said semi-annual period for the purposes for which said fund is established.

Your third inquiry is as follows:

"3. Transfers of funds having been illegally made, should correction be made by a retransfer of the amount to the fund from which taken, without regard to a resultant overdraft in the debtor fund?"

This question evidently relates to the situation where the board of county commissioners has attempted to transfer money from one county fund to another without authority in law or in a manner contrary to the requirements of the statutes governing such transfer. Such attempted transfer being illegal, the effect in law, in so far as the amounts of money in the treasury of the county to the credit of its several funds are concerned, is the same as if no action had been taken and I am of the opinion in answer to your third question that where, as a result of such attempted transfer, the books of the county auditor have been changed in conformity with such action, the commissioners of such county should by proper resolution correct their records

and the books of the county auditor should be immediately corrected so as to show the true status of each of the several funds of the county even though as a result of such correction one or more of said funds to which said board of county commissioners has illegally attempted to transfer money will show an overdraft.

Your fourth question reads as follows:

> "4. The auditor having failed to charge back on semi-annual settlement the portion of primary and election expenses due from the various political subdivisions of the county for the year 1915, causes a shortage in the election fund.
>
> "May the election fund be credited with this amount from the undivided general tax fund as an immediate correction of the error, the proper charge to be deducted from the distributive share of the several districts at the settlement of August, 1916, or must money be borrowed to carry the expenses payable from the election fund until the actual correction is made at the August settlement?"

In view of the fact that proper election expenses for the year 1916 are charged by law against the county election fund and must be paid out of said fund, and in view of the further fact that through inadvertance the county auditor of the county referred to in your inquiry failed to charge back, at the semi-annual settlement in February, 1916, the portion of primary and election expenses due from the several political subdivisions of said county for the year 1915, thus causing at this time a shortage in said county election fund, I can see no valid objection to holding that the auditor and treasurer of said county may proceed under authority of section 2571, G. C., supra, to estimate the amount of money in the county treasury to the credit of the undivided general tax funds and belonging to the several political subdivisions in question, from which funds said election expenses should have been withheld at said semi-annual settlement in February, 1916, and that upon the determination of these several amounts and the aggregate thereof, the commissioners of said county, acting under authority of said section 2571, G. C., supra, may, by a resolution fully setting forth the facts showing such inadvertance of the county auditor, and by an order on their journal, authorize said auditor and treasurer to transfer from such undivided tax funds to the county election fund an amount sufficient to meet the expenses charged by law against said county election fund and in this way avoid the necessity of borrowing money under authority of section 5656, et seq., of the General Code to pay said indebtedness on account of having to wait until the August settlement, at which time the several amounts which should have been withheld from the several funds of the various political subdivisions of the county at the February settlement, would have to be withheld in making the semi-annual distribution in August of this year. It is assumed, of course, in advising that the county officials may act under authority of said section 2571, G. C., supra, that the auditor and treasurer in estimating the amount of money in the county treasury to the credit of the undivided general tax funds and belonging to the several political subdivisions in question, will find sufficient money in the county treasury to the credit of said undivided general tax funds which, under the limitation prescribed by the latter part of said section 2571, G. C., may be transferred to said county election fund for the aforesaid purpose.

While I have already held in answer to your first question, that, generally speaking, the provisions of section 2571, G. C., are rendered inoperative by the provisions of section 5649-3d, G. C., I do not think that the transfer of money to the county election fund in the manner above suggested can be considered an "advance" in the sense that the same is prohibited by section 5649-3d, G. C., for the reason that by inadvertance the county auditor failed to wihhhold from the several political sub-

divisions of the county the several amounts due said county election fund at the February, 1916, settlement, and the deficit in said county election fund at this time is not due to expenditures from said fund prohibited by section 5649-3d, G. C. In advising that said county officers may act under authority of said section 2571, G. C., for the purpose of making up the deficit in said county election fund caused by said inadvertance of the county auditor, I would not be understood as holding that the authority of said section may still be invoked by county officers for the purpose of making "advances" to exhausted current expense funds in cases where said funds have been exhausted by expenditures made by the county commissioners during any fiscal half year contrary to the provisions of said section 5649-3d, G. C. I am of the opinion therefore, in answer to your fourth question, that the county commissioners, auditor and treasurer of the county referred to in your inquiry may proceed in the manner above suggested to remedy the situation presented by said inquiry.

Your fifth inquiry is as follows:

> "5 On March 10, 1913, the county commissioners authorized and negotiated a loan of $7,000 00 to pay an indebtedness due the Institution for Feeble-minded. The proceeds of the loan were credited to the county fund and thereafter expended for the general uses of that fund, the indebtedness for which it was to provide remaining unpaid at the present time The loan was afterward repaid from the county fund.
>
> "May the present board of commissioners make a new loan to cover this indebtedness?"

The indebtedness referred to in your inquiry, and to pay which the county commissioners mentioned in said inquiry borrowed said sum of $7,000.00, was evidently charged against the county in question by virtue of the provisions of section 1898, G. C., which, as in force prior to its repeal by the act of the general assembly, as found in 103 O. L., 864-914, provided as follows:

> "For each person over the age of fifteen years, in the custodial department from any county in the state, the trustees and superintendent may charge against such county a sum not exceeding the annual per capita cost to the county of supporting inmates in its county infirmary, as shown by the annual report of the board of state charities. The treasurer of the county shall pay the annual draft of the financial officer of the institution for the aggregate amount chargeable against such county, for the preceding year, for such inmates."

I note, however, that the foregoing provisions of section 1898, G. C., were carried forward by the general assembly and are now found in section 1815-12, G. C. (106 O. L., 503.)

Assuming that the amount of said charge was properly determined and that there was no money in the treasury of said county available for the payment of said amount, said charge was a valid, existing and binding obligation of the county for the payment of which the county commissioners, acting under authority and in compliance with the requirements of section 5656, et seq., of the General Code, may borrow money.

While the action of the former board of county commissioners in crediting the general county fund with the proceeds of the loan negotiated by them for the purpose of paying the aforesaid indebtedness, and in expending said sum of $7,000.00 for purposes other than those for which the loan was made, was without authority in law, the indebtedness still remains unpaid and is therefore a valid, existing obligation of the county which must be paid, and I am of the opinion, in answer to your

fifth question, that the present board of county commissioners may borrow money for this purpose under authority and in compliance with the requirements of said section 5656, et seq., of the General Code.

Your sixth question is as follows:

> "6. On April 7, 1914, the county commissioners authorized and negotiated a loan of $20,000.00 upon notes of the county, the proceeds of the loan being used to cover overdrafts then existing in the building and county road funds. Of this loan $9,000.00 remains unpaid.
>
> "Both of the funds benefited by this loan being wholly contractual in nature, both the creation of the overdraft and the borrowing of money for their use would be forbidden by the provisions of Secs. 5649-3a and 5649-3d.
>
> "Therefore, there having been no authority of law for the loan, under what obligation is the county placed for its repayment?
>
> "If the county is bound therefor, both of these funds being exhausted, may this debt be funded by a bond issue?"

The overdrafts in question must have resulted from the letting of contracts by the county commissioners under either one of two conditions: (1) Where prior to the letting of a contract to be paid out of the county building fund or county road fund, as the case might be, the county auditor certified that money was in the county treasury to the credit of the fund out of which said contract was to be paid and available for the purpose for which said contract was let, in compliance with the requirements of section 5660, G. C., when in fact such fund was not available; (2) Where the contract was let without the certificate of available funds being filed with the county commissioners by the county auditor.

It is evident that a contract let under the first condition above stated, providing the county commissioners complied with all the requirements of law governing the letting of same, would be binding upon the county, and upon default in the payment to the contractor of any amount due according to the terms of said contract, the contractor could recover from the county. It is equally clear that a contract let under the second condition above mentioned was made without authority in law and section 5661, G. C., provides that such a contract shall be void. It is well settled by the holdings of the courts in this state that the contractor could not have recovered any sum from the county if the county commissioners had refused to pay said contractor for material furnished or labor performed according to the terms of said contract.

It appears, however, that the claims of contractors according to the terms of contracts let under authority of the foregoing conditions were paid out of the treasury in question on the allowance of the county commissioners and the warrant of the county auditor, and as a result of this clear violation of the law by the county auditor or the county commissioners, as the case might have been, the overdrafts referred to in your inquiry were created. It is unnecessary for the purpose of answering your question to express an opinion on the question as to whether the county commissioners would have had authority to borrow money under section 5656, et seq., of the General Code to secure funds to meet the payment of obligations incurred under contracts let under the first condition above set forth when the same became due. It is sufficient to observe that said obligations were paid out of the county treasury as the same became due according to the terms of the contracts and the overdrafts in question were thus created. I am clearly of the opinion that at the time the loan of $20,000.00 referred to in your inquiry was negotiated by said county commissioners to cover said overdrafts, there was not a valid, existing and binding indebtedness of the county for the payment of which said county commissioners could borrow money under authority of section 5656, et seq., of the General Code. I am of the opinion therefore in answer

to your sixth question that the aforesaid loan was not a legal obligation of the county referred to in said inquiry and that the balance of $9,000.00 remaining unpaid cannot be funded by a bond issue under provision of said section 5656, et seq., of the General Code.

If, however, upon the presentation of said claim to the commissioners of the county in question and their refusal to allow the same, the jurisdiction of the court should be invoked, and upon consideration of all the facts and circumstances of the case the court should hold the county estopped to deny the validity of said claims and should render judgment against said county for the amount of such claims, said judgment would in my opinion constitute a valid indebtedness of said county for the payment of which the county commissioners might borrow money under authority of said section 5656, et seq., of the General Code.

Your seventh question is as follows:

> "7. Certain persons having performed labor on the county highways under the direction and by the instruction and with the approval of the county commissioners during the period from March to September, 1915, no certificate having been made by the auditor that funds were in the treasury or in process of collection for that purpose, and there being in fact no funds at that time in the county treasury available for such use, is the county under either a legal or moral obligation to pay the claims presented for compensation for such labor?
>
> "If the county is legally bound, the funds from which these claims are payable, being exhausted, may the commissioners borrow funds in order to make payment?"

While I think the claims referred to in your inquiry are moral obligations of the county which might be paid by the county commissioners out of the road repair fund of said county if there were sufficient money in the county treasury to the credit of said fund and available for said purpose, in view of the plain provision of section 5660, G. C., that

> "The commissioners of a county * * * shall not enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of money, unless the auditor * * * first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate and in process of collection and not appropriated for any other purpose; * * *"

taken in connection with the provision of section 5661, G. C., that

> "All contracts, agreements or obligations and orders or resolutions entered into or passed contrary to the provisions of the next preceding section, shall be void, * * *"

and the further provisions of section 5649-3d, G. C., as above quoted, and in conformity with what has already been said in answer to your sixth question, I am compelled to hold in answer to your seventh question that the claims therein referred to are not legal obligations of the county for the payment of which the county commissioners may borrow money under authority of section 5656, et seq., of the General Code.

Your eighth question is as follows:

"8. The auditor certifies that the money required for a certain improvement is in the county treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate and is in process of collection and not appropriated for any other purpose, when in truth and in fact, said money was not in the treasury, levied or in process of collection.

"Is a contract, otherwise regular, let under such circumstances a legal and binding obligation on the county, and is the county under either a legal or moral obligation to pay the unpaid balance on such contract?"

This question has already been answered in answering your sixth question. Your ninth question reads as follows:

"9. Under authority of the flood emergency act of April, 1915 (O. L., 103, page 141), an emergency fund was created by the sale of $440,000.00. Contracts let under that act and payable from this fund have exhausted the proceeds of the original sale of bonds, and unpaid balances amounting to about $20,000.00 are still outstanding.

"Is there any authority of law for a further bond issue or other relief for this fund in order to meet its outstanding obligations?"

While section 1 of the so-called flood emergency act (103 O. L., 141), was amended in 104 O. L., 183, so as to extend the provisions of said act to the repair, reconstruction and replacement of public property and public ways destroyed or injured by floods occurring in July, 1913, and section 6 of said act as originally enacted was amended in 103 O. L., 761, for the purpose of correcting typographical errors therein, the only section of said act to which reference need be made for the purpose of answering your question is section 3 (103 O. L., 143), which provides as follows:

"For the purposes mentioned in sections 1 and 2 of this act, and for the permanent repair, reconstruction or replacement of public property or public ways destroyed or injured in the manner and at the time described in section 1 of this act, any board of county commissioners, board of education, township trustees or council of any municipal corporation or the road commissioners of any road district may issue bonds or notes of the corporation, subdivision or district *as needed.* * * *"

It seems clear to my mind that under the above provision of section 3 of the said flood emergency act the board of county commissioners of the county referred to in your inquiry has continuing authority to issue the necessary bonds to provide sufficient money in the "flood emergency fund" to meet the obligations of said county when the same become payable according to the terms of contracts duly made by said county commissioners for the purposes mentioned and referred to in said section 3 of said act. I am of the opinion therefore in answer to your ninth question that, upon the facts therein stated, said county commissioners may, acting under authority and in compliance with the requirements of said flood emergency act, issue bonds for the purpose of providing sufficient money in the "flood emergency fund" of said county to pay the balances due according to the terms of the aforesaid contract and still outstanding.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1715.

DISAPPROVAL, RESOLUTION FOR IMPROVEMENT OF CERTAIN ROAD IN FAYETTE COUNTY, OHIO.

COLUMBUS, OHIO, June 20, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of June 16, 1916, transmitting to me for examination final resolution relating to section "A" of the Cincinnati-Zanesville road in Fayette county, petition No. 2330, I. C. H. No. 10.

This resolution was submitted to me for approval on June 12, 1916, and under date of June 15th I returned the resolution to you without my approval for the reason, among other things, that it appears that main market road funds are to be used in part, but it does not appear either upon the face of the resolution or by a certificate attached to or endorsed thereon that the road in question is a main market road. The resolution is still defective in this particular, and I am therefore again returning the same without my approval.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1716.

APPROVAL, RESOLUTIONS FOR IMPROVEMENT OF CERTAIN ROADS IN COSHOCTON, FAIRFIELD, MUSKINGUM, FRANKLIN AND MADISON COUNTIES, OHIO.

COLUMBUS, OHIO, June 20, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communications of June 16 and June 17, 1916, transmitting to me for examination final resolutions relating to the following roads:

"Coshocton county—Sec. 'A,' Walhonding-New Guilford road, Pet. No. 356, I. C. H. No. 411.

"Fairfield county—Sec. 'A,' Lancaster-Kirkersville road, Pet. No. 2325, I. C. H. No. 462.

"Fairfield county—Sec. 'A,' Lancaster-Kirkersville road, Pet. No. 2325, I. C. H. No. 462.

"Muskingum county—Sec. 'L,' Zanesville-Dresden road, Pet. No. 2752, I. C. H. No. 344.

"Franklin county—Sec. 'M,' Columbus-Sandusky road, Pet. No. 2339, I. C. H. No. 4.

"Muskingum county—Sec. 'K,' Zanesville-Cincinnati road, Pet. No. 2754, I. C. H. No. 10.

"Madison county—Sec. 'E,' Washington-London road, Pet. No. 2634, I. C. H. No. 244."

I find these resolutions to be in regular form and am therefore returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1717.

DITCHES—COUNTY COMMISSIONERS HAVE JURISDICTION UNDER SECTION 6443, G. C., EVEN IF DITCH IS LOCATED IN MORE THAN ONE TOWNSHIP.

It is not essential to the jurisdiction of county commissioners in the matter of the location, construction, straightening, altering, deepening, widening, boxing or tiling a ditch, drain or water course as conferred by section 6443, G. C., that such ditch, drain or water course be located in more than one township within the county.

COLUMBUS, OHIO, June 21, 1916.

HON. PERRY SMITH, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—Yours under date of June 13, 1916, is as follows:

"Find enclosed a request or an application to repair and improve a water course in Falls township, Muskingum county, Ohio, the same having been filed with the auditor and with the board of county commissioners on the 12th day of May, 1916.

"The county commissioners have asked me to have you look over this petition and say whether they have jurisdiction or not in viewing this so-called water course. I have given the commissioners my opinion in reference to this application and have said to them that the county commissioners have *no* jurisdiction as this contemplated ditch is in Falls township alone and it would be the duty of the trustees of Falls township to arrange for this ditch.

"Further, if this ditch should be constructed as applicant desires, it would throw the water over and upon another farm, which would mean damages to the adjoining farm where the water is to be thrown and the county commissioners would become liable for any damages sustained. There is no one in Falls township complaining as to the public health, convenience and welfare, save and except John H. Shipps and Mr. Hearing, who bought this farm some eighteen years ago, platted it into lots, made the streets and built the ditch to carry the water at that time. Since then the buildings which have been put upon these lots, have connected their sinks in their kitchens with the tile or drain and the water from the roofs causing the same to be filled up and it seems to me that the proper ones to complain in reference to the health, convenience and the necessity for the improvement should be made by the parties who complained of the inconvenience and the unhealthiness and not the land owners, who desire to have the ditch made for their convenience, so that they can sell their land to a greater advantage through the officers of Muskingum county.

"I have advised the county commissioners that they have no jurisdiction and from the reading of sections 6447, 6451 and 6455 of the General Code, it seems to me that the county commissioners cannot interfere where the ditch or drainage is sought to be made in Wayne township, but must go through two or more townships in order to give them jurisdiction of the case.

"Am I right in my contention or am I wrong? I have so held and so advised the county commissioners, but they are anxious to have your interpretation in reference to this petition as filed and you will see that no

where in the petition or application do they allege that this drain is to be in any other township than Falls, therefore, it is the duty of the applicants to take this matter up with the township trustees of Falls township."

Accompanying your inquiry you submit for examination the original application filed with the county commissioners, together with two bonds in substantially the same form, which said application and bonds are as follows:

"In the matter of the application of John H. Shipps, for the improvement of a natural water course in Falls township, Muskingum county, Ohio state.

"Before the county commissioners of Muskingum county, Ohio state.

"APPLICATION.

"Now comes applicant, John H. Shipps, and says that he is a resident of Falls township, Muskingum county, Ohio state; and that he is the owner of some of the lots through which a natural water course extends, the improvement of which will be conducive to public health, convenience and welfare.

"Said natural water course is located in Falls township, Muskingum county, Ohio state, beginning at a certain spring situated near the center of the Dresden road front of Charles F. Hearing's subdivision, and running thence, in a southwesterly direction, diagonally across the southeast corner of said subdivision near the rear of the dwelling house of George N. Kerner, on Lot No. 1 of said subdivision, to and across Brookover avenue; thence in a southwesterly direction upon and in a westerly direction through a certain 2-2/100 acre tract of land (now divided into lots), of this applicant, John H. Shipps; thence in a westerly direction through Fenton's subdivision, across lot No. 9 owned by Minnie Joanna Bird, near the middle thereof; thence on across lot No. 8 owned by Lena Russel and Amanda Bailey near the rear of their dwelling house; thence on across lot No. 7 and lot No. 6, owned by Vaidney Engle, near the rear of the dwelling house on said lot No. 6; thence on across lot No. 5 of Wm. O. Finney and on through lot No. 3 of Wm. O. Finney, to where said natural water course flows under the Frazeysburgh road, a distance from said spring of about one thousand feet.

"That about eighteen years ago this water course was a natural one, but did not contain living water. That the spring water, storm water, and spouting and seeping water from the elevated lands thereabout, all, lost themselves therein, and enswamped the same, and rendered it dangerous to the public health, conducive to the public inconvenience, and against the public welfare of the community; and for the public health, convenience and welfare of the community, by private agreement between two, John H. Shipps and Charles F. Hearing, or more individuals, said natural water course was ditched and tiled, thereby affecting their real property (which was the same as the premises included in this proceeding), in this, to wit: That for the last eighteen years, without obstruction or interruption, said tiled ditch has drained said natural water course and land of said John H. Shipps and Charles F. Hearing which was situated within it, save and except during the last two or three years, during which time it has become

obstructed for a distance of about three hundred feet from the Frazeysburgh road toward its head. And because of its such establishment and use, said ditch is become and is a public water course, independently of its natural condition and nature as a natural water course.

"That because of such obstructions, all of that part of the water course is again enswamped, the cellars of the dwelling houses flooded; the lots flooded and washed and encumbered with stagnant and polluted water; and all of said waters and their actions are become conducive to public contagious and other diseases and sickness, inconvenience and welfare of the residents in and along and about said natural water course in said township, and in other townships in said county; and it is necessary and will be conducive to the public health, convenience and welfare of said public, said residents of said water course and of said community and townships, to improve said tiled natural water course so as to drain it and said lots, cellars, etc.

"That all of the lots and premises situated in said natural water course, and owned by the parties named herein, are parts of said original tracts of real property benefited by the establishment, some eighteen years ago, of said tiled water course; and that said original tracts were platted, and the lots herein affected were sold and conveyed after and in relation to the establishment of said tiled water course, and with full knowledge thereof on the part of the original purchasers from said John H. Shipps and Charles F. Hearing, of the same; or that said purchasers, and all subsequent purchasers, ought to have known thereof.

"The following named owners of lots in said natural water course, or draining into it, are affected and will be affected by the present obstructed drain and any improvement thereof: John H. Shipps, Minnie Joanna Bird, Lena Russel, Amanda Bailey, Vaidney Engle, Carl E. Horn, Joseph Albert Horn, Wm. O. Finney, Chas. W. Truesdale, Chas. F. Hearing, Geo. N. Kerner, Samuel D. Hearing, Emma L. Griffin, John F. Ross.

"Wherefore, this applicant asks the said county commissioners duly to improve said natural water course, and for all proper relief.

"(Signed) JOHN H. SHIPPS.

"State of Ohio, Muskingum County, ss.

"Now comes the said applicant, who being first duly sworn, says that the above statements are true as he verily believes.

"(Signed) JOHN H. SHIPPS.

"Sworn to and subscribed before me this June 12, 1916.

"(Signed) CHAS. G. GRIFFITH,

"(Seal) *Notary Public.*

"Know all men by these presents, that I, John H. Shipps, as principal, and J. S. Fenton, and C. F. Hearing, as sureties, are hereby held and firmly bound to the state of Ohio in the sum of two hundred dollars, for the payment of which we hereby firmly bind ourselves.

"Dated this June 12, 1916.

"The condition of this bond is such, That whereas said John H. Shipps has filed his petition with the clerk of and before the board of county commissioners of Muskingum county, Ohio, and with the county auditor of said county, for the improvement and repair, etc., of a certain tiled natural water course situated in Falls township, said county, ———

"Now, therefore, if he shall duly pay any and all costs and expenses of

such proceeding, according to law, that shall be assessed against him, then these presents shall become void; otherwise to remain in full force and virtue in law.

"(Signed) JOHN H. SHIPPS,
"J. S. FENTON,
"C. F. HEARING."

In addition to the question of the sufficiency of the bond and application or petition above set forth, you make further inquiry as to the jurisdiction of county commissioners in the matter of the construction or improvement of a ditch, drain or water course located within a single township, which latter inquiry will be first considered.

Section 6443, G. C., confers upon boards of county commissioners jurisdiction and authority in the matter of the construction, straightening, widening, altering, deepening, boxing or tiling of ditches, drains or water courses, and provides as follows:

"The board of county commissioners, at a regular or called session, when necessary to drain any lots, lands, public or corporate road or railroad, and it will be conducive to public health, convenience or welfare, in the manner provided in this chapter, may cause to be located and constructed, straightened, widened, altered, deepened, boxed, or tiled, a ditch, drain or watercourse, or box or tile part thereof, or cause the channel of a river, creek or run, or part thereof, within such county, to be improved by straightening, widening, deepening, or changing it, or by removing from adjacent lands timber, brush, trees, or other substance liable to obstruct it. The commissioners may change either terminus of a ditch before its final location, if the object of the improvement will be better accomplished thereby."

The authority thus conferred upon county commissioners in respect to ditches, drains and water-courses is not in said section specifically limited or restricted to ditches, drains or water-courses which may be located in more than one township, and a careful examination of the chapter in which said section is found fails to disclose any limitation upon the authority here conferred to ditches which are located in more than one township.

I am therefore led to conclude that the location of such ditch, drain or watercourse proposed to be improved under the provisions of the chapter in which section 6443 is found, in more than one township, is not essential or a condition precedent to the authority of the commissioners to proceed with the location, construction, etc., of such ditch pursuant to said section 6443, G. C., et seq.

It is provided by section 6446, G. C., that application for such improvement shall be made to the commissioners of the county, signed by one or more of owners of lots or lands which will be drained or benefited thereby, or shall be made by the street commissioner or superintendent of the road district in which it is required to be done.

Section 6447, G. C., provides as follows:

"A petition shall be filed with the county auditor setting forth the necessity and benefits of the improvement and describing the beginning, route and termini thereof. It shall also contain the names of the persons and corporations, public or private, who, in the opinion of the petitioner or petitioners are in any way affected or benefited thereby. There shall be

filed therewith a bond, subject to the approval of said auditor, payable to the state of Ohio, with at least two sufficient sureties, in not less than two hundred dollars, conditioned for the payment of all costs if the prayer of the petition is not granted or is dismissed for any cause. If the name of a person or corporation, either public or private, in any way affected by the proposed improvement, is omitted from the petition, the county commissioners, upon discovering that such omission has been made, shall supply such name, and cause notice to be served as herein provided."

An examination of the application or petition submitted by you, herein above quoted, discloses that it is made and subscribed by John H. Shipps, that said application or petition recites that the said John H. Shipps is a resident of Muskingum county and an owner of lots or lands which will be drained or benefited by the proposed improvement, as required by section 6446, G. C. Said petition, it will be observed, purports to describe the beginning, route and termini of the ditch, drain or water course proposed to be located, constructed or improved, and further purports to contain the names of the persons and corporations, public and private, who, in the opinion of the petitioner, are in any way affected or benefited by the location, construction or improvement of such drain, ditch or water-course.

While the petition contains much matter that is not material, I am inclined to the view that taken as a whole it sufficiently sets forth the necessity and benefits of the improvement sought to be made, and that it is of such substantial compliance with the requirements of section 6447, G. C., supra, as to render it sufficient in law to confer upon the county commissioners jurisdiction and authority to proceed to determine the necessity of such improvement, in so far as a petition or application therefor is required. The bond herein before quoted appears to be sufficient in form and amount, and when approved by the county auditor, as required by the provisions of section 6447, G. C., supra, together with the application and petition hereinbefore referred to, will confer upon the county commissioners and the county auditor jurisdiction and authority to proceed under the provisions of sections 6448, 6449, 6450 and 6451, G. C., to give notice therein required and to determine the necessity of such improvement and to continue the proceedings for the location, construction and improvement of said ditch, drain or water-course, as required by law.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1718.

BOARD OF EDUCATION—ENCYCLOPEDIA PURCHASED FOR USE OF HIGH SCHOOL NOT A PERMANENT IMPROVEMENT WITHIN MEANING OF THAT PHRASE AS FOUND IN SECTION 7747, G. C.

An encyclopedia purchased for the use of a high school is not a permanent improvement within the meaning of that phrase as found in section 7747, G. C.

COLUMBUS, OHIO, June 21, 1916.

HON. GEORGE W. PORTER, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—Yours under date of June 12, 1916, is as follows:

"Section 7747 provides the manner by which the tuition of a pupil residing outside of the district may be computed.

"It is necessary for a high school, in order to maintain their charter, to purchase an encyclopedia. The question now arises as to whether or not this school board, in computing the tuition of a pupil residing outside of the district, can add in the costs of conducting the school the cost of the encyclopedia and charge the same to the non-resident pupil; whether or not you would consider the encyclopedia as one of the permanent improvements of said school?"

By section 7747, G. C., 104 O. L., 125, to which you refer, provision is made for the payment of the tuition of pupils who are eligible for admission to high schools, and who reside in rural districts in which no high school is maintained, when such pupils attend high school in another district and, as pertinent to your inquiry, said section provides in part as follows:

"No more shall be charged per capita than the amount ascertained by dividing the total expenses of conducting the high school of the district attended, exclusive of permanent improvements and repair, by the average monthly enrollment in the high school of the district."

It will be noted from this provision that the basis for the computation of the tuition to be charged for the attendance of pupils from other districts is the total expense of conducting the high school attended, exclusive of permanent improvements and repair, and your inquiry involves a consideration of the meaning of the phrase "permanent improvement," as found in the above quoted statutory provision.

While the term "improvement" may be applied to the amelioration in the condition of personal property, it is said in 16 Am. and E. Ency., 66 (2nd Ed.) that:

"The term is, however, ordinarily used only in reference to real property."

In its application to real property, the term "improvement" is defined in 22 Cyc., 5, as follows:

"An improvement or betterment, as it is otherwise known, is an improvement on realty which is more extensive than ordinary repair, and enhances in a substantial degree the value of the property."

In support of this definition there is cited the case of Stark v. Starr, 22 Fed. Cas., No. 13307, 1 Sawy. 15, in which it is said:

"A permanent improvement is something done or put upon land by the occupant which he cannot remove, either because it has become physically impossible to separate it from the land or, in contemplation of law, it has been annexed to the soil and become a part of the free-hold."

From the above definitions it is conclusive that in its ordinary sense the term "improvement" or "permanent improvement" has reference to an improvement or betterment made upon real estate, and there appears from a perusal of the section of the statute above referred to no reason for giving to this phrase a meaning other than that in which it is ordinarily used and understood. I am therefore inclined to the view that the phrases "permanent improvement" and "repairs," as found in section 7747, have reference only to the school ground and building or, in other words, the real estate of the school district in which the high school in question is maintained.

An encyclopedia would not in any case be considered as an improvement and betterment, either of the building or the land but, on the contrary, is clearly a part of the equipment only of the school and is therefore not within the terms of the statute referred to, and hence the purchase of such encyclopedia for the use of a high school would constitute a part of the expense of conducting such high school and be included in the computation of the tuition authorized to be charged for the attendance of pupils at such school from other districts.

It may be observed, however, that only such part of the purchase price of such encyclopedia as is actually paid within the year would constitute a part of the expense of conducting such school for that year.

Answering your question specifically, I am therefore of the opinion that the purchase of an encyclopedia for the use of a high school does not constitute a permanent improvement within the meaning of section 7747, G. C., and thereby authorized to be deducted in the calculation of the total expense of conducting such high school in the computation of the tuition to be charged pupils attending the same from other districts.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1719.

OHIO HOSPITAL FOR EPILEPTICS—SUPERINTENDENT—LETTER MAY BE MAILED DESCRIBING CONDITION OF PATIENT IN THAT INSTITUTION TO PERSON CONTEMPLATING MARRIAGE WITH SUCH INMATE.

The superintendent of the Ohio hospital for epileptics may mail a letter describing the condition of a patient in that institution to a person contemplating marriage with the inmate in question for his information and to safeguard the public against the results of such a marriage, without violating the law,—the truth of the statements in the letter and its purpose being a complete justification for its sending.

COLUMBUS, OHIO, June 21, 1916.

G. G. KINEON, M. D., *Superintendent the Ohio Hospital for Epileptics, Gallipolis, Ohio.*

DEAR SIR:—I have your letter of June 16, 1916, asking for an opinion which is as follows:

> "I am enclosing herewith a copy of a letter which I have written to a young man * * * concerning a patient at this hospital by the name of * * * and who has been here for over eleven years. As I understand it * * * met this man while she was away on a visit to her uncle, and the uncle has written for the girl to make him another visit, which, I am informed, is for the purpose of having this young man marry her.
>
> "I have dictated a letter to * * * as per copy enclosed, and should like your opinion as to whether there is any legal objection to such a letter being sent."

The letter to which you refer is a statement concerning the condition of a

patient in the Ohio hospital for epileptics advising of the probable results of a marriage with such a person, and calling attention to the probable consequences thereof. It is to be assumed that the statements in the letter are true, as there is no purpose in its being mailed other than to safeguard the public and interested parties against undesirable results, and it is doubtless a wise precaution to take.

It is my opinion that there is no provision of law which would prevent the mailing of such a communication, and that a complete defense to any action which might result therefrom would be the truth of the statements contained in your letter.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1720.

JURORS—EXPENSES OF MEALS AND LODGING—WHEN IN TRIAL OF ANY CASE, IF NOT PERMITTED TO SEPARATE, SUCH EXPENSES MUST BE PAID FROM COUNTY TREASURY—MAY NOT BE TAXED AS COSTS OR ASSESSED AGAINST ANY PARTY TO SAID CASE.

The expenses of meals and lodging furnished to jurors, when in the trial of any case they are not permitted to separate, must be paid from the county treasury and may not be taxed as costs or assessed against any party to said case.

COLUMBUS, OHIO, June 22, 1916.

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

GENTLEMEN:—I have your letter of June 16, 1916, submitting the following inquiries:

> "1. Where a jury is forbidden by the court to separate, in either a civil or criminal case, can the cost of meals and lodging for the jury be legally paid out of the county treasury?
>
> "2. If so, could such expense be considered such a cost as could be taxed against the parties to the action in the cost bill of the case and the treasury be reimbursed? See sections 11449 and 13688, General Code."

The sections to which you refer in your foregoing letter provide as follows:

> "Sec. 11449. When the case is submitted, the jury may decide it in court, or retire to deliberate. Upon retiring, they must be kept together, in charge of an officer, at a convenient place, until they agree upon a verdict, or are discharged by the court. The court may permit them temporarily to separate at night and for their meals.
>
> "Sec. 13688. When a case is finally submitted, the jurors must be kept together in a convenient place, under the charge of an officer, until they agree upon a verdict or are discharged by the court. Such officer shall not permit a communication to be made to them, nor make any himself, except to ask if they have agreed upon a verdict, unless by order of the court; nor shall he communicate to any person, before the verdict is delivered, any matter in relation to their deliberations. If the jurors are per-

mitted to separate during the trial, they shall be admonished, by the court, not to converse with, nor permit themselves to be addressed by, any person, nor to listen to any conversation on the subject of the trial, nor form or express an opinion thereon, until the cause is finally submitted to them."

The first named section, to wit, section 11449, applies to the trial of civil cases, and when considered in connection with section 11451, G. C., has been construed as authorizing the court to permit a jury in the trial of civil cases to separate temporarily for their meals, even after the case has been finally submitted to them for their verdict. In other words, this section is construed as leaving it entirely in the discretion of the court in the trial of a civil case whether the jury shall be permitted to separate during the progress of the trial, and after the case is finally submitted to it or not.

Parker v. State, 18 O. S., 89-91.

Section 13688, G. C., aforesaid, which applies to the trial of criminal cases, does not permit a separation of the jury after the case is finally submitted to it. It, however, makes it discretionary with the court to permit a separation during the progress of the case and until the time when the case is submitted to the jury for its determination.

Parker v. State, supra.
Bergin v. State, 31 O. S., 111.

It appears to be the general practice of the courts of this state to permit a separation of the jury during all stages of the trial of civil cases, while in the more important criminal matters no separation is permitted at any time during the trial of such cases, and no separation may be permitted in any criminal case after the same is finally submitted to the jury. It is apparent, therefore, that in the trial of all criminal cases the necessity may arise to furnish the jury some care and sustenance during its service in said cases, while in civil cases, if the court in the exercise of its discretion orders and directs the jury not to separate, such necessity may also arise. In modern practice it has always been recognized in this state as right and proper to furnish jurors with meals, care and sustenance during their service on juries when either by the provisions of law or by an order of the court no separation is permitted.

As early as 1832 in the case of State v. Town, Wright's Reports, 78, the following observation is found in the statement of the case:

"The jury retired at nine o'clock p. m. At eleven o'clock they sent for the court and received instruction upon a point of law and again retired. At eight o'clock the next morning they were allowed refreshment and a physician was allowed to examine and prescribe for one of the jurors that was sick."

Again, in the case of Sutliff v. Gilbert, 8 Ohio, 405, which was a civil suit, the question of the right of a jury to separate after sealing a verdict, and before making its report to the court was considered. The court in commenting upon the right of jurors to separate makes the following observation:

"Formerly jurors were not permitted to separate until their verdict was returned into court; and in order to compel them to agree, they were deprived of the necessaries of life for the time being. But these rigid

rules have been much relaxed in the practice of this state. We do not, it is true, permit jurors to separate until a verdict is found, but we allow them all necessary refreshment, and when they have agreed upon a verdict, if the court is not in session they are permitted to put it under seal, and then separate."

Your attention is directed to the foregoing matters simply to illustrate the change that has taken place in the matter of the treatment of juries in modern as compared with earlier times and as illustrating the attitude of the courts toward the right of a court to furnish jurors with the necessary care and sustenance during their service to the court when under their obligations as jurors they may not be permitted to take care of themselves.

You first inquire if the cost of such care and sustenance can be legally paid out of the county treasury. This question, in so far as it applies to criminal cases, is answered by the case of State ex rel. v. Auditor, 19 Ohio, 116. In this case it appears that the sheriff of Hamilton county expended a certain amount of money in and about the boarding, and care of two juries impaneled to try a person charged in two indictments with the crime of murder. This money was expended in obedience to an order of the court, and the allowance and order of the court for said sum of money were duly presented to the defendant, who was the auditor of said county, with the request that he issue an order on the treasury therefor, which he refused to do. The case itself was an action in mandamus to compel the auditor to issue said order. In passing upon the question thus presented in said case the court said:

"There is no difference of opinion amongst our number, in respect to the justice of this claim, and the propriety of the expenditure by the sheriff, under the circumstances.

"Indeed we would with one voice unite in advising the defendant to audit and allow the account as a proper charge against the county of Hamilton, but we do not see the way clear to carry out the remedy by mandamus, as the law no where, in express terms, makes it the duty of the auditor to act upon the allowance of the court, in cases of this sort.

"A majority of the court, however, believe it to be a necessary incident to their authority, to make a provision for the sustenance and care of juries when called to administer the criminal laws of the state, in any county; and as the speediest way of reimbursing the sheriff for money advanced by him for this salutary purpose, they will direct the county auditor to consider an account of this character, audited and allowed by the court, as 'a just demand against the county, settled and allowed by a tribunal authorized by law to do so.' A peremptory mandamus will issue."

So far as I have been able to ascertain, the authority of this case has never been questioned. It follows, therefore, that it would seem to settle the liability of a county for such expense in the trial of criminal cases, and I am unable to conceive of any reason why the same reasoning will not apply with equal force in civil cases under like circumstances. In other words, when the court in a civil suit in its discretion requires a jury to be kept together after the case is finally submitted to it or during the progress of the trial thereof, it may be said to be a necessary incident to the right of the court to make such order to also provide for the sustenance and care of such jury while it is so subject to such order. While the necessity of an order requiring a jury to remain together during the progress of the trial of a civil case would be of very rare occurrence, yet it is very frequently a wise precaution upon the part of the court to refuse to permit a separa-

tion in such cases after they are finally submitted to a jury for its verdict, and it not infrequently happens that it is necessary under such conditions that the jury shall be furnished with meals. In view of these considerations I am of the opinion that your first inquiry must be answered in the affirmative.

This conclusion, in so far as it applies to criminal cases, is in harmony with an opinion of this department of the date of April 16, 1870, reported in Vol. II, page 20 of the opinions of the attorney-general of said year. In a later opinion, however, under date of March 17, 1886, the conclusion was reached by the then attorney-general of this state, that in felony cases when the court orders the sheriff to keep the jury together during the progress of the trial, the hotel bills should not be paid by the county. There is, however, in the last opinion no discussion of the question whatever. In view of this conflict I have deemed it necessary to discuss more fully than I otherwise would my reasons for arriving at the foregoing conclusion.

You next inquire if such expense may be taxed as costs in such cases, and assessed against the parties to the action and the treasury reimbursed.

Section 12375, G. C., provides:

> "In all sentences in criminal cases, the court shall include therein, and render a judgment against the defendant for the costs of prosecution; and, if a jury has been called in the trial of the cause, a jury fee of six dollars shall be included in the costs."

This section is held to be exclusive and that no further charge for jury service may be taxes as costs in any criminal case. Commissioners v. Commissioners, 14 C. C., 28.

As there is no statutory provision permitting such expenses to be taxed as costs in any case, and as the costs include "only those expenditures which are by law taxable and to be included in the judgment." McDonald v. Page, Wright's Reports, 121, and Commissioners v. Commissioners, supra, I am of the opinion that such expenses may not be taxed as costs in any case. Your second inquiry, therefore, will be answered in the negative.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1721.

MUNICIPAL CORPORATION—PETITION PRESENTED BY PROPERTY OWNERS FOR IMPROVEMENT OF STREET ON ASSESSMENT PLAN CANNOT CONTAIN RESTRICTIONS BINDING PRESENT OR SUBSEQUENT COUNCIL AS TO GENERAL ASSESSMENTS FOR STREET IMPROVEMENTS.

The petition presented by property owners for improvement of a street on the assessment plan cannot contain restrictions preventing council from improving other streets of municipality in which a larger per centum of the cost thereof is assumed by the village than is assumed by the village in the instant improvement.

COLUMBUS, OHIO, June 22, 1916.

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

GENTLEMEN:—I am in receipt of your letter of June 15th, wherein you request my opinion as follows:

"A petition is presented by property owners for the improvement of a certain street upon which their property abuts, the village to pay two per centum and cost of intersections. Said petition contains the following clause:

"'Further, the petitioners hereto, make a part of this petition for the improvement of said street in the manner and between the points named, this condition: That in consideration of the acceptance of this petition, the construction of said improvement and the assessment of the cost thereof in the proportions above named, that all property so abounding, abutting, benefited and assessed for said improvement in said proportions shall hereafter be exempt from contributing by general taxation or otherwise toward the improvement of any streets, parts of streets, public places and public ways in said village, except such amount, in proportion, as the village of Somerset, Ohio, from general taxation, or otherwise contributes to this proposed improvement.'

"Would this clause prove effective if the improvement be made upon the conditions mentioned in said petition, and prevent a subsequent council from improving other streets of the municipality in which a larger per centum of the cost thereof is assumed by the village, the same to be met by taxation?"

There is no doubt that the clause quoted by you from the petition presented by the property owners is ineffective to prevent a subsequent council from improving other streets of the municipality in which a larger part of the cost thereof is assumed by the village, the same to be met by taxation. In fact the clause, as I view it, is absolutely without any force or effect. If no proceedings have been had on the petition referred to, I would suggest that the entire petition be disregarded and, if the improvement referred to therein is desired, that council proceed in the regular way to make the improvement as if no petition had been presented.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1722.

INSPECTOR OF AUTOMATIC COUPLERS—ASSESSMENT FOR MAINTENANCE OF SUCH OFFICE NOT REQUIRED TO BE PAID BY RAILROADS BEFORE AUGUST 1ST, ANNUALLY.

The assessment provided for in section 8960, G. C., is not required to be paid before August 1st, annually.

COLUMBUS, OHIO, June 22, 1916.

HON. R. W. ARCHER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—Under date of June 1st you submitted for my opinion the following:

"In regard to section 8960 of the General Code, providing for the assessment of the sum of $2,500 for the support and maintenance of the office of inspector of automatic couplers:

"We mailed statements to every railroad assessed under date of January 7th. It seems that the procedure heretofore has been to allow the

railroad companies to pay these amounts on or before August 1st. Inasmuch as the law is silent in this respect I have made an attempt to complete this collection by June 10th, believing the time intervening between January 7th and June 10th to be sufficient.

"Some of the railroads have taken exception to my efforts, contending that the payment would not have to be made before August 1st. In order to settle the controversy we would like to have your decision as to just when this assessment should be paid."

Section 8960 of the General Code, to which you refer, provides as follows:

"Such inspector (inspector of automatic couplers, etc.) shall receive a salary of fifteen hundred dollars per year, and all necessary expenses, not exceeding one thousand dollars in any one year, which shall be paid in the manner now provided by law for the salary and expenses of the railroad commission. In addition to the fifteen thousand dollars now authorized for such state railroad commission, there shall be assessed yearly in the manner and upon the corporations as the law provides, the sum of two thousand, five hundred dollars to pay the salary and expenses herein provided for."

A careful examination of the history of the legislation of section 8960, G. C., which prior to codification bore the section number 3365-23d of the Revised Statutes, will disclose that the provision therein "as the law provides," refers to section 606, G. C., the original of which prior to codification was known as section 250-2 of the Revised Statutes. Therefore, the time for paying the assessment referred to in section 8960, G. C., is the time specified in section 606.

In opinion No. 1712 rendered to you on June 19, 1916, I advised you as to the manner and time of the assessment and collection of the amount to be assessed under section 606, G. C., and said opinion will apply as well to the time of the assessment to be made under section 8960, G. C. In said opinion it was held that the payment of the assessment could not be compelled prior to August 1st, annually.

Respectfully,
EDWARD C. TURNER,
Attorney-General

1723.

TOWNSHIP TRUSTEES—NOT ENTITLED TO ANY COMPENSATION FOR SERVICES PERFORMED UNDER OLD SECTIONS 7033 TO 7052, G. C., INCLUSIVE.

Township trustees are not entitled to any compensation for services performed under old sections 7033 to 7052, G. C., inclusive.

COLUMBUS, OHIO, June 23, 1916.

HON. GEORGE THORNBURG, *Prosecuting Attorney, St. Clairsville, Ohio.*

DEAR SIR:—I have your communication of June 15, 1916, which communication reads as follows:

"Under the provisions of sections 7033 to 7052, G. C., Washington township trustees are improving their roads. Information relative to their

bond issue was submitted to me by your opinion of October 27, 1915, No. 978. The trustees are proceeding under your directions to improve the roads under said sections now repealed.

"Section 7052 of said law provides:

" 'The trustees shall designate one of their number to supervise the improvement of each working section of the public highways.'

"Section 6999 provides that trustees shall receive two dollars per day for services performed under this sub-division.

"The Cass law makes no provision for compensation for trustees for such services, and they have submitted to me the question of how the trustees are to be paid for superintending the work.

"It seems to me that since they are proceeding to sell their bonds and improve the road under the old law that they have a right to charge for compensation under section 6999 at the rate of two dollars per day for their services, not to exceed one hundred dollars in all.

"If they can sell their bonds and proceed under the law as has already been outlined, I think they should also be governed by all other provisions of the law, and that the saving sections of the Cass law will protect them.

"I desire to have your opinion as to whether or not I am taking the proper view of it."

It should first be observed that all of the sections of the General Code referred to by you were repealed by the Cass highway law, 106 O. L., 574, and are now operative only in so far as they are preserved by the saving provision of that act. Where by virtue of such saving provisions the trustees are still proceeding under old sections 7033 to 7052, G. C., inclusive, I quite agree with your conclusion that such trustees are now entitled to the compensation, if any, which they would have received for services rendered under such sections prior to the going into effect of the Cass highway law. In other words, the conclusion as to the proper compensation of township trustees for services rendered under old sections 7033 to 7052, G. C., inclusive, will be the same without regard to whether the services were rendered before or after the going into effect of the Cass highway law.

Section 7052, G. C., reads as follows:

"The trustees shall designate one of their number to supervise the improvement of each working section of the public ways. They shall provide such blanks, books and records, as are necessary, and allow to the township clerk for the services to be rendered by him, reasonable compensation; all of which shall be paid out of the fund provided for such improvement on the order and allowance of the township trustees."

This section was originally section 13 of house bill No. 557, being an act to authorize township trustees to create road districts and improve the roads therein, passed April 12, 1900, and found in 94 O. L., 129. The section in question in its original form read as follows:

"That the township trustees shall designate one of their number to supervise the improvement of each working section of said public ways, improved under this act, and the trustee so designated shall receive for his services in that behalf not to exceed two dollars a day for the time actually and necessarily employed in such supervision; and the trustees shall provide such blanks, books and records, as shall be necessary to meet

the requirements of this act: and shall allow to the township clerk for the services to be rendered by him, reasonable compensation; all of which shall be paid out of the funds provided for such improvement on the order and allowance of the township trustees."

It will be noted that the provision of this section, giving the trustee designated to supervise the improvement of a working section a compensation not exceeding $2.00 per day for the time actually and necessarily employed in such supervision, was stricken out by the codifying commission and cannot therefore be regarded as a part of this scheme of road improvement unless preserved by some other section of the General Code.

Section 6999, G. C., referred to by you, read as follows:

"For the duties performed under the provisions of this subdivision of this chapter, the trustees, upon filing an itemized statement with the clerk of such township, as provided by law, shall receive two dollars per day for the time actually employed in addition to the fees allowed otherwise by law for other services. Such compensation shall not in any one year exceed one hundred dollars each, for the services performed under such subdivision. The trustees shall allow the township clerk for his services under such subdivision a reasonable compensation, not to exceed one hundred dollars in any one year."

This section, in the form in which it was last put by the legislature prior to the work of the codifying commission, was a part of section 15 of house bill No. 67, being an act to authorize the improvement of public roads of townships, including streets of cities or villages therein, etc., passed April 22, 1904, and found in 97 O. L., 550. Section 15 of the act in question read in part as follows:

"* * * for the duties performed under the provisions of this act, the trustees shall, upon filing an itemized statement to the clerk of such township, as provided in section 1530, Revised Statutes, as amended April 21, 1890, receive two dollars per day in addition to the fees allowed in section 1530, for other services rendered for the time actually employed, and such compensation shall not in any one year exceed the sum of one hundred dollars each, for the services performed under this act; and the trustees shall allow the township clerk for services performed under this act a reasonable compensation, not to exceed one hundred dollars in any one year."

It will be noted that the above quoted provision as to the compensation of township trustees was preserved by the codifying commission. House bill No. 557, 94 O. L., 129, became a subdivision of chapter 3, title IV, part second of the General Code, and was styled by the codifying commission "township or precinct a road district." House bill No. 67, 97 O. L., 550, also became a subdivision of the same chapter, and was styled by the codifying commission "roads partly in a municipality."

I have referred to the history of these two subdivisions of chapter 3, title IV, part second of the General Code, for the purpose of showing that any provision as to compensation of trustees, found in old section 6999, G. C., can have no application to services rendered by trustees under old sections 7033 to 7052, G. C., inclusive, for the reason that the compensation provided by old section 6999, G. C., is, by the terms of that section, expressly limited to duties performed under the subdivision of the chapter in which old section 6999, G. C., was found. Old section

7052, G. C., not providing any compensation for township trustees for services rendered under old sections 7033 to 7052, G. C., inclusive, and no such provision being found in any of the other sections of the subdivision in question, township trustees are not entitled to any compensation for such services unless the same is allowed under the general section relating to the compensation of township trustees. That section is section 3294, G. C., which reads as follows:

> "Each trustee shall be entitled to one dollar and fifty cents for each day of service in the discharge of his duties in relation to partition fences, to be paid in equal proportions by the parties, and one dollar and fifty cents for each day of service in the business of the township, to be paid from the township treasury. The compensation of any trustee to be paid from the treasury shall not exceed one hundred and fifty dollars in any year including services in connection with the poor. Each trustee shall present an itemized statement of his account for such per diem and services, which shall be filed with the clerk of the township, and by him preserved for inspection by any person interested."

The services now under discussion have, of course, no relation to partition fences, and it is my opinion that such services cannot be said to relate to the business of the township. Road districts organized under the sections in question might have consisted of a township or that part of a township outside of any municipal corporation or corporations therein situated or an election precinct or part thereof in a township. The services in question related therefore not to the business of a township but to the business of a road district which might or might not have consisted of all of a township. In view of the foregoing, I therefore conclude that township trustees were not and are not entitled to any compensation for services rendered under old section 7033 to section 7052, inclusive, of the General Code.

The above conclusion is the same as that reached by my predecessor, Hon. Timothy S. Hogan, in opinion No. 982,, rendered to Hon. Archer L. Phelps, prosecuting attorney of Trumbull county, on June 17, 1914, and found in the annual report of the attorney-general for that year at page 801.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1724.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY VILLAGE OF CRESTLINE, OHIO.

COLUMBUS, OHIO, June 23, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

> "RE:—Bonds of the village of Crestline, Ohio, in the amount of $4,000.00 to pay the village's portion of the cost and expense of improving North Seltzer street from the north line of Main street to the north line of Diamond street, being 10 bonds of $400.00 each."

I have examined the transcript of the proceedings of the council and other officers of the village of Crestline relative to the issuance of the above bonds; also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of the village of Crestline, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1725.

APPROVAL, RESOLUTION FOR IMPROVEMENT OF ROAD IN FAYETTE COUNTY.

COLUMBUS, OHIO, June 24, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:- I have your communication of June 21, 1916, transmitting to me for examination final resolution relating to section "A" of the Cincinnati-Zanesville road, Pet. No. 2330, I. C. H. No. 10, Fayette county.

I find this resolution to be in regular form and am, therefore, returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1726.

APPROVAL, LEASE OF ISLAND IN BUCKEYE LAKE TO C. C. PHILBRICK.

COLUMBUS, OHIO, June 24, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:- I have your communication of June 20, 1916, transmitting to me for examination a lease of a small island in Buckeye lake known as "Castle Island" to C. C. Philbrick.

I find this lease to be in regular form and am, therefore, returning the same with my approval endorsed upon the triplicate copies thereof.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1727.

APPROVAL, RESOLUTION FOR IMPROVEMENT OF CERTAIN ROAD IN PORTAGE COUNTY.

COLUMBUS, OHIO, June 24, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of June 20, 1916, transmitting to me for examination final resolution relating to section "A" of the Aurora-Warren road, Petition No. 2832, I. C. H. No. 474, in Portage county.

I find this resolution to be in regular form and am, therefore, returning the same with my approval endorsed upon the duplicate copies thereof.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1728.

BOARD OF EDUCATION—WHERE SCHOOL TEACHERS' PENSION FUND IS MAINTAINED—CLERK-TREASURER OF SCHOOL BOARD BECOMES TREASURER OF BOARD OF TRUSTEES OF SAID SCHOOL TEACHERS' PENSION FUND—NEITHER BOARD HAS AUTHORITY TO PROVIDE DEPOSITORY FOR SAID FUND.

Where the board of education of a school district, which maintains a school teachers' pension fund, has provided a depository for the school funds of said district in the manner authorized by law and has dispensed with the treasurer of said funds under authority of section 4782, G. C., 104 O. L., 159, the clerk of said board of education succeeds to the duties of said treasurer by provision of the latter part of said section 4782, G. C., and under provision of section 7889, G. C., said clerk-treasurer, upon giving the bond required by said section, becomes treasurer of the board of trustees of said school teachers' pension fund and custodian of said fund.

Neither the board of education of said school district nor the board of trustees of said school teachers' pension fund have any authority in law to provide a depository for said fund for the purpose of relieving the clerk-treasurer as custodian of said fund of any and all liability incident to the care and custody of moneys belonging to such fund.

COLUMBUS, OHIO, June 24, 1916.

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

GENTLEMEN:—In your letter of June 13th, you request my opinion upon the following question:

> "Do the resolutions submitted by the assistant city solicitor of the city of Cincinnati, Ohio, enclosed herewith, marked Exhibits A and B, respectively, represent, in the event of enactment by the board of education of said city school district, legal action on the part of said board?"

The resolutions above referred to read as follows:

"Exhibit A.

"A RESOLUTION.

"*Whereas,* The board of education of the Cincinnati school district has dispensed with the services of the city treasurer as treasurer of the school moneys and directed the clerk of the board to perform the duties required by law of the treasurer, and

"*Whereas,* Section 7889 provides that the treasurer of the school district shall be the custodian of the pension fund, therefore, be it

"*Resolved,* That the treasurer of the school district of the city of Cincinnati be required to file a bond in the penal sum of $——— for the faithful performance of duty as custodian of the school teachers' pension fund.

"*Resolved,* That Richard B. Witt, treasurer, be and is hereby authorized and directed to deliver to Wm. Grautman, his successor in office, all securities, moneys, books and other property of whatsoever kind, nature and description in his hands or under his control as treasurer of the school teachers' pension fund of Cincinnati, Ohio.

"*Resolved,* That Wm. Grautman, treasurer of the school teachers' pension fund be and is hereby directed to receipt in the name of the board of trustees for all such records, papers, books, bonds and cash.

"*Resolved,* That upon delivery of said records, papers, books, bonds and cash, the said Richard B. Witt shall be and he is hereby released from any and all liability as custodian of the school teachers' pension fund.

"Exhibit B.

"A RESOLUTION.

"*Resolved,* That the Columbia Bank and Savings Company be and is hereby designated by the board of trustees of the school teachers' pension fund of Cincinnati, Ohio, as the depositary for all cash moneys belonging to the said fund.

"*Resolved,* That said Columbia Bank and Savings Company be required to file a bond in the penal sum of $25,000.00 for the receipt, safekeeping and payment over of all moneys belonging to the school teachers' pension fund which may be deposited with said bank.

"*Resolved,* That the treasurer of the school teachers' pension fund be and he is hereby directed to deposit all moneys belonging to said fund with the said Columbia Bank and Savings Company.

"*Resolved,* That (upon) compliance with these resolutions, the treasurer shall be relieved of any and all liability, in so far as deposits are concerned."

Section 7875, G. C., provides that:

"When the board of education of a school district by resolution, adopted by a majority vote of the members thereof, declares that it is advisable to create a school teachers' pension fund for that school district, such fund shall be under the management and control of a board to be known as 'the board of trustees of the school teachers' pension fund' for such district,"

and further provides the manner in which said board of trustees shall be selected.

Section 7879, G. C., governs the investment of the pension fund referred to in section 7875, G. C., supra, and the payment of pensions from said fund, and provides that

> "Such board of trustees may invest such pension fund (created and maintained under provisions of sections 7877, 7879, 7894 and 7895 of the General Code) in the name of the board in bonds of the United States, or of the state of Ohio, or of any county, or municipal corporation, or school district in this state; and may make payments from such fund for pensions granted in pursuance of the laws relating thereto."

Said section further provides that:

> "The board of trustees from time to time also may make and establish such rules and regulations for the administration of the fund as they deem best."

Section 7889, G. C., provides:

> "The treasurer of such school district (in which a school teachers' pension fund has been established) shall be the custodian of such pension fund, and keep it *subject to the order, control and direction of the board of trustees.* He must keep books of accounts concerning the fund in such manner as may be prescribed by such board which always shall be subject to the inspection of the board of trustees or of any member thereof. Such treasurer shall execute a bond to the board of trustees with good and sufficient sureties in such sum as the board requires, which bond shall be subject to its approval, and be conditioned for the faithful performance of his duties as custodian and treasurer of the board."

Section 7890, G. C., provides:

> "Such treasurer must keep and truly account for all moneys and profits coming into his hands belonging to such fund, and at the expiration of his term of office pay over, surrender and deliver to his successor all securities, moneys and other property of whatsoever kind, nature and description in his hands or under his control as treasurer. For his services he shall be paid not to exceed one per cent. annually of the amount paid into the fund during the year."

Section 4763, G. C. (104 O. L., 159), provides that:

> "In each city school district the treasurer of the city funds shall be the treasurer of the school funds. * * *"

Section 4782, G. C. (104 O. L., 159), provides that:

> "When a depository has been provided for *the school moneys of a district*, as authorized by law, the board of education of the district, by resolution adopted by a vote of a majority of its members, shall dispense with a treasurer of the school moneys, belonging to such school district. In such case, the clerk of the board of education of a district shall perform all the services, discharge all the duties and be subject to all the obligations required by law of the treasurer of such school district."

I am informed by Mr. Saul Zielonka, the assistant city solicitor referred to in your letter, that Richard B. Witt, mentioned in the first resolution above set forth, is the city treasurer of Cincinnati, and that William Grautman is clerk of the board of education of the Cincinnati city school district.

By provision of section 4763, G. C., supra, the treasurer of said city was ex-officio treasurer of the school funds of said school district up until the time said board of education, acting under authority of section 4782, G. C., supra, dispensed with his services as treasurer of said school funds. Since that time, by provision of the latter part of said section 4782, G. C., the clerk of said board of education has performed such services, discharged all the duties and has been subject to all the obligations required by law of said treasurer.

I have already held in opinion No. 1265 of this department, rendered to your bureau under date of February 14, 1916, that in a school district in which a school teachers' pension fund has been established and is being maintained, and in which the board of education has provided a depository for the school funds in the manner authorized by law and has dispensed with the treasurer of said funds under authority of said section 4782, G. C., the clerk of said board, who is now performing all the services and discharging all the duties and is subject to all the obligations required by law of the treasurer of such school district, is treasurer of said school teachers' pension fund under provision of said section 7889, G. C., supra. It follows that inasmuch as the school teachers' pension fund has been established and is being maintained in the Cincinnati city school district and the board of education of said school district has provided a depository for the school funds of said district in the manner authorized by law and has dispensed with the treasurer of said funds under authority of said section 4782, G. C., the said William Grautman as clerk of said board, upon giving the bond required of said section 7889, G. C., will succeed the said Richard B. Witt as custodian of said pension fund and it will be the duty of the said Richard B. Witt to deliver to his successor, the said William Grautman, "all securities, moneys, books and other property of whatsoever kind, nature and description in his hands or under his control as treasurer of the school teachers' pension fund" of said city school district, and the said William Grautman as the successor of the said Richard B. Witt as custodian of such fund, should receipt, as such custodian, for all such records, papers, books, bonds and moneys.

In view of the foregoing I am of the opinion that the latter part of the first branch of the resolution, as above set forth and marked "Exhibit A," should be modified so as to designate the treasurer of said pension fund as "the treasurer of the school teachers' pension fund of the Cincinnati city school district" and that the second branch of said resolution should be modified to read as follows:

> "*Resolved*, That William Grautman, treasurer of the school teachers' pension fund, be and is hereby directed to receipt as such custodian for all such records, papers, books, bonds and moneys."

With this modification I am of the opinion that said resolution will be in conformity with the provisions of the statutes hereinbefore set forth.

Coming now to a consideration of the second resolution above set forth, I note that the pension fund in question is derived from the following sources:

> "1. Deductions of two dollars from the monthly salary of each teacher accepting the provisions of the law for creating said pension fund (section 7877, G. C.).
>
> "2. All moneys received from donations, legacies, gifts, bequests or from any other sources (section 7878, G. C.).

"3. Deductions from the salaries of teachers on account of their tardiness or absence (section 7894, G. C.).

"4. The payment from the contingent fund of such school district into said pension fund of not less than one per cent. nor more than two per cent. of the gross receipts of the board raised by taxation (section 7895, G. C.)."

The moneys received under item 2 are paid either into the pension fund or into a permanent fund. If paid into a permanent fund only the interest thereof shall be credited to the pension fund and applied to the payment of pensions.

It will be observed that under provision of section 7889, G. C., supra, the custodian of the pension fund is required to "keep it subject to the order, control and direction of the board of trustees" and the bond given by said treasurer as such custodian is subject to the approval of said board of trustees and conditioned for the faithful performance of his duties as custodian and treasurer of the board.

In the former opinion of the department, above referred to, it was observed that while the above provision of section 7889, G. C., makes the treasurer of a school district, which has established a school teachers' pension fund, the treasurer of the board of trustees and as such the custodian of said fund, the treasurer of said school district as treasurer of said board of trustees and as custodian of said fund is in no way accountable to the board of education of said district. It was further observed that the bond required to be given by the provision of the latter part of said section 7889, G. C., is executed to said board of trustees and is subject to the approval of said board; that in view of the provisions of sections 7889 and 7890, G. C., taken in connection with the above provisions of sections 7875 and 7879, G. C., it seems clear that the board of education of a school district is in no way charged with the administration of the school teachers' pension fund and that said fund is not a fund of the school district within the meaning of section 7604, G. C. (106 O. L., 328), which provides that:

"Within thirty days after the first Monday in January, 1916, and every two years thereafter, the board of education of any school district by resolution shall provide for the deposit of any or all moneys coming into the hands of its treasurer."

and it was held in said opinion that the provision of this latter statute has reference only to the funds belonging to the school district and is not applicable to the pension fund under consideration.

It seems clear to my mind from a consideration of all of the provisions of the statutes relating to said school teachers' pension fund and governing the administration and control of said fund and determining the sources from which the same is derived, that the several funds going to make up the school teachers' pension fund cannot be considered school funds of the district and that the board of trustees, created under authority of section 7875, G. C., and in the manner therein provided, is vested by the provisions of the foregoing statutes with the administration and the exclusive control of said pension fund with the authority under section 7879, G. C., supra, to invest said fund in the securities therein mentioned, to make payments from such fund for pensions granted in pursuance of the laws relating thereto and to make and establish such rules and regulations for the administration of said fund as they deem best.

It follows that the board of education of the Cincinnati city school district is without authority in law to pass the proposed resolution above set forth and marked "Exhibit B." Moreover, I am of the opinion that in view of the foregoing provisions of the statutes and in the absence of any provision of the statutes, governing the administration and control of said fund, requiring or even authorizing said

board of trustees to provide a depository for said fund, said board is without authority in law to pass such a resolution for the purpose of relieving the clerk-treasurer as custodian of said fund of any and all liability incident to the care and custody of moneys belonging to such fund.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1729.

STATE HIGHWAY COMMISSIONER—CONTRACTS MADE BY SUCH OFFICER ARE NOT REQUIRED TO BE APPROVED BY COUNTY COMMISSIONERS ALTHOUGH COUNTY CO-OPERATES IN MAKING IMPROVEMENT.

Contracts made by the state highway department are not required to be approved by the county commissioners of the county in which the work is to be done, even in those cases in which the county is co-operating in the making of the improvement.

COLUMBUS, OHIO, June 24, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of June 17, 1916, which communication reads as follows:

"Under date of March 24 th this department, after the usual preliminary proceedings, received bids for the construction of section 'K' of the National road, I. C. H. No. 1, M. M., No. IV, in Guernsey county, the estimated cost of the work being $109,297.15.

"The lowest bid for this work was submitted by W. H. Young Company, the amount of the bid being $96,150.15, the Illinois Surety Company signing form of proposal and contract bond as surety for the W. H. Young Company.

"Our form of contract, in addition to the signature of the state highway commissioner with the proper attestation, and the signature of the contractor, provides for the approval of such contract by the county commissioners of the county in which the improvement is to be made. A form of contract signed by W. H. Young Company, by W. H. Young, and not bearing the signature of the state highway commissioner, was sent to the county commissioners of Guernsey county for their approval. Their response to our request is dated April 21st, and reads as follows:

"'Hon. Clinton Cowen, Columbus, Ohio.

"'Dear Sir:—In the matter of the contract on the construction of the section K of the National road, Pet. No. 2397, I. C. H. No. 1, Guernsey county, Ohio.

"'In reply to yours of the 20th of April: The board of commissioners would reply that the board cannot concur in the award of this contract to the W. H. Young Company, at their bid of $96,160.15 because it has reasons to believe that this company would be unable to successfully construct the

improvement in accordance with specifications and in a workmanlike manner.

"'We further would respectfully request that the contract be awarded to Gray Bros., of Bowling Green, Ohio, at their bid of $105,000.00 if your investigation on the responsibility of the firm and the general reputation for road building is such as to justify your so doing. Or, if not, to proceed to re-advertise for bids on the same at your earliest possible date.

(Signed) "'T. C. White, County Auditor.

"'By order of the county commissioners of Guernsey county, Ohio.'

"Pursuant to the request of the county commissioners, this department re-advertised this work and received bids again on May 5, 1916, at which time the W. H. Young Company, bidding at $105,541.13, were the sole bidders. The proposal and contract bond submitted in connection with this bid is signed by both the Maryland Casualty Company and the National Surety Company.

"This bid and form of contract was also submitted to the county commissioners of Guernsey county for their approval with the signature of the W. H. Young Company, by W. H. Young, and without the signature of the state highway commissioner, and they again request that the work be re-advertised as shown by copy of their letter attached hereto. I am also attaching hereto copy of my answer as to June 8th, and reiterate the opinion therein expressed, viz., that the work should be let to the W. H. Young Company as the season is already far advanced, prices of material and labor are on the rise, Mr. Young assuring me that he will employ practical and competent assistants on this work, and he has furnished what in my notion is a very sound bond.

"I respectfully request an opinion from your office, therefore, as to whether I may proceed and enter into contract with the W. H. Young Company without the approval of the county commissioners of Guernsey county."

The request of the county commissioners that you again re-advertise the work reads as follows:

"At the regular quarterly session of the Guernsey county commissioners: In the matter of section K of the National road.

"It was moved by Mr. Nelson and seconded by Mr. McCracken that the bid of the W. H. Young Company on section K on the National pike, east of the village of Washington, be rejected for the same reason as was incorporated to you in a former letter regarding the bid on the letting of April 7, 1916, it is the desire of this board that you proceed to re-advertise this section for bids at your earliest opportunity.

"On roll call on the above motion the members voted as follows: McBride, yes; McCracken, no; Nelson, yes. The motion was declared carried."

Your answer to the request of the county commissioners, transmitted to them under date of June 8th, reads as follows:

"I beg to asknowledge receipt of your favor of June 7th in regard to awarding the contract for the improvement of section K of the National pike east of Washington to the W. H. Young Company.

"Mr. Young has been able to furnish what appears to be adequate bond, and has given me assurance that he will be associated with practical and

experienced assistants. This work has already been repeatedly delayed, and has been the cause of considerable criticism on this department and the county officials.

"If we re-advertise, we might not be any better off than we are with the W. H. Young Company, who have given me assurance that the work will be pushed vigorously and continuously until it has been completed.

"It is my opinion that we should award the contract to said company and not re-advertise as the season is already getting late."

I have carefully examined all the provisions of law relating to the activities of your department, and find no statutory provision to the effect that the contracts of your department are to be approved by the county commissioners of the county in which the work is to be done, even in those cases in which the county is co-operating in the making of the improvement. After the county commissioners, acting under authority of section 1200, G. C., have adopted the surveys, maps, plans, profiles, specifications and estimates for the proposed improvement, caused to be made by you and transmitted to the commissioners with your certificate of approval endorsed thereon, and after the county commissioners have provided that the highway in question be constructed under the provisions of chapter VIII of the Cass highway law and have, under authority of section 1218, G. C., made a written agreement to assume in the first instance that part of the cost and expense of said improvement, over and above the amount to be paid by the state, they have completely exhausted their authority in the premises and their approval of a contract subsequently made by you for the construction of the improvement, is not required, and such approval adds nothing to the validity of the proceedings.

Your inquiry as to whether you may proceed to enter into a contract with the W. H. Young Company, without the approval of the county commissioners of Guernsey county is, therefore, to be answered in the affirmative.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1730.

BOARD OF EDUCATION—BOND ISSUE TO PURCHASE SITE AND ERECT HIGH SCHOOL BUILDING MAY BE SUBMITTED AT SPECIAL OR GENERAL ELECTION—ADDITIONAL TAX FOR HIGH SCHOOL PURPOSES, HOW SUBMITTED—BONDS ISSUED UNDER SECTION 7669, G. C., FOR HIGH SCHOOL BUILDING MUST BE ISSUED BY EACH DISTRICT SEPARATELY AND MAJORITY OF ELECTORS IN EACH DISTRICT MUST APPROVE—LEVY FOR INTEREST AND SINKING FUND—HOW APPORTIONED—SITE PURCHASED BY BOARDS OF EDUCATION OF SEVERAL UNITED DISTRICTS—LIMITATIONS OF LEVY FOR INTEREST AND SINKING FUND DISCUSSED.

The question of issuing bonds for the purpose of purchasing a site and erecting a high school building, as authorized by section 7669, G. C., may be submitted at a special election called for that purpose or at a regular or general election.

When the question of issuing bonds is submitted pursuant to sections 7669 and 7625, G. C., it is not required that in addition thereto there shall be submitted the question of levying additional tax for high school purposes, pursuant to sections 5649-5 and 5649-5a, G. C.

Bonds authorized by section 7669, G. C., to be issued for the purpose of purchasing a site and erecting a high school building, must be issued by each district separately and issue must be approved by a majority of the electors voting thereon in each district in which the question is submitted.

The levy for interest and sinking fund must be in proportion to the amount of bonds issued in each of the several united districts.

The site should be purchased and the high school building erected by the boards of education of the several united districts.

The levy for interest and sinking fund for the payment of bonds issued pursuant to section 7669, G. C., may be without the five mill limitation of section 5649-3a, G. C., but is within the fifteen mill limitation prescribed in section 5649-3b, G. C., 103 *O. L.*, 57.

COLUMBUS, OHIO, June 26, 1916.

HON. HUGH F. NEUHART, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR SIR:—Yours under date of April 29, 1916, is as follows:

"The boards of education of two adjoining rural school districts by a majority vote of the full membership of each board have united such districts for high school purposes under section 7669 of the General Code.

"It is now necessary to purchase a site and erect a building.

"1. May bonds be issued under this section by submitting the question to the voters at a special election for that purpose, or must a vote be taken at a general election for an additional tax levy for high school purposes before the bonds may be issued?

"2. If bonds may be issued under this section without first submitting the question of the tax levy to the voters, will the bond issue be an issue of the joint district and must the vote carry in each district?

"3. If the bonds may be issued after submission to the electors at a special election will the levy for the sinking fund and interest be made in the proportion as provided under section 7671?

"4. Does the control of the purchase of land and the letting of the contract for the building vest in the committee provided for by section 7670?

"5. May the levy for the sinking fund and interest on bonds issued under section 7669 by either of the above methods be in excess of the 5 mill limitation for school purposes?"

Section 7669, G. C., 104 O. L., 229, to which you refer in your first inquiry, provides as follows:

"The boards of education of two or more adjoining rural school districts, or of a rural and village school district by a majority vote of the full membership of each board, may unite such districts for high school purposes. Each board also may submit the question of levying a tax on the property in their respective districts, for the purpose of purchasing a site and erecting a building, and issue bonds, as is provided by law in case of erecting or repairing school houses; but such question of tax levy must carry in each district before it shall become operative in either. If such boards have sufficient money in the treasury to purchase a site and erect such building, or if there is a suitable building in either district owned by the board of education that can be used for a high school building it will not be necessary to submit the proposition to vote, and the boards may appropriate money from their funds for this purpose."

The first branch of your first question is: May bonds be issued under section 7669, G. C., by submitting the question at a special election.

It will be noted that by said section it is specifically provided:

"Each board also may * * * issue bonds, as is provided by law in case of erecting or repairing school houses."

I find that the provision for issuing bonds in case of erecting or repairing school houses is made in section 7625, G. C., 102 O. L., 419, as follows:

"When the board of education of any school district determines that for the proper accommodation of the schools of such district it is necessary to purchase a site or sites to erect a school house or houses, to complete a partially built school house, to enlarge, repair or furnish a school house, or to purchase real estate for playground for children, or to do any or all of such things, that the funds at its disposal or that can be raised under the provisions of sections seventy-six hundred and twenty-nine and seventy-six hundred and thirty, are not sufficient to accomplish the purpose, and that a bond issue is necessary, the board shall make an estimate of the probable amount of money required for such purpose or purposes and at a general election or special election called for that purpose, submit to the electors of the district the question of the issuing of bonds for the amount so estimated. Notices of the election required herein shall be given in the manner provided by law for school elections."

Here it is specifically provided that the question of issuing bonds in the case referred to may be submitted at a general election or special election called for that purpose. This provision is clearly adopted by reference by the provision of section 7669, G. C., 104 O. L., 225, above referred to, and it therefore follows that the question of issuing bonds, pursuant to the provisions of said section last mentioned, may be submitted at a special election called for that purpose, or at a general election.

The separate branches of your first question are somewhat confusing in that the first branch refers to the submission of the question of issuing bonds, while the second branch refers to the submission of the question of levying a tax. The conduct of elections is subject solely to statutory control and special elections may be held in those cases only in which there is special statutory provision and authority therefor. There is no provision in section 7669, G. C., supra, for holding a special election for the submission of the question of levying a tax as therein authorized, nor does section 7625, G. C., supra, the provisions of which are adopted by reference as to the question of issuing bonds, contain any provision at all as to the submission of the question of levying a tax in any case. I am therefore of opinion, in answer to the alternative question contained in your inquiry that the question of levying a tax authorized by section 7669, G. C., to be submitted, may be submitted only at a regular or general November election.

The tax levy authorized by section 7669, G. C., supra, is distinct from that authorized by section 5649-5, G. C., provision for the submission of which is made in section 5649-5a, G. C., in that the former is for the special purpose of purchasing a site and erecting a building and may be used for that purpose alone while the latter may be used for general school purposes.

The condition by which your second inquiry is introduced is in no way material to the question submitted. It may be observed in passing, however, that bonds may not be issued pursuant to section 7669, G. C., above referred to, without submitting the question to a vote of the electors, as provided in section 7625, G. C., et seq.

Whether the bond issue authorized by section 7669, G. C., supra, is a joint issue or the obligation of the entire united district is not without difficulty, but reading the section as a whole and in view of the specific provision for separate action of the several boards in effecting a union of the districts for high school purposes, the absence of provision for joint action of the boards in respect to any matter relating to such united districts, and the further provision where a tax levy is authorized to be submitted, that each board must submit the same and the requirement that it carry in each district before it shall become operative in either, I am inclined to the view that the bond issue authorized by said section 7669, G. C., is not a joint issue of the several united districts, but on the contrary such bonds may be issued only by the several districts, and it therefore follows that the same must be approved by a majority of the electors voting thereon in each of the districts in which the question of issuing such bonds is submitted.

Again in your third question, the condition precedent incorporated is wholly immaterial to the question submitted.

Coming to conisder the question of whether the levy for the sinking fund and interest must be made in the proportion as provided by section 7671, G. C., in case of a bond issue under section 7669, G. C., attention is called to section 11 of article XII of the Constitution, adopted September, 1912, as follows:

> "No bonded indebtedness of the state, or any political subdivisions thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

From the plain terms of this constitutional provision, it follows that in those districts in which it is proposed to issue bonds under section 7669, G. C., provision must be made in the resolution authorizing the submission of the question for levying and collecting annually a tax sufficient to pay the interest on said bonds,

and to provide a sinking fund for their redemption at maturity. So that the levy for interest and sinking fund purposes in the several districts which issue bonds pursuant to section 7669, G. C., will in every case of necessity be in proportion to the amount of bonds issued by such district for the purpose of erecting the building and purchasing the site, as provided in said section.

Sections 7661 and 7662, G. C., 104 O. L., 225, refer only to the maintenance and support of the high school of such united districts and have no application to the purchasing of a site or the erection of a building for high school purposes, as authorized in said section 7669, G. C., supra.

The authority of the committee referred to in your fourth inquiry is found in section 7670, G. C., which provides in part as follows:

> "Any high school so established shall be under the management of a high school committee, consisting of two members of each of the boards creating such joint districts, elected by a majority vote of such boards. Their membership of such committee shall be for the same term as their terms on the boards which they respectively represent."

It will be noted that it is the authority for the management only of a high school so established that is here conferred on the high school committee authorized to be elected. It would be difficult to maintain that a high school had been established prior to the erection of a building or the letting of the contract therefor. The election of the members of such committee devolves upon the boards of education of the districts and until a high school is so established within the contemplation of section 7670, supra, no duty to elect members of such committee is imposed and I am not inclined to believe that mandamus would lie to compel the election of such members until a building has been provided for such school. That is to say, until the districts have been united and the building erected pursuant to section 7669, G. C., a high school may not be said to be established within the contemplation of the provisions of said section 7670, G. C. I am therefore of opinion, in answer to your fourth question, that there is no authority in the committee chosen pursuant to section 7670, G. C., to purchase a site or let a contract for the erection of a building, and that the site must be procured and the building erected by the boards of education of the several united districts.

Your fifth inquiry involves a consideration of that part of section 5649-3a, G. C., which is as follows:

> "The local tax levy for all school purposes shall not exceed in any one year five mills on the dollar of valuation of taxable property in any school district. Such limits for * * * school levies shall be exclusive of any special levy, provided for by a vote of the electors. * * *"

The levy for purchasing a site and erecting a building here under consideration, having been authorized or approved by a vote of the electors, comes clearly within the class defined in the above exception to the five mill limitation, and I am therefore of opinion, in answer to your fifth inquiry, that the necessary levy for payment therein referred to may be outside of the five mill limitation on the levy for school purposes found in said section 5649-3a, G. C., but must be within the fifteen mill limitation prescribed by section 5649-3b, G. C., 103 O. L., 57.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1731.

SPENCERVILLE ARMORY—CONTRACT AND BOND FOR COMPLETION OF SAME, APPROVED.

COLUMBUS, OHIO, June 27, 1916.

HON. BYRON L. BARGAR, *Secretary, Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—Under date of June 14th you advised me as follows:

"Pursuant to your opinion of February 5, 1916, the board duly advertised for four consecutive weeks for bids for the completion of Sereff Bros.' defaulted contract for construction of the Spencerville armory. In accordance with said advertisement, it received the bids described in the following copy of its proceedings on the date of June 8, 1916:

"'SPENCERVILLE ARMORY: The board had received previous to 12 o'clock noon of this date four proposals for completion of Spencerville armory pursuant to previous resolution and legal advertisement for said bids. At 12:05 said bids were opened and found to be as follows:

"'Fred E. Fletcher, Columbus, complete bid (using fan)_____$4,410.50
"'Fred E. Fletcher, Columbus, complete bid (not using fan)____ 4,705.50
"'(A certified check for $100 accompanied said bid.)
"'Geo. S. Kline, Sidney, complete bid (using fan)_____ 5,849.90
"'Geo. S. Kline, Sidney, complete bid (not using fan)_____ 5,649.90
"'(A certified check for $100 accompanied said bid.)
"'H. I. Williams, Dayton Construction Co., complete bid (using fan) _____ 5,970.00
"'H. I. Williams, Dayton Construction Co., complete bid (not using fan) _____ 6,300.00
"'(A certified check for $120 accompanied said bid.)
"'The Clemmer & Johnson Co., Hicksville, complete bid (not using fan) _____ 5,095.00
"'(A certified check for $110 accompanied said bid.)

"'After opening bids, the board recessed for lunch and reassembled at 1:15 p. m.

"'SPENCERVILLE ARMORY CONTINUED: RESOLVED, That the bid of Fred E. Fletcher for completion of the general contract abandoned by Sereff Bros., by furnishing both labor and material and fully completing said contract, not using fan vento coils, and radiators and marked "Property of Plikerd Bros." for the sum of $4,705.50, being the lowest bid received today for said work, and being regularly filed according to law, be and hereby is accepted and contract awarded accordingly on the condition that this acceptance and award be approved by the attorney-general. That the contract bond to be provided by said Fred E. Fletcher shall be in the sum of $2,330.00.'

"By your direction, we have prepared the contract with the lowest bidder with attached 'Summary of Work to be Done,' to complete the Spencerville armory and have secured a contract bond from the proposed contractor, who is the lowest bidder.

"Said proposed contract is herewith forwarded in triplicate with said bond in duplicate. Proof of publication of said advertisement for bids is also herewith enclosed.

"Please advise whether or not the contract and bond are approved by you as required by law."

Enclosed with your letter were the proposed contract in triplicate and contract bond; also proof of publication of the advertisement for bids.

Under section 5258, G. C., the board is required to advertise for sealed bids for the erection of such armory by publication "in at least one newspaper in the city or county in which the armory is to be erected."

From the papers submitted I note that you have complied with the provisions of the above statute in advertising for bids for the completion of the Spencerville armory, and the advertisement made in the Republican Gazette of Allen county, as submitted, is a legal advertisement.

I have examined the contract and bond submitted and find the same to be in accordance with law, and have ascertained from the auditor of state's office that there is available for the purposes of the completion of this contract an amount of money sufficient to meet the price called for therein.

The drawings and specifications and summary of work to be done should be identified by the signatures of the parties before the delivery of the contract to the contractor, and as soon as this is done the same should be filed with the auditor of state.

I am returning to you herewith the copies of the contract and bond, and also the legal advertisement submitted by you.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1732.

CONSTRUCTION OF PHRASE "IMPROVED ROADS" AS FOUND IN SECTION 13421-12, G. C.—APPLIES TO GRAVELED ROADS—WHAT CONSTITUTES AN OFFENSE UNDER ABOVE SECTION—DESTRUCTION OF HIGHWAYS.

Section 13421-12, *G. C., applies to graveled roads. The expression "any political subdivision thereof" occurring in section* 13421-12, *G. C., is meant to include the political subdivisions of the state authorized to construct or improve roads, to wit: Townships, counties and municipalities. In order to constitute an offense under section* 13421-12, *G. C., it is not only necessary that a traction engine with tires or wheels, equipped with lugs, spikes, chains or other projections, be driven over an improved highway, but it is also necessary that such lugs, spikes, chains or other projections be seriously destructive to the highway.*

COLUMBUS, OHIO, June 27, 1916.

HON. ADDISON P. MINSHALL, *Prosecuting Attorney, Chillicothe, Ohio.*

DEAR SIR:—I have your communication of June 14, 1916, which communication reads as follows:

> "In Ross county there are quite a number of persons engaged in the business of threshing. There are also in Ross county paved, concreted and other modern roads. Section 289 of the Cass Road Laws provides as follows:
>
> "'Whoever drives over the improved highways of the state, or any political subdivision thereof, a traction engine with tires or wheels equipped with lugs, spikes, chains or other projections seriously destructive to such

highways, or by any other means damages such highways, shall be fined for each offense not less than ten dollars nor more than two hundred dollars.'

"Does this section apply to graveled roads?

"What is the meaning of the phrase 'or any political subdivision thereof?'

"Would a person driving over any road, coming within the provisions of this law, a traction engine equipped with lugs, spikes, chains or other projections be guilty of a misdemeanor unless it were proven that such lugs, etc., were damaging the highway?"

If graveled roads are to be regarded as improved highways, then section 289 of the Cass Highway Law, section 13421-12, G. C., must be taken as applying to the same. I think there is no doubt but that a graveled road is to be regarded as an improved highway.

Without attempting a general definition of the term "improved highways," occurring in section 13421-12, G. C., it may safely be said that a road upon which has been placed an artificial surface or a surface composed of material not present in the natural state of the road, said material being placed thereon for the purpose of making the surface more substantial, even and easy for travel, is an improved road within the meaning of the statute. I therefore advise you, in answer to your first question, that section 13421-12, G. C., applies to graveled roads.

Replying to your second question, it is my opinion that the expression "or any political subdivision thereof," occurring in the section in question, is used in its ordinary signification and is meant to include the political subdivisions of the state authorized to construct or improve roads, to wit: Counties, townships and municipalities.

Your third question is to be answered by reference to the language of the section in question, and in order to constitute an offense under this section it is not only necessary that a traction engine, with tires or wheels equipped with lugs, spikes, chains or other projections be driven over an improved highway, but it is also necessary that such lugs, spikes, chains or other projections be seriously destructive to the highway.

I therefore advise you that a conviction under this section would not be warranted unless it be averred in the indictment or affidavit that the lugs, spikes, chains or other projections were seriously destructive to the highway, and unless such fact be proven at the trial.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1733.

APPROVAL, SALE OF CERTAIN ABANDONED OHIO CANAL PROPERTY IN MADISON TOWNSHIP, LICKING COUNTY AND HOCKING CANAL IN VILLAGE OF LOGAN, HOCKING COUNTY.

COLUMBUS, OHIO, June 27, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of June 8, 1916, transmitting to me duplicate copies of a resolution providing for the private sale of certain abandoned Ohio canal property in Madison township, Licking county, to The Newark Sub-

urban Realty Company of Newark, Ohio, for the sum of $500.00, and also duplicate copies of a resolution providing for the private sale of eighty square feet of the abandoned Hocking canal in the village of Logan, Hocking county, Ohio, to E. A. Moore, for the sum of $25.00.

I find these resolutions to be in regular form and to contain the proper recitals of jurisdictional facts, and I am therefore returning the same with my signature attached to the duplicate copies thereof. Respectfully,

EDWARD C. TURNER,
Attorney-General.

1734.

APPROVAL, SALE OF CERTAIN CANAL LANDS IN VILLAGE OF NEWBURGH HEIGHTS, CUYAHOGA COUNTY, OHIO.

COLUMBUS, OHIO, June 27, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of June 10, 1916, transmitting to me duplicate copies of a resolution providing for the private sale of certain canal lands in the village of Newburgh Heights, Cuyahoga county, Ohio, to The American Steel & Wire Co., for the sum of $350.00.

I find this resolution to be in regular form and to contain the necessary recitals of jurisdictional facts, and I am therefore returning the same with my signature attached to the duplicate copies thereof.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1735.

APPROVAL, FORM LEASES OF RESERVOIR LANDS AT INDIAN LAKE AND ST. MARYS.

COLUMBUS, OHIO, June 27, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of June 23, 1916, transmitting to me for examination the following leases of canal lands:

	"Valuation.
"To The Russell Point Amusement Co., land at Indian Lake	$1,666.66
"To Jacob L. Wust, cottage site at Lake St. Marys	300.00
"To H. G. Barrington, cottage site at Lake St. Marys	166.66
"To Helen Colgan, cottage site at Lake St. Marys	166.66"

I find these leases to be in regular form and am, therefore, returning the same with my approval endorsed thereon. Respectfully,

EDWARD C. TURNER,
Attorney-General.

1736.

APPROVAL OF CERTAIN LEASES FOR OHIO AND HOCKING CANAL LANDS AND ST. MARYS RESERVOIR LANDS.

COLUMBUS, OHIO, June 27, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of June 8, 1916, transmitting to me for examination the following leases of canal lands:

"Price McKinney, canal lands at Cleveland	$11,700.00
"The Buckeye Pipe Line Co., for abandoned Ohio canal lands	200.00
"The Buckeye Pipe Line Co., for abandoned Hocking canal lands	200.00
"Albert M. Koch, St. Marys reservoir land	166.66
"Roy E. Layton, Lake St. Marys reservoir land	300.00
"H. S. Vaubel, one-half lot Lake St. Marys	166.66
"E. D. Hancock and Ford Hancock, lands at Akron	4,500.00
"C. T. Kolter, one-half cottage site, Lake St. Marys	166.66
"Jacob F. Seitz, cottage site, Lake St. Marys	300.00
"Lewis Stout, cottage site, Lake St. Marys	300.00
"Charles E. Speck, half cottage site, Lake St. Marys	166.66"

I find these leases to be in regular form and am therefore returning the same with my approval endorsed upon the triplicate copies thereof.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1737.

APPROVAL, SALE OF CERTAIN CANAL LANDS IN CITY OF AKRON, TO FRANK C. HOWLAND.

COLUMBUS, OHIO, June 27, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of June 22, 1916, transmitting to me a record of your proceedings relating to the sale of certain canal lands in the city of Akron, Summit county, Ohio, to Frank C. Howland, for a consideration of $4,200.00, and described as follows, to wit:

> "Situate in the City of Akron, Summit county, Ohio, and beginning at a point in the south line of Buchtel avenue, in the city of Akron, Summit county, Ohio, that is 478.80 feet west of Main street, measured along the present southerly line of said Buchtel avenue: thence north 62° 25′ west, parallel to the center line of Buchtel avenue and 30 feet therefrom, 27.50 feet to an iron pin; thence south 9° 47′ east parallel to and 12 feet easterly from the base line of the state canal survey, 20 feet to an iron pin on the south line of Buchtel avenue, as originally laid out ninety-nine (99) feet wide; thence south 3° 48′ west, parallel to and 12 feet easterly from said base line 277.50 feet to a point that is 12 feet east of the base

line referred to above; thence south 8° 20′ west 82 feet to a point in the north line of Exchange street in said city, which point is south 62° 22′ east, 12.70 feet from the point where the base line of the state canal survey crosses the north line of Exchange street, which point is also 360.6 feet west of the northwest corner of Main and Exchange streets, measured along the north line of Exchange street; thence south 62° 22′ east along the north line of Exchange street 18.30 feet; thence along the east line of land claimed by the state of Ohio, north 6° 8′ east, 356.50 feet to the place of beginning and containing 7,050 square feet, more or less."

I find that your proceedings have been conducted in accordance with the provisions of the statutes, and I am therefore returning the record of proceedings with my approval of the sale endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1738.

TREASURER OF STATE—NOT AUTHORIZED TO ACCEPT LEGALLY ISSUED BONDS OF SCHOOL DISTRICTS IN LIEU OF CASH DEPOSIT PROVIDED UNDER SECTION 9778, G. C., FOR TRUST COMPANIES.

Treasurer of state is not authorized to accept legally issued bonds of school districts in lieu of a cash deposit under the provisions of section 9778, G. C.

COLUMBUS, OHIO, June 28, 1916.

HON. R. W. ARCHER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of June 27th in which you request my opinion as follows:

"We are in receipt of the following communication from The Tillotson & Wolcott Company, of Cleveland, Ohio:

"'Kindly advise us if the legally issued bonds of school districts are acceptable under the provisions of section 9778, of the code.'

"The statute is silent with reference as to whether we can use the kind of bonds that these people ask us to accept. We would, therefore, be pleased to have your official opinion with reference to the matter. A prompt reply will be highly appreciated."

Section 9778 of the General Code, referred to in your letter, is as follows:

"No such corporation either foreign or domestic shall accept trusts which may be vested in, transferred or committed to it by an individual, or court, until its paid in capital is at least one hundred thousand dollars, and until such corporation has deposited with the treasurer of state in cash fifty thousand dollars if its capital is two hundred thousand dollars or less, and one hundred thousand dollars if its capital is more than two hundred thousand dollars, except that, the full amount of such deposit by

such corporation may be in bonds of the United States, or of this state, or any municipality or county therein, or in any other state, or in the first mortgage bonds of any railroad corporation that for five years last past paid dividends of at least three per cent. on its common stock."

In opinion No. 1314, which I gave you on March 3, 1916, I advised you that the provisions of section 9778 of the General Code, authorizing you to accept certain specified bonds in lieu of a cash deposit should be strictly construed. Although the legally issued bonds of a school district in Ohio are ordinarily considered to be securities of as high a character as municipal or county bonds, yet the legislature has not seen fit to authorize you to accept them by the provisions of said section 9778.

I therefore advise you that you are not authorized to accept legally issued bonds of school districts under said section 9778 of the General Code above quoted.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1739.

VETERINARY MEDICINE—FORM OF INDICTMENT FOR ILLEGAL PRACTICE OF SAME.

COLUMBUS, OHIO, June 28, 1916.

HON. ALLEN T. WILLIAMSON, *Prosecuting Attorney, Marietta, Ohio.*

DEAR SIR:—In yours received June 22, 1916, you request that I submit a form of indictment for the prosecution of the illegal practice of veterinary medicine in violation of section 13382 of the General Code, in reply to which the following general form is suggested:

That _____, late of _____ _____ county, on the _____ day of _____, in the year of our Lord, 19__, at said county of _____, state of Ohio, did knowingly, wilfully and unlawfully engage in the practice of veterinary medicine in the state of Ohio, without having first complied with the provisions of sections 1177-17 and 1177-18, of the General Code of Ohio, as amended by the act passed April 21, 1915, 106 O. L., at page 165, in this, that at the time and place aforesaid, he, the said _____, did for a fee and compensation, to wit: the sum of_____ ($_____) dollars, prescribe, direct, advise, recommend, administer and dispense, for the cure and relief of a disease of an animal, to wit: a horse, then and there belonging to one _____, a certain drug, medicine and treatment, the exact name and character of which is unknown, put up in _____ form and incased in (here describe the vessel, bottle, box or case in which said drug, medicine or treatment was contained), upon the outside of which said (vessel, bottle or case), then and there containing said medicine, drug and treatment, put up in _____ form, as aforesaid, he, the said _____, then and there wrote and signed his name to a certain prescription and direction and he, the said _____, then and there

annexed and appended the letter (set out letters or titles named in section 1127-20, 106 O. L., 166), to his said name so written under and signed to said prescription and directions, as aforesaid, which said prescription and directions are in the words and figures following, to wit:

(Here set forth the prescription and directions.)

The name and composition of said drug, medicine and treatment is to the grand jurors aforesaid unknown and was by the said _____ prescribed, advised, recommended and administered, as aforesaid, for the cure and relief of a bodily infirmity and disease of the aforesaid animal owned by _____, as aforesaid, the name and nature of which bodily infirmity and disease is to the grand jurors aforesaid unknown; he, the said _____ at the time aforesaid, not having first obtained, in the manner required by law, a certificate from the said board of veterinary examiners of the state of Ohio, entitling him to practice veterinary medicine and surgery within the state of Ohio, as required by said sections 1177-17 and 1177-18 of the General Code of Ohio, as amended in 106 O. L., at page 165, and he, the said _____, at the time aforesaid, not then and there being entitled, qualified and authorized under the laws of the state of Ohio to engage in the practice of veterinary medicine and surgery within the state of Ohio, the prescription, direction, advice, recommendation, administration and dispensation of said drug, medicine and treatment for the cure and relief of a disease of an animal, to wit: A horse as aforesaid, and none nor all of the said services and acts of the said _____ _____ aforesaid then and there being in a case, or cases of emergency, and none nor all of the aforesaid acts of the said _____ then and there consisting of or constituting animal castration or the dehorning of cattle, contrary to the statute in such case made and provided and against the peace and dignity of the state of Ohio.

You will observe that the practice of veterinary medicine and surgery is now defined by statute, section 1127-20, G. C., 106 O. L., 166, in a similar manner to the general practice of medicine and surgery as found in section 1286 of the General Code, so that an indictment for a prosecution under the provisions of section 13382 of the General Code, should be made to conform to the statutory definition of the practice of veterinary medicine and surgery, above referred to, as well as to the provisions of sections 1177-17 and 1177-18 of the General Code, as amended in 106 O. L., at page 165, hereinbefore referred to.

With these observations it is believed you will have no difficulty in adapting the form above suggested to the facts of the particular case before you.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1740.

BOARD OF EMBALMING EXAMINERS—REQUIREMENTS FOR LICENSE —FIXING AGE LIMITATION IS WITHOUT FORCE AND EFFECT.

The requirements for license to engage in the practice of embalming fixed by law are specific and the action of the Ohio state board of embalming examiners in fixing an age limitation is without force and effect.

COLUMBUS, OHIO, June 28, 1916.

The Ohio State Board of Embalming Examiners, Columbus, Ohio.

GENTLEMEN:—Your request for an opinion is as follows:

"Will you kindly give us your written opinion upon the following question?

"On October 7, 1905, the Ohio state board of embalming examiners, at a meeting held on that day, took the following action:

"'Moved by Jones, and seconded by Krupp, that all applicants for embalmers' licenses in the state of Ohio shall be at least twenty-one years of age. Carried.'

"Is the above action of the board legal?

"Our reason for submitting the question is that one, G. E. C., made application upon the form provided by the board for an embalmer's license. In said application he stated as follows:

"'I was born 4th day of August, 1894. I am twenty-one years old.'

"The said G. E. C. took the examination and passed, and received a license on October 9, 1915. It now develops that said G. E. C. was born August 4, *1896*.

"In view of the fact that the applicant in his application stated that he was twenty-one years of age, which statement was not true, and on said application and examination a license was issued to him, has the board any power in regard thereto at the present time?"

Sections 1341, 1342 and 1343 of the General Code are as follows:

"Sec. 1341. For use in the examination of persons who desire to engage in the practice of embalming and the preparation and disposal of the dead in this state, the state board of embalming examiners shall prepare a list of questions on the following subjects:

"(a) Visceral anatomy and vascular system of the human body.

"(b) The action and comparative value of germicides.

"(c) The methods of embalming and of preparing bodies for transportation.

"(d) The meaning of 'contagion,' 'infection,' the dangers they beget, and the best methods of their restriction and arrest, and bacteriology in relation to contagion and infection.

"(e) The signs of death and the manner in which they are determined.

"(f) Practical demonstrations on a cadaver.

"Sec. 1342. A person desiring to engage in the practice of embalming or in the preparation of the dead for interment, cremation or transportation, shall make an application in writing to the secretary of the state board of embalming examiners for a license and pay a license fee of five dollars. Such applicant shall also appear before the board and pass an examination on the subjects named in the preceding section.

"Sec. 1343. If the state board of embalming examiners finds that the applicant possesses a good moral character and has passed a satisfactory examination in such subjects, it shall register such applicant as a duly licensed embalmer. The license shall be signed by the president and secretary of the board and attested by its seal. The person to whom a license is issued shall register it with the board of health of the city, village or township in which he proposes to practice. He shall also display such license in a conspicuous place in his office and annually thereafter on or before the date fixed by the state board pay to the secretary thereof one dollar for its renewal."

As a preliminary to taking an examination to qualify as a licensed embalmer it is provided in section 1342 of the General Code, supra, that the applicant shall make an application in writing and pay a license fee of five dollars. He is then qualified to enter the examination which is to be given on the subjects set out in section 1341 of the General Code, supra.

If he passes the examination in a manner satisfactory to the board he is subject to the further requirement that he must possess a good moral character. If he meets the requirements referred to he is entitled to receive a license to operate as an embalmer.

In the enactment of laws governing the right to engage in the practice of various occupations the general assembly has seen fit in some cases to fix an age limitation or to vest the authority in charge of the matter to make rules which might include the fixing of an age limit. However, there is nothing in the law governing the matter under consideration which fixes an age limit nor vests your board with authority to do so.

In the absence of any provision of law authorizing your board to fix an age limit for applicants, the specific conditions governing applications for license to act as embalmers and the course pursued by the general assembly in legislating on similar matters it is my opinion that the action of your board in adding an age limitation was without authority and the action would have no force or effect.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1741.

BOARD OF ADMINISTRATION—CONVICT—NO AUTHORITY FOR ISSUANCE OF CONDITIONAL CERTIFICATE OF RESTORATION.

There is no authority of law for the issuance of a conditional certificate of restoration to a convict in any case, hence a convict released from prison on the expiration of a commuted term of sentence should be granted a certificate of restoration on his compliance with the provisions of section 2161, *G. C.*

COLUMBUS, OHIO, June 29, 1916.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Your request for an opinion is as follows:

"Your official opinion is requested respecting the following:

"A conditional pardon is issued to a prisoner in the Ohio penitentiary and he is discharged by reason of such pardon. Can a conditional certificate of restoration be issued to him?"

Sections 99 and 12390 of the General Code are as follows:

"Section 99. A pardon or commutation of sentence may be granted upon such conditions as the governor may impose, which shall be stated in the warrant; but such pardon or commutation shall not take effect until the conditions so imposed are accepted by the convict and his acceptance indorsed upon the warrant, signed by him, and attested by one witness. In case of commutation of sentence, such witness shall go before the clerk of the court in whose office the sentence is recorded and prove the signature of the convict. The clerk shall thereupon record the warrant, endorsement, and proof in the journal of the court, which record, or a certified transcript thereof, shall be evidence of such commutation, the conditions thereof, and the acceptance of the conditions.

"Section 12390. A person convicted of felony, unless his sentence is reversed or annulled, shall be incompetent to be an elector or juror, or to hold an office of honor, trust or profit. The pardon of a convict shall effect a restoration of the rights and privileges so forfeited, or they may be restored as provided elsewhere by law, but a pardon shall not release a convict from the costs of his conviction unless so stated therein."

It will be noted from a reading of section 99 of the General Code, supra, that a pardon or commutation of sentence may be granted by the governor on such conditions as he may impose, and under the provisions of section 12390 of the General Code, supra, it is provided that the pardon of a convict shall effect a restoration of the rights and privileges forfeited by him on his conviction, while under the provisions of section 99 of the General Code, supra, what is known as a conditional pardon or commutation may be granted. There is no provision of law providing for the issuance of what you have seen fit to term a "conditional certificate of restoration."

As you have verbally requested that I consider the question of the issuance of a conditional commutation, I have to advise that there is no provision of law which effects the issuance of a certificate of restoration based upon either a conditional or unconditional granting of a commutation. However, your attention is directed to section 2161 of the General Code, which is as follows:

"A convict who has served his entire term without a violation of the rules and discipline * * * shall be restored to the rights and privileges forfeited by his conviction. He shall receive from the governor a certificate of such restoration, to be issued under the great seal of the state, whenever he shall present to the governor a certificate of good conduct which shall be furnished him by the warden."

After a commutation has been granted, whether conditional or unconditonal, the right of the convict to earn the certificate of restoration is dependent upon his record in the penitentiary or reformatory, as before such certificate of restoration is issued it is incumbent upon the convict after his release to present to the governor a certificate of good conduct which shall be furnished by the warden. The only effect of the commutation is to diminish the term of the sentence of the convict.

It will also be noted from a reading of section 2161, General Code, supra, that such certificate of restoration is only to be issued to the convict who has served his entire term. Regardless of the length of the original term for which the convict has been sentenced, there is no question but that after commutation and when a convict has been released under the terms of a commuted sentence by expiration thereof it must be said that he has served his entire term.

Wise public policy demands that one who has paid the penalty imposed by the state for a violation of law be given the full benefit of the law to the end that he may rehabilitate himself, and even though one by his conduct in prison has not earned his certificate of restoration it is provided in section 2162, General Code, that he may have opportunity of earning it on the outside by his conduct.

It is my opinion that there is no warrant of law for the issuance of a conditional certificate of restoration in any case, hence a convict who has served the entire term fixed by a commutation of sentence, conditional or otherwise, is entitled to receive a certificate of restoration on his compliance with the provisions of section 2161 of the General Code, supra.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1742.

MUNICIPAL CORPORATION—SUPERINTENDENT OF WATERWORKS OF CITY HAVING HELD POSITION CONTINUOUSLY FOR MORE THAN SEVEN YEARS PRIOR TO JANUARY 1, 1915, MAY ONLY BE REMOVED BY SECTION 486-17a, 106 O. L., 412—REMOVAL—TEMPORARY APPOINTMENT—HOW MADE.

A superintendent of the waterworks of a city who has held such position continuously for more than seven years prior to January 1, 1915, *may only be removed therefrom as provided by section* 486-17*a, as amended,* 106 *O. L.,* 412.

No temporary appointment may be made by the mayor to such position until said superintendent is removed therefrom as provided aforesaid and if no eligible list exists from which an appointment may be made, such provisional appointment may only be made as provided by section 486-14, *G. C., as amended* 106 *O. L.,* 409, *aforesaid.*

COLUMBUS, OHIO, June 29, 1916.

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

GENTLEMEN:—I have your letter of June 2, 1916, submitting the following statement of facts and inquiries:

> "The mayor of a city desires to remove the superintendent of the waterworks who has held the position for more than seven years prior to the enactment of the civil service law of May 27, 1915, but has not passed either a competitive or non-competitive examination for such position. There is no eligible list from which to appoint a successor to said superintendent. The following questions arise in connection therewith, upon which we desire your written opinion:
>
> "1. May the mayor make a temporary appointment to the position of superintendent of the waterworks under section 486-14 of the General Code, as amended 106 O. L., 409, without first proceeding to remove the incumbent?
>
> "2. If the mayor cannot make such temporary appointment, may he make an order of removal and remove such superintendent without set-

ting out his reasons therefor, and giving said superintendent time to make explanation as provided in section 486-17a, G. C., 106 O. L., 412, and at the same time make a temporary appointment to said position?

"3. If the mayor may remove such superintendent in the summary manner set out in question No. 2, must he certify such removal to the city civil service commission?

"4. Will such temporary appointee hold until an eligible list is certified by the city civil service commission, or for thirty days only?

"5. If such summary removal cannot be made, we would be pleased to have you outline the proper proceedings that should be observed by the mayor in order to accomplish the legal removal of such superintendent."

The inquiries submitted in your foregoing letter may best be answered by considering first the matter contained in the last inquiry, or, in other words, in determining in what way or manner a mayor may legally remove a superintendent of waterworks in a city.

It appears from the statement accompanying your inquiries that the superintendent of waterworks involved in this inquiry has held his present position for more than seven years prior to January 1, 1915. He, therefore, comes within the provision of section 486-31, G. C., as amended 106 O. L., 418, which provides that:

"All persons who have served the state or any political subdivision thereof continuously and satisfactorily for a period of not less than seven years next preceding January 1, 1915, shall be deemed appointees within the provisions of this act."

Manifestly, therefore, said superintendent under this law is and has been since January 1, 1915, an appointee within the provisions of the civil service law of this state and his position being in the classified service he may only be legally removed therefrom under the provisions of said civil service law in respect to the removal of persons holding positions in the classified service.

This is so because it is provided in section 486-19, G. C., 106 O. L., 414, that:

"The procedure applicable to reductions, suspensions and removals, as provided for in section 486-17 and 486-17a of the General Code, shall govern the civil service of municipalities."

Referring now to section 486-17a, G. C., aforesaid, it provides that:

"The tenure of every officer, employe or subordinate in the classified service of the state, the counties, cities and city school districts thereof, holding a position under the provisions of this act, shall be during good behavior and efficient service; but any such officer, employe or subordinate may be removed for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of the provisions of this act or the rules of the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance or nonfeasance in office.

"In all cases of removal the appointing authority shall furnish such employe or subordinate with a copy of the order of removal and his reasons for the same, and give such officer, employe or subordinate a reasonable time in which to make and file an explanation. Such order with the explanation, if any, of the employe or subordinate shall be filed with the com-

mission. Any such employe or subordinate so removed may appeal from the decision or order of such appointing authority to the state or municipal commission, as the case may be, within ten days from and after the date of such removal, in which event the commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the commission, and it may affirm, disaffirm or modify the judgment of the appointing authority, and the commission's decision shall be final; * * *"

The foregoing section prescribes the only legal method or manner whereby removals may be made from positions in the classified service of the state, counties, cities or city school districts, and this section, therefore, furnishes the method or manner whereby said mayor may remove said superintendent of waterworks in the case under consideration. This law requires the mayor when he removes said superintendent to furnish the latter with a copy of his order of removal and his reasons for the same and to give him a reasonable time within which to make and file an explanation. It also requires the mayor to file a copy of his order of removal with the explanation of said superintendent, if any is filed, with the municipal civil service commission. The superintendent will have ten days from and after the date of such removal to appeal from the order of said mayor to said municipal commission and it is made the duty of such commission to hear such appeal within thirty days after its filing and to affirm, disaffirm or modify the judgment of the mayor upon such hearing.

When the mayor has removed the superintendent as prescribed by the foregoing law, he should at once issue a requisition for an eligible list from which to select a successor to said superintendent. Should there be no eligible list available then the mayor may appoint a provisional appointee under authority of section 486-14, G. C., 106 O. L., 409, which provides as follows:

"Whenever there are urgent reasons for filling a vacancy in any position in the classified service and the commission is unable to certify to the appointing officer upon requisition by the latter, a list of persons eligible for appointment after a competitive examination, the appointing officer may nominate a person to the commission for non-competitive examination, and if such nominee shall be certified by the commission as qualified after such non-competitive examination, he may be appointed provisionally to fill such vacancy until a selection and appointment can be made after competitive examination; but such provisional appointment shall continue in force only until regular appointment can be made from eligible lists prepared by the commission, and such eligible lists shall be prepared within ninety days thereafter. In case of an emergency an appointment may be made without regard to the rules of this act, but in no case to continue longer than thirty days, and in no case shall successive appointments be made; * * *"

It will be observed that the foregoing section provides for two classes or kinds of provisional appointments. One to be made after a non-competitive examination and a certification as to qualifications by the civil service commission and the other, known as an emergency appointment, which may be made without regard to the provisions of the civil service act but which appointment may continue only for the period of thirty days and no successive appointments may be made after the expiration of that time. It would seem advisable, therefore, if it becomes necessary to make a provisional appointment, that the mayor should make such appointment in accordance with the first provision named in said section, to wit, an appointment after a non-competitive examination.

The foregoing observations will explain fully the manner and method of accomplishing the legal removal of said superintendent as requested in your last inquiry.

Referring now to your remaining inquiries: In view of the foregoing considerations the first two thereof must be answered in the negative, and in answer to your third, while the mayor may not remove such superintendent in the manner therein suggested, yet when said superintendent is legally removed the mayor must certify the order of removal to the civil service commission as hereinbefore explained.

Your fourth inquiry is sufficiently answered by the observations made herein in reference to the provisions of section 486-14, G. C., aforesaid. That is to say, an emergency appointment for thirty days may continue no longer than that time and is made without regard to any of the provisions of the civil service act, but if a provisional appointment is made under the first clause of said section the appointee may serve until an eligible list is furnished by said civil service commission, which shall be done within ninety days after said provisional appointment was made.

It must further be understood that the foregoing observations do not apply to charter cities which have adopted their own civil service system under their charter.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1743.

COUNTY COMMISSIONERS—COMPENSATION AUTHORIZED FOR JOINT COUNTY DITCH WORK—LIMITATIONS—DUTIES MAY BE IMPOSED ALTHOUGH MAXIMUM COMPENSATION FOR YEAR HAS BEEN RECEIVED.

The compensation of county commissioners, of three dollars per day for work on joint county ditches, authorized by the provisions of section 6563-44, *G. C.*, 102 *O. L.*, 575, *is subject to the limitations of section* 3001, *G. C., and the total compensation received pursuant to section* 6563-44, *G. C., together with the compensation received for all other ditch work may not exceed in any one year the sum of* $300.00.

Where the maximum compensation of $300.00 *for ditch work in any one year has been received, county commissioners may be compelled to discharge the duties imposed upon them by law in respect to ditches for the remainder of the year without further compensation therefor.*

COLUMBUS, OHIO, June 20, 1916.

HON. B. A. MYERS, *Prosecuting Attorney, Celina, Ohio.*

DEAR SIR:—Yours under date of May 12, 1916, is as follows:

> "The following question has been submitted to me by our county commissioners and they have asked that I submit the question to you:
>
> "Can the county commissioners draw fees and expenses above the three hundred ($300.00) dollars amount on ditch work, where such additional work is done on joint county ditches? (That is, is the joint county ditch work included in the three hundred dollars [$300.00] allowance as provided in section 3001 of the General Code?)

"The question has come up because of the excessive rains in this community last year and the great amount of ditch work which followed.

"Our county commissioners have a great deal of ditch work on hand but have already drawn the three hundred dollars ($300.00) for this year. Can they be compelled to do ditch work from now on till the 14th of September, 1916, without pay?"

You first inquire whether county commissioners are entitled to compensation and expenses for ditch work on joint county ditches in addition to their salary and compensation for ditch work provided by section 3001, G. C.

That part of section 3001, G. C., pertinent to your inquiry provides:

"* * * * In counties where ditch work is carried on by the commissioners, in addition to the salary herein provided, each commissioner shall receive three dollars for each day of time he is actually employed in ditch work; the total amount so received for such ditch work not to exceed three hundred dollars in any one year. Such compensation shall be in full payment of all services rendered as such commissioner and shall not in any case exceed four thousand dollars per annum. Such compensation shall be in equal monthly installments from the county treasury upon the warrant of the county auditor."

It will be observed that this provision has reference to "ditch work" without qualification or restriction as to class and there is nothing therein found to suggest a legislative distinction of classes of ditch work in which county commissioners may be employed or which would support the position that the same applies to one class to the exclusion of another. The legislature will be presumed to have been mindful of the different classes of ditch work required of these officers recognized by the statute at the time of the enactment of this provision and in the absence of even a suggestion to the contrary, I am inclined to the view that the phrase "ditch work" includes all classes of ditch work on which county commissioners may be lawfully employed, viz., single county ditches, joint county ditch work under the provisions of sections 6556 to 6563, G. C., inclusive, as well as county ditch work under the provisions of section 6563-1 to 6563-48, G. C, inclusive.

An examination of the history of the provisions of section 3001, G. C., above quoted, discloses that there has been no substantial change in the same except that the maximum compensation of county commissioners was increased from $3,500.00 to $4,000.00 by amendment in 102 O. L., 514, since the original enactment of the salary law of such officers in 97 O. L., 254. That is to say, the $300.00 maximum limitation on the amount of compensation for ditch work in any one year has remained unchanged since its first enactment and was in no way affected by the amendment of the section in which the same is found in 102 O. L., 514, save by the operation of the increase of the maximum total compensation from $3,500.00 to $4,000.00 per annum above referred to. This maximum limitation on the amount of compensation which county commissioners might receive in any one year for ditch work for some years theretofore had been, and was in force at the time of the enactment of section 6563-44, G. C., hereinafter referred to.

The legislature must be presumed to have had in contemplation the existence and operation of the $300.00 limitation long since established in the enactment of section 6563-44, G. C. There is no such irreconcilable inconsistency in the provisions of sections 3001 and 6563-44, G. C., as to sustain a contention for a repeal by implication. Indeed, there is no inconsistency whatever and it requires no strained construction to give full operative force to both. The $300.00 limitation now found

in section 3001, G. C., then in full force, at the time of the enactment of section 6563-44, G. C., operated only to effect a modification thereof to the extent of putting the same limitation upon the amount of compensation which might be received in any one year under section 6563-44, G. C., as was already applicable to the compensation which might be received for any and all other ditch work.

A distinct scheme of improvement, construction and location of joint county ditches is provided under sections 6536 and 6563, G. C., as amended in 103 O. L., 836. A careful examination of these sections fails to disclose any provision therein for compensation of county commissioners for ditch work under the scheme therein provided, so that the authority for the payment of compensation of commissioners for ditch work, pursuant to the provisions of the statutes last above referred to is found in said section 3001, G. C., supra. The compensation of commissioners for ditch work done pursuant to those sections of the General Code would, therefore, unquestionably be subject to the limitation provided by section 3001. It is difficult to assign a substantial reason for allowance of compensation for joint county ditch work without limitation when performed under the separate and distinct scheme provided by sections 6563-1, et seq., and the application of the limitation of section 3001, G. C., to such compensation under another scheme where the work is substantially identical.

With the limitations of section 3001, G. C., upon the compensation which the commissioners might then receive in any year for ditch work, then in force and operation, and at least presumably in contemplation thereof, the legislature enacted section 6563-44, G. C., which provides as follows:

> "Said surveyors named in section 8 shall meet with the joint board of county commissioners whenever required by said board and said surveyors and auditors shall be paid their necessary expenses while employed under this act and shall be allowed the same fees as are allowed in ditch work generally and said commissioners shall receive the sum of three dollars a day and their actual expenses while employed under this bill."

The question of whether county commissioners were entitled under the provisions of this section to compensation for ditch work, in adddition to that allowed by section 3001, G. C., supra, was considered by my predecessor, Hon. Timothy S. Hogan, in opinion No. 1365, rendered to the bureau of inspection and supervision of public offices and found at page 1732 of the Report of the Attorney-General for the year 1914, in which it is held that in joint county ditch proceedings, pursuant to sections 6563-1 to 6563-48, G. C., inclusive, the county commissioners may be allowed for their services $3.00 per day and their expenses as provided by section 6563-44, G. C., in addition to their salary and compensation for ditch work provided by section 3001, G. C. This conclusion was reached upon the theory that section 6563-44, was special and controlled to the exclusion of section 3001, G. C., as being a general provision otherwise governing the same subject-matter. While section 3001, G. C., in respect to the limitation on compensation for ditch work may properly be said to be general in character, its manifest purpose was to apply to all these special provisions for compensation for ditch work of all classes as heretofore pointed out. That is to say, section 3001, G. C., makes manifest the general policy and settled purpose of the legislature at the time of its enactment to limit the compensation which may be received for ditch work to $300.00 per annum in all cases.

In discussing the force to be given to such declaration of general policy as to compensation of public officials, the supreme court in the case of State ex rel. v. Stone, 92 O. S., 63, 65, referring to section 2977, G. C., in connection with section 3001, G. C., said:

> "This section, as well as the section following, clearly indicates the settled purpose and fixed plan of the state to pay county officials a fixed lump sum, no matter what additional duties may be imposed upon them from time to time, unless there be a clear purpose to pay further compensation for such duties."

It cannot be maintained that there is found in section 6563-44, or elsewhere in that act, a clear expression of the purpose on the part of the legislature to render its provisions free from modification by operation of section 3001, G. C., and independent of the general policy therein manifest. As before pointed out in this opinion, the general policy of the limitation of the compensation of commissioners for ditch work to $300.00 in any one year, as manifest from the provisions of section 3001, G. C., from the original enactment of the salary law for such officers in 97 O. L., 254, seems incontrovertible.

It must be observed that the enactment of section 6563-44, G. C., supra, was subsequent to the establishment of the general policy of limitation upon the compensation for ditch work, and it is not therein provided in any way that the compensation there authorized and provided *shall be in addition* to any or all other compensation authorized for ditch work.

The principle applicable to such case is clearly laid down in the second branch of the syllabus in the case of State ex rel. v. Stone, supra, as follows:

> "Such policy of the general assembly should not be overturned or invaded by carrying or re-enacting such impliedly repealed statute in the report of a codifying commission, which is subsequently adopted by the general assembly, or by some subsequent enactment of the general assembly, unless such other statute clearly evinces by appropriate language an intention and purpose to provide 'an additional salary.'"

In view of the rule here laid down by the supreme court and for the reasons above stated, I am compelled to conclude that the compensation authorized by section 6563-44, G. C., as well as that provided by section 6523, G. C., in case of single county ditches, and that provided for ditch work under the provisions of sections 6536 to 6563, G. C., inclusive, is subject to the $300.00 limitation by section 3001, G. C.

The case of State ex rel. v. Stone, supra, had not been decided at the time the opinion of my predecessor above referred to, was rendered and I do not believe that the conclusion therein stated would have been reached in the light of the decision in that case.

Answering specifically your first question, I am, therefore, of opinion that the compensation of county commissioners for ditch work in every case is subject to the limitation of $300.00 per annum, found in section 3001, G. C., as well as by the further limitation therein found of $4,000.00 on the total aggregate compensation of such officers in any one year.

You further inquire if county commissioners may be compelled to do ditch work after the exhaustion of the $300.00 maximum annual compensation therefor, prescribed by section 3001, G. C., without additional compensation.

It is a well established rule of law that public officials are entitled to such compensation only for the performance of official duties as is prescribed by statute and where such duties are imposed by law on public officials and no compensation is provided therefor, the services in the performance thereof are gratuitous, or deemed to have been compensated by fees, salary or perquisites already provided. Clark v. Board of County Commissioners, 58 O. S., 107; In re Lease, 4 C. C., 3: Commissioners v. Williver, 12 C. C., 440.

I am, therefore, of opinion that county commissioners may be compelled to perform services required to be performed in ditch work for the remainder of the official year without additional compensation therefor, where they have already received within the official year the maximum of $300.00 for such ditch work.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1744.

TOWNSHIP BOARDS OF HEALTH—EXPENSES—HOW PAID.

Township boards of health may be allowed expenses incurred in the discharge of duties imposed by Section 4448, *G. C., and township trustees have authority under the provisions of section* 4451, *G. C., to make the necessary appropriations for the payment of such expenses.*

COLUMBUS, OHIO, June 29, 1916.

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

GENTLEMEN:—Your request for an opinion is as follows:

"We would respectfully request your written opinion upon the following question:

"Section 4448, General Code, requires township trustees as boards of health to inspect the sanitary condition of all schools and school buildings within their jurisdiction semi-annually and oftener, if, in their judgment, it be necessary. If said trustees, in the performance of such duty, hire an automobile to make said trip of inspection, may the expense thereof be paid from the township funds?

"If such payments are illegally made, should findings for recovery be made against the trustees by our examiners; i. e., are such illegal expenditures recoverable?"

Section 4448 of the General Code is as follows:

"Semi-annually, and oftener, if in its judgment necessary, the board of health shall inspect the sanitary condition of all schools and school buildings within its jurisdiction, and may disinfect any school building. During an epidemic or threatened epidemic, or when a dangerous communicable disease is unusually prevalent, the board may close any school and prohibit public gatherings for such time as it deems necessary."

Section 3391 of the General Code is as follows:

"In each township the trustees thereof shall constitute a board of health, which shall be for the township outside the limits of any municipality. Each year they shall elect one of their number president and the township clerk shall be clerk of the board of health. They shall appoint a health officer and may appoint as many sanitary officers as they deem necessary to carry out the provisions of this chapter and they shall define the

duties and fix the compensation of such appointees who shall serve during the pleasure of the board. Such board of health shall meet annually and at such other times as it deems necessary."

Section 4451 of the General Code is as follows:

"When expenses are incurred by the board of health under the provisions of this chapter, upon application and certificate from such board, the council shall pass the necessary appropriation ordinances to pay the expenses so incurred and certified. The council may levy and set apart the necessary sum to pay such expenses and to carry into effect the provisions of this chapter. Such levy shall, however, be subject to the restrictions contained in this title."

Section 3394 of the General Code is as follows:

"Township boards of health shall have the same duties, powers and jurisdiction, within the township and outside of any municipality as by law are imposed upon or granted to boards of health in municipalities, and any violation of any order or regulation of such township board made pursuant to such authority, or obstruction or interference with the execution thereof, or wilful or illegal omission to obey such order or regulation, shall be punished, and the prosecution thereof instituted and conducted in the same manner, and the fines and penalties and the disposition thereof, and the punishment shall be the same as is provided by law for the prosecution and punishment of the violation of any like order or regulation of boards of health in municipalities."

The provisions of law relative to boards of health referred to in the sections quoted above are all parts of and taken from an act passed May 7, 1902 (95 Ohio Laws, 421-437).

It will be noted that the duties imposed on the board in section 4448 of the General Code, supra, are alike applicable to township and municipal boards of health. This is a special duty which involves the traveling of the board to all parts of the township wherever a school house may be located and which necessarily involves expense such as not contemplated in the discharge of the ordinary duties of township trustees.

In section 4451 of the General Code, supra, it is provided that:

"when expenses are incurred by the board of health under this chapter * * * council shall pass the necessary appropriation ordinances to pay the expenses. * * *"

While it is recognized in the section quoted that expenses may be incurred by boards of health, no machinery is provided for the payment of township boards' expenses, while the payment of expenses of boards of health of municipalities is provided for specifically.

It appearing clearly that the general assembly had in mind the payment of expenses incurred by boards of health in connection with the performance of the duties imposed by section 4448 of the General Code, supra, it follows that in the case of township boards of health which are charged with the same duties as are cast on municipal boards it is necessary to substitute for the word "council" in section 4451 of the General Code, supra, the word "township trustees" thereby

recognizing their authority to make the necessary appropriations to carry out the purposes of the related statutes.

Section 3267 of the General Code is as follows:

> "A person elected or appointed to a township office, who neglects or refuses to serve therein, shall forfeit and pay to and for the use of the township wherein he resides at the time of such election, the sum of two dollars, to be recovered by an action before a justice of the peace of such township. The township clerk shall demand, receive, or sue for such forfeiture, in the name of the township, and when collected, pay to the township treasurer. No person may be compelled to serve in a township office two terms in succession."

It will be noted from a reading of the section quoted above that a person elected as township trustee is subject to serve under a penalty of forfeiture and by virtue of his being a member of the board of township trustees he becomes a member of the township board of health with the duties imposed by section 4448 of the General Code, supra, cast upon him, hence it is my opinion that if it becomes necessary to hire an automobile to perform those duties the expenses therefor may be allowed and provision made for their payment from township funds under the provisions of section 4451 of the General Code, supra.

The answer to your first question disposes of the necessity of reply to the second.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1745.

APPROVAL, SALE OF CANAL LANDS IN CITY OF AKRON TO THE B. F. GOODRICH COMPANY.

COLUMBUS, OHIO, June 29, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of June 29, 1916, transmitting to me duplicate copies of your proceedings relating to the public sale of certain canal lands in the city of Akron, Summit county, Ohio, to The B. F. Goodrich Co., for a consideration of $35,000.00.

I find that your proceedings in this matter have been conducted in accordance with the provisions of the statutes and I am, therefore, returning to you the duplicate copies of the record of your proceedings, with my approval of the said sale endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1746.

BOARD OF AGRICULTURE OF SHELBY COUNTY—WHEN CANDIDATES FOR SUCH OFFICES ARE AUTHORIZED TO BE NOMINATED AND ELECTED—NO ELECTION THIS YEAR.

Candidates for members of the board of agriculture of Shelby county as authorized by the act of April 29, 1902, 95 O. L., 833, may not be nominated at the August primary 1916 nor may such members be elected at the November election 1916.

COLUMBUS, OHIO, June 29, 1916.

HON. D. FINLEY MILLS, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR:—Yours under date of June 23, 1916, is as follows:

"The Shelby county agricultural board was created or provided for under the provisions of the special act passed by the legislature in 1903, 95 O. L. 833-835. Since the amendment of the election laws providing for biennial for state and county offices no elections have been made of the members of the county agricultural board in Shelby county, but the old members have been permitted to continue in office and the vacancies occurring in said board have been filled by appointment by the board.

"This year a few petitions have been filed with the board of elections asking that their names be printed on the ballot at the next primary for nomination as members of said board for their respective township. I think there are only three or four such petitions from the whole county. The board of elections has asked my opinion as to the manner of selecting the candidates and members from the various townships and as to whether or not an election for the same should be held this year. In looking over the act aforesaid and construing it in the light of the present election laws and the method of nominating candidates for township and county offices, I fail to see how nominations and elections can be made at the coming primary and election. I have suggested to the board that no nomination and election be held for members of this board this year, and that the old members be permitted to continue in office until an amendment can be secured at the next session of legislature, which will properly provide for the nomination and election of the members of said board.

"Three years ago at the suggestion of the secretary of state an election was dispensed with with that idea in mind, but when the legislature met the matter was overlooked or forgotten and no attention was paid to the matter from that time until the present. I would like very much to have your opinion in the matter, and if my suggestions do not meet with your approval, I would be pleased to have you give me your opinion as to how the matter may be legally managed at the coming primary and election. At the next session of the legislature I shall see to it that this act is amended so as to prevent any further trouble. As the election board is anxious to know what should be done in the matter, I will be pleased to hear from you in the matter as soon as possible."

That the act referred to by you is unconstitutional there can be little doubt, but even assuming the constitutionality of the act of 1902, 95 O. L., 833-835, referred to by you, and that the same has not been expressly or by implication repealed by statutory enactment, the contrary of either of which would abrogate all

authority therein for the election of "members of the agricultural board," your inquiry is fully answered by either of two provisions of the constitution. The act referred to required the election of two members of the agricultural board from each township of Shelby county at the fall election in 1902 and provides further that:

> "Thereafter, annually, at the annual fall election held in said county, for the election of the state and county ticket there shall be elected in each township in said county, by the qualified electors thereof, one (1) member of the agricultural board, who shall hold his office for two years and until his successor is elected and qualified."

Section 7 of said act provides in part as follows:

> "The election of members of the agricultural board shall be governed in all respects by the same laws governing the elections of other township officers, and the township clerk shall issue notices of election to such members elect as required by law for other township officers."

That the members of the agricultural board in question are not county officers is clear from the provisions of section 2 of article X of the constitution as follows:

> "County officers shall be elected on the first Tuesday after the first Monday in November, by the electors in each county in such manner, and for such term, not exceeding three years, as may be provided by law."

Section 1 of article XVII of the constitution of Ohio provides:

> "Elections for state and county officers shall be held on the first Tuesday after the first Monday in November in the even numbered years; and all elections for all other elective officers shall be held on the first Tuesday after the first Monday in November in the odd numbered years."

The plain and unambiguous terms of this constitutional provision clearly preclude the election of any township officers at the coming November election and since in addition to section 2 of article X of the constitution it is specifically provided that:

> "the election of members of the agricultural board shall be governed in all respects by the same laws governing the election of other township officers"

which provision clearly comprehends the constitutional as well as the statutory provisions governing the election of township officers, it, therefore, follows, if for no other reason, that candidates for the office of member of the agricultural board of Shelby county are not authorized to be nominated at the primary election to be held in August next.

Attention is also directed to the provision of section 7 of article V of the constitution of Ohio following:

> "but direct primaries shall not be held for the nomination of township officers or for officers of municipalities of less than two thousand population, unless petitioned for by a majority of the electors of such township or municipality."

By reason of this constitutional inhibition primaries may not be held for the nomination of township officers in any event unless such primary election be petitioned for by a majority of the electors of the township.

I am, therefore, of opinion that members of the agricultural board of Shelby county may not be elected at the November election in 1916 and that candidates for such office may not be nominated at the primary election to be held in August of this year.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1747.

COUNTY BOARD OF EDUCATION—MAY NOT DISMISS DISTRICT SUPERINTENDENT UPON CHARGES SPECIFIED BY STATUTE—PRESIDENTS OF BOARDS OF EDUCATION OF SEVERAL RURAL AND VILLAGE SCHOOL DISTRICTS HAVE AUTHORITY.

A district superintendent who is elected by the county board of education, pursuant to section 4741, *G. C.,* 104 *O. L.,* 133, *may not be dismissed by such county board of education upon charges of inefficiency, neglect of duty, immorality or improper conduct, pursuant to section* 7701, *G. C.*

COLUMBUS, OHIO, June 29, 1916.

HON. E. A. SCOTT, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR:—Yours under date of June 12, 1916, is as follows:

> "Section 7701 of the General Code of Ohio gives the county board of education the right to dismiss any appointee or teacher, etc.
>
> "When charges have been filed against a district superintendent, has the board of education any right to allow witness fees?"

In reply to a request for further information, you state, under date of June 26, 1916:

> "The district superintendent, against whom charges have been filed, was elected by county board of education on account of the presidents of the boards of education failing to agree on him."

Section 7701, G. C., to which reference is made, provides as follows:

> "Each board may dismiss any appointee or teacher for inefficiency, neglect of duty, immorality, or improper conduct. No teacher shall be dismissed by any board unless the charges are first reduced to writing and an opportunity be given for defense before the board, or a committee thereof, and a majority of the full membership of the board vote upon roll call in favor of such dismissal."

The provisions of this section were last enacted, prior to the codification of 1910, as a part of section 4017, R. S., as amended in 97 O. L., 362, prior to the enactment of section 4728, G. C., 104 O. L., 133, under authority of which county boards of education are created.

The boards of education referred to in the act in which section 7701, G. C.,

was originally enacted were limited to city, village, township and special school district boards of education and the phrase "each board," as then used, could have had no application to county boards of education, which were then unauthorized. Whether the term "each board" comprehends county boards of education, it is not deemed necessary here to undertake to determine.

The term "appointee or teacher" clearly has reference only to appointees and teachers appointed or employed by the board of education therein referred to. That is to say, teachers and appointees, whose employment or appointment is in the first instance authorized and required to be made by a board of education, hence it is only appointees and employes of a board of education that may be dismissed under authority of section 7701, G. C., supra.

By section 4738, G. C., 106 O. L., 396, county boards of education are required to divide the county school district into supervision districts, and sections 4739 and 4741, G. C., 104 O. L., 133, provides as follows:

> "Section 4739, G. C. Each supervision district shall be under the direction of a district superintendent. Such district superintendent shall be elected by the presidents of the village and rural boards of education within such district, except that where such supervision district contains three or less rural or village school districts the boards of education of such school districts in joint session shall elect such superintendent. The district superintendent shall be employed upon the nomination of the county superintendent, but the board electing such district superintendent may, by a majority vote, elect a district superintendent not so nominated.
>
> "Section 4741, G. C. The first election of any district superintendent shall be for a term not longer than one year, thereafter he may be re-elected in the same district for a period not to exceed three years. Whenever for any cause in any district a superintendent has not been appointed by September first, the county board of education shall appoint such superintendent for a term of one year."

From the foregoing it will readily appear that the election of district superintendents devolves primarily upon the presidents of the boards of education of the several village and rural school districts constituting the supervision district, except where the supervision district contains three or less rural or village school districts, in which case the district superintendent is required, in the first instance, to be elected by the boards of education of such districts in joint session.

District superintendents are therefore not subject in the first instance to election, appointment or employment by the county board of education. It is only when by reason of the failure of the presidents of the boards, or the boards of education fail or refuse for any cause, to elect or appoint a district superintendent for any supervision district, that the county board of education is authorized, ex officio, to exercise that function. When so acting, the county board of education is rather acting instead of the otherwise constituted authority, and when a district superintendent is so elected and his compensation determined, as provided in section 4743, G. C., 104 O. L., 133, the county board of education then loses all authority or jurisdiction in the matter, and the district superintendent so elected stands in the same relation to the county board of education as a district superintendent elected either by the action of the presidents of the boards of education of the rural and village districts constituting the supervision district or by the boards of education of the village and rural districts in joint session. It would not be argued that a district superintendent, elected by the presidents of the boards of education of the village and rural school districts of the supervision district, was an appointee of the county board of education and subject to its jurisdiction

as to dismissal. A superintendent so elected cannot be said to be the appointee of any board of education and would, therefore, not be subject to dismissal under the provisions of section 7701, G. C., supra. To hold then that district superintendents, elected by the county board of education, are subject to dismissal pursuant to said section 7701, G. C., would lead to the anomalous result of some district superintendents being subject to dismissal while employes or appointees in the same class would not be so subject to dismissal. The legislature certainly never intended that a district superintendent, because he happened to have been elected by the county board of education, pursuant to section 4741, G. C., supra, should be subject to dismissal under section 7701, G. C., while a superintendent of an adjoining supervision district could not be so dismissed because he happened to be elected by the presidents of the boards of education of the several rural and village school districts of the supervision district, pursuant to section 4739, G. C., supra.

I am therefore of opinion that upon the election of a district superintendent by the county board of education, pursuant to section 4741, G. C., supra, and the determination of his compensation by said board, as provided by section 4743, G. C., 104 O. L., 133, such district superintendent then becomes in contemplation of law, to the same extent as district superintendents otherwise elected, the appointee of the presidents of the boards of education of the village and rural school districts of the supervision district or the joint boards of education thereof, as the case may be, and are not subject to dismissal by the county board of education, under authority of section 7701, G. C., supra.

The above conclusion renders unnecessary a consideration of the question submitted by you.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1748.

SCHOOLS—COUNTY SUPERINTENDENT AS COUNTY SCHOOL EXAMINER ENTITLED TO COMPENSATION FOR CONDUCTING INVESTIGATIONS—SECTIONS 7827 AND 7828, G. C., INTERPRETED.

The county superintendent, as county school examiner, is entitled to the compensation of three dollars per day provided in section 7828, G. C., for conducting investigations required by section 7827, G. C.

COLUMBUS, OHIO, June 30, 1916.

HON. E. A. SCOTT, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR:—Yours received June 20, 1916, is as follows:

"Section 7828, General Code of Ohio, gives the board of school examiners the sum of $3.00 per day for conducting investigations where charges have been filed against a teacher.

"Does the language of this section as 'other expenses' include payment of witness fees?

"Does the county superintendent draw $3.00 per day for such investigations when he is under a salary?"

It is provided by section 7827, G. C., that hearings and investigations may be had by the board of county examiners upon charges against teachers for intemperance, immorality, incompetence or negligence.

Section 7828, G. C., to which you refer, provides as follows:

> "The fees and the per diem of examiners for conducting such investigation at three dollars a day each, and other expenses of such trial shall be certified to the county auditor by the clerk and president of the examining board and be paid out of the county treasury upon the order of the auditor."

Your first question was considered in an opinion of my predecessor, Hon. U. G. Denman, found at page 296, of the report of the attorney-general for the year 1910, in which it was held that the board of county school examiners might lawfully pay mileage and fees of witnesses called by it under authority of sections 7827 and 7828, G. C.

While costs, witness fees and mileage are governed by statute, and may not be paid from the public funds except upon express statutory authority therefor, it will be observed that it is provided by section 7828, G. C., supra, that fees and per diem of examiners and "other expenses" shall be paid out of the county treasury when certified by the county auditor by the clerk and president of the examining board. I find no expense of such investigation, other than the fees and per diem of the examiners, expressly prescribed or authorized to be incurred in such investigations, hence the phrase "other expenses" seems necessarily to comprehend some expenditure not otherwise specifically provided. The examining board is authorized, under the provisions of section 7827, G. C., "to send for witnesses and examine them." There is no provision for the issuance of compulsory process, nor is there express provision for the payment of fees and mileage to such witnesses, yet it may readily be conceived that to send for witnesses and to procure their attendance would, in most cases, necessarily involve some expense. It is not mandatory upon the examining board to send for witnesses in any case, yet the power to do so is clearly conferred, and therefore rests in the discretion of the board whether witnesses shall be sent for, and if so, how many and whom? If in thus procuring the attendance of witnesses, necessary and reasonable expense is incurred, in no case in excess of witness fees and mileage in ordinary cases, I am of the opinion that such expense may be paid pursuant to the provisions of said section 7828, G. C.

Coming to consider your second question as to the right of the county superintendent to $3.00 per day, under said section 7828, G. C., supra, attention is first directed to section 4744-1, G. C., 104 O. L., 133, which prescribes the salary of county superintendents. There is not in this section found any provision that the salary therein provided "shall be in full payment of all the services rendered," and required by law of the county superintendent and in lieu of all the fees otherwise provided by law, nor is there elsewhere such provision as is found in section 3001, G. C., under consideration in the case of State ex rel. v. Stone, 92 O. S., 63, that:

> "Such compensation shall be in full payment of all services rendered as such commissioners, and shall not in any case exceed four thousand dollars per annum."

The question before the court in that case was whether this specific statutory declaration was repealed by implication by the re-enactment of section 5597, G. C.

102 O. L., 279, and the court held that an established and clearly defined general policy as to compensation of county officers could not be thus overridden by mere implication.

In the matter of the compensation of school examiners, it will be noted that the law fixing the compensation of county and district superintendents and which provides that the county superintendent and one of the district superintendents shall be members of the board of school examiners, was passed subsequent to the enactment of section 7828. So that the question here under consideration is rather the converse of that decided in the Stone case, supra, viz.: Whether the specific statutory provision of section 7828, G. C., is repealed by implication by the subsequent enactment of a statute fixing the compensation of an officer or employe who, by virtue of the same act is ex officio a member of the board of school examiners, in the absence of any declaration indicating an intent that the compensation so provided shall be in full payment for all services.

There is a further distinction which is deemed worthy of note. The basis for the determination of the salary of county commissioners is definitely fixed by section 3001, G. C., while the compensation of county and district superintendents is fixed in every case by the appointing authority (sections 4743 and 4744-1, G. C., 104 O. L., 133). So that there seems ample reason for the legislature not providing that the salary of county and district superintendents should be in full payment for all services in contemplation of the appointing authority taking into consideration the compensation of school examiners in fixing the compensation of such superintendents.

Since one of the county school examiners is also a district superintendent (section 7811, G. C., 104 O. L., 100) whose compensation, as such, is fixed in similar manner to that of the county superintendent, it seems conclusive that whatever rule would apply to the compensation of the county superintendent, under section 7828, G. C., must apply equally to the other school examiner who is a district superintendent. Section 4743, G. C., 104 O. L., 133, prescribing the compensation of district superintendents, was passed February 5, 1914. On the next day, February 6, 1914, there was passed by the legislature section 7834, G. C., 104 O. L., 100, in which it was provided that each member of the board of school examiners should be paid certain compensation for conducting examinations of teachers for teachers' certificates. By the same act (section 7811, G. C., 104 O. L., 100) it was provided that one of the school examiners should be a district superintendent. This subsequent action of the legislature tends strongly to support the position that it was not contemplated that the salary provided by section 4743, G. C., supra, should constitute the sole compensation to which the district superintendent, who is the school examiner, might be entitled. If, as above suggested, it be clear that it was thus intended that the school examiner, who is a district superintendent, should be entitled to the compensation provided by section 7828, G. C., it would hardly be argued that the examiner, who is county superintendent, should not be entitled thereto under the same statute.

Section 7828, G. C., which was in operation at the time of the enactment of section 4744-1, G. C., which provides for the payment of the salary of county superintendents, has not been expressly repealed. Repeals by implication are not favored, and there appears no inconsistency or conflict between the provisions of the sections above referred to.

I am therefore of opinion, in answer to your second question, that in a proper case a county superintendent is entitled to $3.00 per day for conducting the investigation authorized by section 7827, G. C., in addition to the annual salary fixed and provided by section 4744-1, G. C.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1749.

APPROVAL, RESOLUTION FOR ROAD IMPROVEMENT IN RICHLAND, JEFFERSON AND MERCER COUNTIES.

COLUMBUS, OHIO, June 30, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of June 28, 1916, transmitting to me for examination final resolutions relating to the following roads:

"Richland county—Section 'I,' Mansfield-Norwalk road, Pet. No. 822, I. C. H. No. 287.

"Jefferson county—Section 'E,' Canton-Steubenville road, Pet. No. 660, I. C. H. No. 75.

"Mercer county—Section 'A,' Celina-Wabash road, Pet. No. 2687, I. C. H. No. 264."

I find these resolutions to be in regular form, and am therefore returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1750.

GENERAL ASSEMBLY—SALARY OF MEMBER—CERTIFICATE OF SPEAKER OF HOUSE OF REPRESENTATIVES, CONCLUSIVE—JOHN A. MANSFIELD, STEUBENVILLE, OHIO.

The certificate of the speaker of the house of representatives under section 54, G. C., is, in the absence of fraud or collusion, conclusive.

COLUMBUS, OHIO, June 30, 1916.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Under date of April 28th you submitted for my opinion the following:

"Will you kindly give me an opinion upon the following facts?

"Hon. John A. Mansfield, of Steubenville, Ohio, was elected a member of the 81st general assembly. On January 4, 1915, he was excused on account of illness. On February 16, 1915, he presented his certificate of election. He was present at the session on February 16th, April 29th, May 7th, 13th, 14th, 15th, 17th and 27th, 1915. He was absent on all other days of the session. The journal of the house does not show that he was granted leave of absence, nor does it show that he was excused for absence, except as to January 4, 1915.

"In spite of these facts, the speaker of the house signed vouchers for the salary of Mr. Mansfield, as follows: Numbers 23866, 38201, 40204,

43796, 56199 and 68310, being salary of Mr. Mansfield for the first year of the 81st general assembly. Upon these vouchers the auditor of state issued the following warrants:

"January 20, 1915	$200 00
"February 24, 1915	100 00
"March 12, 1915	100 00
"March 18, 1915	200 00
"April 15, 1915	200 00
"May 18, 1915	200 00

"At the time of the presentment of the vouchers to the auditor of state, each voucher had endorsed upon it the following: 'Received a warrant on treasurer of state for within amount (carrying the date).' Each such statement was signed by Mr. Mansfield.

"Upon the examination of the financial affairs of the general assembly made by this department, the fact of Mr. Mansfield's absence without leave or excuse, and also that the warrants had never been delivered to Mr. Mansfield, but were being retained by the clerk of the house, came to the notice of this department.

"On January 27, 1916, the attention of Mr. Mansfield to these facts was drawn by a letter to him from this department, and Mr. Mansfield was requested to state whether it was his intention to accept these warrants, or, if it was not his intention so to do, to kindly advise the clerk of the house to return them to this department so that proper entries might be made before the report of the examination was completed. To this no answer was received from Mr. Mansfield, so that we do not know his attitude, except by inference.

"On January 5, 1916, voucher No. 74 for $1,000, being the second year's salary of Mr. Mansfield as a member of the 81st general assembly, was presented to the auditor of state. It had been signed by Mr. Mansfield in acknowledgment of the receipt of the warrant, as the former vouchers had been signed.

"The matters upon which we desire an opinion are as follows:

"1. Was Mr. Mansfield entitled to the full salary for the first year (1915) without deduction for absence without leave or excuse, as provided by section 50, G. C.?

"2. If such deductions should have been made, in view of the fact that the warrants covering the salary in full are yet in the possession of the clerk of the house, may this department, under section 270, G. C., require the return of such warrants as will cover the excess?

"3. If under section 270, G. C., the auditor cannot compel the return of these warrants to the amount of the excess, then what action should he take to recover the amount of such excess?"

Immediately upon receipt of your request for opinion as above set forth, I wrote to Hon. John A. Mansfield, at Steubenville, advising him of your request for opinion and requesting him to give me the benefit of his views and claims in the premises.

On May 6th Mr. Mansfield replied to my letter, giving me a statement of facts as he understood them for my consideration. In the course of his letter he said:

"The people of Jefferson county honored me with an election to the Ohio legislature, and it was my purpose to render all the service in that office possible for me to render. By reason of the continued illness of

Mrs. Mansfield it was impossible for me to render the service desired, and I cannot express the deep regret and disappointment to me by reason thereof. I make this statement to show that my absence was in no sense wilful or due to negligence.

"The situation was conveyed to Speaker Conover prior to the meeting of the legislature, and he stated that my absence would be excused. On the 16th day of February I appeared, presented my certificate of election, and took the oath of office, when I again communicated to Speaker Conover the difficulties under which I labored. He again said that my absence would be excused, but to attend all that I could. The vouchers for my salary were regularly issued by the speaker, and the clerk of the house was instructed to obtain the necessary warrants from the auditor of state, and to retain the same until the end of the session, or until such time as I requested the return of the same to me. I attended some eight or ten days, and rendered all the service it was possible for me to render under the circumstances. Both the speaker and clerk of the house informed me that I was legally entitled to the salary, and this assumption is borne out from the fact that the speaker issued to me the necessary vouchers, and the auditor of state issued the necessary warrants for the first year's salary, together with my mileage.

"I made no examination of the law, never read section 50, G. C., until after receiving your letter, made no examination of the journal of the house, and did not know what action had been taken by the house relative to my absence until after receiving your letter. I simply relied upon what the speaker and the clerk had said to me.

"Along about the first of July, 1915, Speaker Conover forwarded to me his voucher for the second year's salary, payable on the first of January, 1916. This voucher I retained in my possession, and along about the first of January, 1916, I requested Clerk Maynard to forward to me my warrants for the first year's salary, which he did. On January 28, 1916, I received a communication from the auditor of state, to the effect that by an examination of his department it came to his notice that I had not drawn my first year's salary, and also desiring to know whether I had received Speaker Conover's voucher for the second year's salary, and what I intended to do with it, as he was anxious to close up his books and make a report. Immediately thereafter I wrote to Clerk Maynard, enclosing Speaker Conover's voucher, requesting Mr. Maynard to present the voucher to the auditor of state and obtain my warrant for the second year's salary, and return the same to me. Mr. Maynard presented the voucher to the auditor, but for some reason or other the warrant was not forthcoming. I wrote to the auditor of state in answer to his communication that I had forwarded Speaker Conover's voucher for the second year's salary to Mr. Maynard, with the request that he present the same to the auditor of state for the warrant, which I assumed would be an answer as to my intentions in the matter."

Upon receipt of the letter from Mr. Mansfield, in view of the facts stated therein, I wrote to Mr. C. D. Conover, speaker of the house of representatives, under date of May 18th, advising him of the fact that a request for opinion had been received by this department; that under date of May 6th I had received from Mr. Mansfield his view of the facts therein, and that I was desirous of receiving a letter from him setting forth the facts as he understood them in regard to the matter.

Under date of June 16th I received a letter (dated May 31st) from Mr. Conover in answer to my letter, in the course of which letter he states as follows:

> "The journal of the house shows that on January 4, 1915, that Mr. Mansfield was excused on account of illness. This was on the opening day of the 81st general assembly. The question of excusing Mr. Mansfield from the opening session was presented to the house because citizens from Jefferson county and Senator Moore stated that the attendance of Mr. Mansfield was impossible on account of 'illness.' This is the only time that the question of excusing Mr. Mansfield was brought to my attention, and consequently to the attention of the house for action. I am certain of this as every request for an excuse or leave of absence by a member was promptly written down and presented to the house during that day's session."

Under date of June 16th I again wrote to Mr. Conover, referring to the entry made in the minutes of the meeting of the house of representatives on January 4, 1915, to the effect that

> "The speaker excused Mr. Mansfield, of Jefferson, on account of illness."

and requested him, in view of the fact that the entry referred to was not specific in regard to the length of time for which Mr. Mansfield was excused, to advise me as to what was intended when he excused Mr. Mansfield.

Under date of June 26th I received a reply to my letter, which is as follows:

> "In your last letter, that of June 16, you ask for a 'statement of intention' as to the length of time for which Mr. Mansfield was excused. I do not think that there was any specific intention connected with the action of the house as to the length of time. The bare fact is that Mr. Mansfield assured the house that he could not attend. The excuse followed as an inevitable result. The excuse was on account of illness. There are many contingencies that may operate to delay or advance man's perspective recovery from illness, and for that reason an excuse granted on account of illness could not be bounded by so many days. The regular attendance of the members of the 81st assembly is not surpassed by that of any previous assembly and equalled by very few. They were men of honor, respected by the people who elected them or else they would not have been here. It is only reasonable to assume that the integrity of any member would not be impeached without facts to justify such action. Furthermore, I kept in close touch with those who were absent and I know that no member was wilfully absent under color of illness.
>
> "The matter of entry on the record varies somewhat. I do not know why the entry you refer to appears in the form that it does as the speaker never excuses any one from attendance. The question is presented by the speaker for the action of the house and whatever intention there is connected with it is that of the house and not that of the party who presents it, whether he be the presiding officer or a member. For instance: On page 143 a member was granted an 'indefinite leave of absence on account of illness.' On page 180 a member was granted a leave of absence 'on account of illness.' Another 'granted leave of absence on account of death in his family.' Again on page 416 a member was granted a leave

of absence 'for today.' Another for 'Wednesday and Thursday.' I cite these to show that the question as to the length of the time of an excuse is dependent largely upon the circumstances connected with each particular case."

The sections of the General Code applicable to this question are as follows:

"Sec. 50. Every member of the general assembly shall receive as compensation a salary of one thousand dollars a year during his term of office. Such salary for such term shall be paid in the following manner: Two hundred dollars in monthly installments during the first session of such term and the balance of such salary for such term at the end of such session.

Each member shall receive two cents per mile each way for mileage once a week during the session from and to his place of residence, by the most direct route of public travel to and from the seat of government, to be paid at the end of each regular or special session. If a member is absent without leave, or is not excused on his return, there shall be deducted from his compensation the sum of ten dollars for each day's absence.

"Sec. 52. The word 'attendance' includes all days from the opening to the close of the session, except such days of absence as are not excused by the house to which the member or officer belongs.

"Sec. 54. The president of the senate, and speaker of the house of representatives, shall ascertain the number of days' attendance of each member and officer of the respective houses, during the session, the number of miles travel of each member to and from the seat of government, and certify such attendance and mileage, and the amount due therefor, to the auditor of state."

Reading the definition of "attendance" as used in section 52, G. C., it is clear that the absence of a member of the house of representatives is to be excused by the house. The entry of January 4, 1915, hereinbefore referred to, states that "the speaker excused Mr. Mansfield."

From such examination as I have been able to make it would seem that it has been the custom for the speaker to excuse members from attendance and report the same to the house for its ratification, and that if no objection is made thereto the action of the speaker is deemed to be ratified.

While it is not absolutely clear as to what was intended by the entry of January 4, 1915—which is the only entry relative to the absence of Mr. Mansfield that I have been able to find—it seems to me from the facts stated in the letter of Mr. Mansfield hereinbefore referred to, and which the speaker of the house of representatives does not state is not the fact, that it was the intention that Mr. Mansfield should be excused from attendance during the session on such days as he found it impossible, by reason of the facts stated by him, to attend.

Construing the entry in the minutes of January 4, 1915, as an indefinite leave of absence to Mr. Mansfield, the questions submitted by you do not arise, for the reason that if Mr. Mansfield was excused from attendance the deductions required to be made under the provision of section 50, G. C., supra, would not be made, and the entire amount due Mr. Mansfield as salary would be payable.

Under the provisions of section 50 of the General Code there is to be deducted from the compensation of each member of the general assembly the sum of ten dollars for each day's absence, unless excused. The power of excusing is lodged with the house, but under section 54, G. C., it is made the duty of the speaker to

ascertain the number of days' attendance of each member, together with his mileage, and certify such attendance and mileage and the amount due therefor to the auditor of state.

The speaker of the house of representatives, under the provisions of said section 54, G. C., certified to the auditor of state as due Mr. Mansfield the entire salary due him, and in the absence of a showing of fraud or collusion the certificate of the speaker is conclusive. From the facts stated, as hereinbefore set forth, there is no doubt that there was no fraud or collusion in this matter. Therefore, the certificate of the speaker is conclusive.

For the foregoing reasons, I am of the opinion that Mr. Mansfield was entitled to his entire salary for the first year of his term.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1751.

OHIO UNIVERSITY—BALANCE OF APPROPRIATION FOR WOMEN'S DORMITORY AVAILABLE FOR CONSTRUCTION OF ANNEX TO HOUSE HELP.

The balance of appropriation of $120,000 *for women's dormitory at Ohio University (H. B.* 701) *is available for construction of annex to women's dormitory to house help, since it could be used for changes in dormitory proper and construction of annex amounts to the same thing.*

COLUMBUS, OHIO, July 1, 1916.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Under date of June 29th you submitted for my opinion the following:

> "On June 27, 1916, at a meeting of the governor, auditor of state and secretary of state, acting under section 2314, G. C., plans and specifications, etc., for an annex to the women's dormitory at Ohio University were presented for approval.
>
> "For the Ohio University there was appropriated in house bill No. 701 the following:
>
> " 'Section 2. Women's dormitory to cost complete with equipment $120,000.00 ---------- $15,000.00
>
> " 'Section 3. To complete and equip women's dormitory--------$105,000.00'
>
> "A contract was entered into for the women's dormitory for $97,777.77, leaving a balance of $17,292.98 exclusive of architects' fees.
>
> "I was directed to request an opinion as to whether the building commission has authority to approve the plans for an annex to the women's dormitory inasmuch as the appropriation reads 'women's dormitory and equipment.' The purpose of the annex is to be a part and to serve the same purpose as the dormitory, the purpose for which is to provide for the help which otherwise would have to be taken care of in the dormitory proper, thus permitting a corresponding increase in the capacity of the dormitory."

While the word "dormitory" usually conveys the idea of a single building, nevertheless, I do not believe that the appropriation made in house bill No. 701 should necessarily receive that restricted meaning. It is apparent that the legislature intended to provide sleeping quarters for women, the same to cost complete with equipment not to exceed $120,000.00.

Section 2320 of the General Code provides as follows:

> "After they are so approved and filed with the auditor of state, no change of plans, descriptions, bills of material or specifications, which increases or decreases the cost to exceed one thousand dollars, shall be made or allowed unless approved by the governor, auditor and secretary of state. When so approved, the plans of the proposed change, with descriptions thereof, specifications of work and bills of material shall be filed with the auditor of state as required with original plans."

It is clearly shown by the provisions of said section that changes therein could be made, and if the said changes increase or decrease the cost to exceed one thousand dollars, the same must receive the approval of the governor, auditor of state and secretary of state, and when approved "the plans of the proposed change, with descriptions thereof, specifications of work and bills of material shall be filed with the auditor of state as required with original plans."

In the instant case it is apparent that under the provisions of section 2320, G. C., there would be full authority for the university to change the plans of the women's dormitory and add thereto an additional story in which to house the "help." If there be funds sufficient for that purpose left in the appropriation, I can see no reason why the university could not provide a separate and distinct building for such purpose, and therefore advise you that the building commission has authority to approve the plans for an *annex* to the women's dormitory, the same to serve the purpose of providing for the help which otherwise would have to be taken care of in the dormitory proper. Respectfully,

EDWARD C. TURNER,
Attorney-General.

1752.

WHEN TWO OR MORE BOARDS OF TOWNSHIP TRUSTEES WITHIN SAME COUNTY MAKE APPLICATION FOR STATE AID—HOW STATE HIGHWAY COMMISSIONER MAY CHOOSE.

When two or more boards of township trustees within the same county make applications for state aid, the state highway commissioner may, under proper circumstances, make his selection of the particular application to be granted upon the basis of the amounts which the local authorities are able and willing to expend, and to approve the application of the board of township trustees offering the largest measure of co-operation.

COLUMBUS, OHIO, July 3, 1916.

HON. E. A. SCOTT, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR:—Your communication of May 18, 1916, received by this department on May 29, 1916, reads as follows:

> "The county commissioners have requested me to ask you for an opinion relative to the following questions. I herewith enclose copy of letter

sent out by Hon. Clinton Cowen, state highway commissioner. The facts are briefly stated as follows: The county commissioners joined in a request to continue the intercounty road started two years ago, but did not agree to furnish any money with which to continue the same. The various townships mentioned in letter asked state highway department to cooperate with them.

"*Question:* Has the state highway commissioner any legal right to locate the proposed improvement to the highest amount offered or highest bidder?

"Is it not against public policy to build road or improve same under such plan?

"Would not an injunction be granted to restrain the expenditure of money under such a plan of road improvement?

"Is there any law whatever for such a plan of improvement?"

The enclosed copy of letter from the state highway commissioner reads as follows:

"We have on file in this department petitions from the trustees of the following townships: Meigs, Wayne, Green, Scott, Oliver, Tiffin and Winchester.

"At a meeting here today with a large delegation from the vicinity of Seaman, it was suggested, and I think generally agreed, that the amount of state funds due Adams county for 1916, which amounts to about $17,000.00, which should not be split up and divided among the several townships because the amount which each township would receive would be so small as to be of little benefit to any.

"It was further suggested and agreed that the townships or citizens, or both, that would raise the greatest amount of money per mile for any particular road in said township should receive state aid to assist that township in building such road, the money raised by township and citizens to be in cash and to the credit of such township by June 1, 1916. A proper certificate from any bank or responsible depository will be evidence as to the amount each township or community has raised for the above mentioned purpose."

Section 185 of the Cass Highway Law, section 1192, G. C., reads as follows:

"In case the county commissioners do not file any application for state aid before January 1st of any year in which the funds will be available for the construction, improvement, maintenance or repair of some one or more of the intercounty highways or main market roads, then the board of township trustees of any township within the county may file such application, and the state highway commissioner may co-operate with such trustees in the construction, or improvement of said highway in the manner hereinafter provided in cases where the county commissioners make such application."

Under the provisions of sections 1213 and 1217, G. C., where an improvement is made by the state highway department on the application of township trustees, the township and the owners of abutting real estate must pay at least twenty-five per cent. of the cost of the improvement and they must pay at least fifty per cent. of the cost of the improvement unless the state assumes the county's proportion

of the same. It appears that about $17,000.00 is available as state aid for use in your county, and that seven townships have made application for the improvement of roads situated within their territorial limits. It seems to be the policy of the state highway commissioner not to divide the $17,000.00 among the several townships for the reason that the amount which under such plan would be available for use in each township would be so small as to be of little benefit. His policy seems to be to select some one of the townships and expend the entire sum in that township to the end that an improvement of substantial extent may be constructed. It should be observed that the principle of contribution by the local authorities is recognized by the statutes, and that under the sections of the General Code heretofore referred to, the state highway commissioner is now without authority to co-operate with any one of the townships unless such township is able and willing to pay at least twenty-five per cent. of the cost of the improvement. Indeed, the township with which the state highway commissioner co-operates must be willing to pay at least fifty per cent. of the cost of the improvement unless the state highway commissioner, acting on behalf of the state, is willing to assume the county's proportion of the cost, which proportion is twenty-five per cent.

The right of the state highway commissioner to receive contributions from citizens is recognized by section 1224, G. C., but the statutes do not authorize co-operation by the state highway commissioner with citizens in the sense that the term "co-operation" is used in connection with counties and townships. In other words, the state highway commissioner would not be authorized in rejecting the application of a county or township properly made when such county or township was able, willing and ready to co-operate with the state, in order that he might enter into an engagement with private individuals looking toward the construction of a particular road, in consideration of contributions to be made by them. I do not understand, however, that such a course has been contemplated by the state highway commissioner, either in your county or elsewhere. In cases where two or more boards of township trustees within one county make applications for available state funds, it is my opinion that the state highway commissioner may, in the exercise of his discretion, determine that he will grant one or more applications and reject the remainder. The situation in your county furnishes an excellent illustration of the reasoning on which this conclusion is based. If the $17,000.00 available for use in your county were to be divided equally among the seven townships making the applications less than $2,500.00 would be available for use in each township and the amount of roadway that could be improved in each township would not be of sufficient length to be of substantial benefit. It is also a well known fact that the letting of a number of very small contracts is not an economical method of handling funds.

The statute is silent as to the facts to be taken into consideration by the state highway commissioner in determining which of several applications by boards of township trustees within the same county he will approve and which he will reject or at least hold in abeyance. Section 1195, G. C., provides only that if, upon the receipt of an application for state aid the highway commissioner approves of the construction, improvement, maintenance or repair of the intercounty or main market roads described in the application, or any part thereof, he shall certify his approval to the county commissioners or township trustees making the application. There are a number of facts which may properly be taken into consideration by the state highway commissioner in determining a question of this character, and among these may be mentioned the relative importance of the several roads covered by the applications, the present condition of such roads and the need of immediate action in reconstructing or improving the same, and the ability and willingness of

the local authorities to co-operate with the state. It is possible and even probable that in some instances the importance of one road and the imperative need for its immediate improvement would be such that in determining the question the state highway commissioner would have a right to look only to these considerations and would not be authorized in refusing an application for state aid in the improvement of such road if the board of township trustees were able and willing to expend the minimum percentage required by the statute, even though some other board of township trustees in the county might be able and willing to pay a much larger percentage of the cost of improving some other road of less importance or a road the condition of which did not render imperative its immediate improvement. However, in view of the fact that the statute recognizes and even requires a measure of co-operation on the part of the local authorities before an application for state aid can be granted, and in view of the fact that there is no statutory provision setting forth the considerations which are to govern the state highway commissioner in the selection of the particular road to be improved or the particular township whose application is to be granted, I am of the opinion that where two or more boards of township trustees within the same county make applications for state aid, and the roads covered by the applications are of substantially the same importance, and the condition of the several roads and the other facts and circumstances are not such as to render it apparent that as between the two or more roads one should be improved at the present time and the work upon the other road or roads delayed, then the state highway commissioner is authorized to make his selection upon the basis of the amounts which the local authorities are able and willing to expend, and to approve the application of the board of township trustees offering the largest measure of co-operation.

I believe the above constitutes as specific an answer as can be made to the several questions submitted by you.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1753.

ROADS AND HIGHWAYS—COUNTY COMMISSIONERS—NOT AUTHORIZED TO ISSUE BONDS UNDER SECTION 6929, G. C., UNTIL PRELIMINARY STEPS OUTLINED IN PRECEDING SECTIONS HAVE BEEN TAKEN.

County commissioners are not authorized to issue bonds under section 6929, G. C., until the preliminary steps outlined in the preceding sections of chapter VI of the Cass highway law and looking toward the improvement of a particular road have been taken.

COLUMBUS, OHIO, July 3, 1916.

HON. ELI H. SPEIDEL, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—I have your request for an opinion under date of June 9, 1916, which request reads as follows:

> "On March 16, 1916, I wrote your office asking for an opinion relative to the authority of the county commissioners to issue road improvement bonds, and also asking whether or not it was necessary to first submit the

question to a vote of the people, and, in a well considered opinion from your office, being opinion No. 1460, dated April 6, 1916, you held that it was not necessary to first submit the question to a vote of the people and that ample authority was provided by section 6929 of the General Code, being section 108 of the Cass highway law, for the issuing and sale of such bonds.

"The board of county commissioners and the county highway superintendent of this county, acting on the advice contained in your opinion, proceeded as follows:

"On May 15, 1916, Archie G. Holland, the county highway superintendent of this county, presented to the board of county commissioners an estimate of the cost of rebuilding, repairing and resurfacing certain enumerated parts of certain highways in said county, a copy of which estimate is herewith enclosed for your inspection.

"On the same day the board of county commissioners, by unanimous vote by resolution, accepted said estimate and approved and confirmed the same.

"On the same day, the board of county commissioners by a unanimous vote, passed a resolution to issue the bonds of said county of Clermont, in the sum of one hundred thousand ($100,000.00) dollars, to pay the cost of rebuilding, repairing and resurfacing the said portions of said turnpikes, enumerated in the estimate of the county highway superintendent, and which are embraced in the resolution as passed.

"These bonds were then offered in writing to the industrial commission of Ohio, as provided by law, but not taken.

"They were then advertised as provided in section 6929 of the General Code, and also in the Cincinnati Enquirer, a newspaper having a general circulation throughout the state, and were sold to the Provident Savings Bank and Trust Company at a premium of $3,470.00.

"On June 6, 1916, I received a communication from the law firm of Peck, Shaffer & Peck, which letter I herewith enclose, in which they raise the question as to whether or not the steps mentioned in their letter are conditions precedent, which should be complied with or performed before the resolution is passed to issue the bonds.

"They also suggest that if I believe that the opinion of your office justified the issue of bonds without such preliminary steps, that I submit their letter to you for your consideration and to let me have your exact views upon the subject.

"After giving the matter considerable thought and consideration, both before the resolution was passed, and since, I am of the opinion that none of the steps mentioned in the letter of Peck, Shaffer & Peck, are required, when the bond issue is a general issue, to be met by general taxation on all the property in the county, but I am submitting the matter to your office for a further opinion, as I feel that Peck, Shaffer & Peck will be largely guided by the view taken of the matter by your office.

"I might add that the work to be performed on these roads is largely force work, which the county commissioners expect to have done in the manner heretofore pointed out and approved by an opinion rendered by your office to the bureau of inspection and supervision of public offices.

"I feel that the determination of this question by your office is of the greatest importance in this county, for, if the suggestions contained in the Peck, Shaffer & Peck letter are conditions precedent to the passing of the resolution and the sale of the bonds, then under the conditions as they

exist in this county, it becomes almost impossible to effectively utilize the provisions of the Cass highway act as a remedial road measure.

"I might add this fact for your consideration. About three years ago, the board of county commissioners of this county, in practically the same manner as they have proceeded with the present issue of bonds, sold the bonds of the county in the sum of fifty thousand dollars, to pay the county's portion of the costs of building certain parts of certain intercounty highways in this county. Mr. Shaffer of the firm of Peck, Shaffer & Peck, in a general way, raised the same questions that he is now raising, to wit: That it was necessary to have plans and specifications and the other preliminary steps that were provided in that act, before the resolution could be passed, but after we had discussed the matter for quite a while, the bonds were accepted and the proceedings approved."

The communication from Messrs. Peck, Shaffer & Peck, addressed to you under date of June 6, 1916, and referred to in your communication, reads as follows:

"The Provident Savings Bank & Trust Company have submitted to us for examination an issue of $100,000.00 road improvement bonds of Clermont county Ohio.

"With the transcript is an opinion from the attorney-general of the state, to the effect that counties have authority under section 6929 to issue road improvement bonds.

"In this opinion the attorney-general does not specify the preliminary steps necessary giving the county commissioners jurisdiction to issue such bonds.

"These bonds are issued under authority of chapter 6 of the Cass road bond act, and particularly under section 6929 of the General Code, being 108 of said act. It seems to us that this chapter affords a scheme by which such bonds might be issued, which scheme involves the following jurisdictional acts:

"1. The filing of a petition signed by at least fifty-one per cent. (51%) of the lot owners residents of the county, asking that the improvement be made. The granting of such application or the determination of the county commissioners by a unanimous vote declaring the necessity therefor, as provided by section 6910.

"2. The ordering of the county surveyor to make plans and estimates for the improvement.

"3. The determination by the county commissioners to construct the improvement and causing the publication in a newspaper of general circulation of a notice that such improvement is to be made, and that the surveys, estimates, etc., are on file for the inspection of all persons interested thereon. The notice must state the time and place of hearing the objections to the improvement.

"4. The determination at the hearing that the commissioners are still satisfied that the public convenience and welfare require the improvement to be made, and the cost and expense thereof will not be excessive in view of the public utility therefor, and their determination to proceed with the improvement as provided by section 6917.

"5. The determination of the county commissioners of the method of paying the compensation and expenses thereof in accordance with the eight separate plans provided for in section 6919.

"6. The resolution of the county commissioners providing for the issue of the bonds.

"The transcript does not show that any of these proceedings were taken. It may be that the transcript does not contain all of the proceedings of the county commissioners.

"If such proceedings have not been taken and you believe that the opinion of the attorney-general justifies the issue of bonds without such preliminary steps, we suggest that you submit this letter to the attorney-general for his consideration and let us know exactly his views upon the subject."

Before considering the question raised by your inquiry I desire to refer briefly to opinion No. 1460, rendered to you on April 6, 1916, and referred to by you in your request for an opinion.

No attempt was made in this opinion to determine the necessity for the preliminary proceedings referred to by Messrs. Peck, Shaffer & Peck, that matter not being involved in your inquiry. In brief, it was held in the opinion in question that the provision for the issuance of bonds by county commissioners for county road improvement purposes is found in section 6929, G. C., that under the provision of this section all bonds of this character must mature in not more than ten years, that there is no authority for submitting to the electors of a county the proposition of issuing bonds for such purposes, that the county commissioners have full power and authority to issue such bonds without a vote of the electors and that such bonds, in so far as they are to be issued in anticipation of the collection of taxes, are to be issued in anticipation of levies made under sections 6926 and 6927, G. C. It was further pointed out in this opinion that not only is a submission to a vote of the electors of the question of issuing such bonds neither required nor authorized, but that it is also true that no substantial advantage could be derived by submitting a proposition of this character to a vote of the electors, in view of the statuory provisions relating to the tax levies in anticipation of which bonds of this character may be issued, which tax levies were fully discussed and defined. No effort was made in the opinion in question to determine the amount of bonds that might be issued by Clermont county, under section 6929, G. C., the opinion only going so far as to point out the limitations to be considered by the authorities of Clermont county, or any other county in the state in reaching a determination as to the possible amount of bonds that might be issued.

The questions submitted by you and in response to which opinion 1460 was prepared related to the amount of bonds that might be issued at the present time for road improvement purposes by the board of county commissioners of Clermont county, the length of time that such bonds might run and the authority or power of the commissioners to submit such bond issue to a vote of the people. All of these questions were answered specifically except the first. In answering the first question it was impossible to calculate the amount of bonds that might be issued for the reason that your communication contained no information as to present tax rates, and, therefore this question was answered by the statement of a rule by the use of which the local authorities might make the computation.

As has been previously observed, your inquiries did not involve a consideration of the necessity of preliminary legislation of the character referred to in the letter of Messrs. Peck, Shaffer & Peck, and, therefore, opinion No. 1460 cannot be taken as having answered that question either in the affirmative or in the negative.

The first sentence of section 6929, G. C., reads as follows:

"The county commissioners, in anticipation of the collection of such

taxes and assessments may, whenever in their judgment it is deemed necessary, sell the bonds of said county in the aggregate amount necessary to pay the estimated cost and expenses of *such* improvement."

In the view that I take of the law, the language of this sentence is conclusive as to the question submitted by you. The sentence in question is both a grant of power and a limitation upon the power granted. It authorizes the county commissioners to sell the bonds of the county, but only in the aggregate amount necessary to pay the estimated cost and expense "of such improvement." The only inference that can be drawn from the use of the word "such," in connection with the word "improvement" is that the legislature intended to restrict the bond issuing authority of the county commissioners to the amount necessary to pay the estimated cost and expenses of an improvement projected in the regular manner, in accordance with the provisions of the preceding sections of chapter 6 of the Cass highway law. In other words, there must have been a petition filed under authority of section 6907, G. C., a view of the proposed improvement by the county commissioners and a determination that the public convenience and welfare require that the improvement be made, or, in lieu of the above the commissioners must, under authority of section 6910, G. C., have adopted a resolution by a unanimous vote declaring the necessity for the improvement. Under authority of section 6911, G. C., the commissioners must have determined the route and termini of the road, the kind and extent of the improvement and must have ordered the county surveyor to make the required surveys, etc. The surveyor must have complied with this order and transmitted to the commissioners his estimate of the cost and expense of the improvement, together with a copy of his survey, etc., and the commissioners must have given the notice provided by section 6912, G. C., to the effect that the improvement is to be made and that the surveys, estimates, etc., are on file for inspection and the notice must also state the time and place for hearing objections and claims for compensation and damages and must contain the other matter referred to in sections 6912 and 6913, G. C. The proceedings relating to the allowance of compensation and damages, referred to in sections 6914 and 6916, G. C., inclusive, must have been taken and the commissioners must have adopted a resolution under authority of section 6917, G. C., setting forth that they are still satisfied that the public convenience and welfare require that such improvement be made and that the cost and expense thereof will not be excessive, in view of the public utility thereof, and ordering that they proceed with the improvement and adopting the plans, etc., reported by the surveyor or with the modification agreed upon. The commissioners must also determine by resolution the method of paying the compensation, damages, costs and expenses of the improvement, which determination must be the same as that set forth in the petition when the board is acting upon a petition. Under authority of section 6921, G. C., the commissioners may, by a unanimous vote, order that all the compensation and damages, costs and expenses of constructing any improvement, be paid out of the proceeds of any levy or levies for road purposes, on the grand duplicate of the county or out of any road improvement fund available therefor. This seems to be the method desired by the county commissioners of your county. If any part of the cost and expense of the improvement is to be specially assessed upon benefited real estate, the further steps provided by sections 6922 to 6924, G. C., inclusive, should be taken before bonds are issued. That is to say, the surveyor should make his estimated assessment and file the same in the office of the county commissioners, notice that the estimated assessment has been made and is on file and that objections will be heard at a certain time should be given, the assessments should be approved and confirmed either as originally made or as modified by the commissioners and the persons specially assessed should be given an opportunity to

pay their assessments in cash. When all the above requirements have been complied with, the county commissioners will be authorized to issue and sell the bonds of the county, if in their judgment it is deemed necessary, in the aggregate amount necessary to pay the estimated cost and expenses of the improvement. If any part of the cost and expense of the improvement has been specially assessed and any part of the special assessments has been paid in cash, then, of course, it will not, under any circumstances, be necessary to sell bonds in anticipation of the collection of the special assessments already paid. Answering your question specifically, I advise you that the steps above outlined are jurisdictional to the authority of the county commissioners to issue bonds under section 6929, G. C.

I am unable to share your view that the conclusion herein expressed will in any substantial measure curtail the availability and usefulness of the provisions of the Cass highway law herein discussed. I gather from your correspondence that it is desired by the board of county commissioners of your county to reconstruct or repair a number of county roads within the county, and to pay the entire cost and expense thereof out of the funds of the county without making any special charge against the townships in which the roads are located or against benefited real estate. In the view that I take of the law, proceedings of this character should be initiated by resolution adopted by the county commissioners by unanimous vote, under authority of section 6910, G. C., declaring the necessity therefor, the route and termini of the road and the kind and extent of the improvement and ordering that the county surveyor make the necessary surveys, etc. When the county surveyor has complied with this order, the county commissioners should cause to be published the notice provided by section 6912, G. C., and upon the day fixed in such notice should hear and determine objections to the improvement, if any, and also claims for compensation and damages, if any, and should then by a unanimous vote declare that they are still satisfied that the public convenience and welfare require that such improvement be made and that the cost and expense thereof will not be excessive, in view of the public utility thereof, and should order by resolution that they proceed with the improvement and should adopt the plans, profiles, specifications and estimates therefor, as reported by the surveyor, or as modified by agreement, and should further order that all the compensation and damages, costs and expenses be paid out of the proceeds of a levy to be made for road purposes on the grand duplicate of the county. The county commissioners will then be in a position to adopt a resolution making the necessary levy under authority of section 6926, G. C,, and providing for a sale of the bonds of the county under authority of section 6929, G C.

Respectfully,

EDWARD C. TURNER,

Attorney-General

1754.

DEPUTY STATE SUPERVISORS OF ELECTIONS—THE TERM "CLERK" IN SECTION 5092, G. C., 103 O. L., 496, DOES NOT INCLUDE DEPUTY CLERKS—TERM ELECTION REFERS ONLY TO REGULAR AND GENERAL NOVEMBER ELECTIONS AND SPECIAL ELECTIONS.

The term "clerk," referring to clerks of deputy state supervisors of elections in section 5092, G. C., 103 O. L., 496, does not include deputy clerks of deputy state supervisors of elections.

The term election first found in section 5092, G. C., supra, has reference only to regular and general November elections and special elections at which the final choice of officers is consummated and does not include elections at which only nominations of candidates are made.

COLUMBUS, OHIO, July 6, 1916.

HON. ROBERT C. PATTERSON, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—Yours under date of June 21, 1916, is as follows:

> "Hon. J. Clarence Schaeffer, clerk of court of common pleas of this county, requests me in writing to ask you for an opinion on section 5092, General Code (103 O. L., p. 496,), covering the following questions:
>
> "*First.* Does the term 'clerk thereof' following the words 'deputy state supervisor,' include deputy clerks appointed by the deputy state supervisors?
>
> "*Second.* Does the word 'election' in the part of sentence 'for an office to be filled at an *election*' mean a primary election as well as a general election?"

Section 5092, G. C., 103 O. L., 496, to which you refer, provides as follows:

> "No person, being a candidate for an office to be filled at an election, other than for committeeman or delegate or alternate to any convention, shall serve as deputy state supervisor or clerk thereof, or as a judge or clerk of elections, in any precinct at such election. A person serving as deputy state supervisor or clerk thereof, judge or clerk of elections contrary to this section shall be ineligible to any office to which he may be elected at such election."

Little, if any, reason can be assigned for a distinction between the clerk and the deputy clerk of boards of deputy state supervisors of elections in the matter of their being candidates for offices at elections as to which they bear an official relationship.

It is, however, an elementary principle of statutory construction that "if the words are free from ambiguity and doubt and express plainly, clearly and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation." Lewis' Sutherland Statutory Construction, 2nd Edition, section 366.

The legislature must be presumed to have been mindful of the statutory authority for the office or position of deputy clerks of boards of deputy state supervisors of elections and the relationship of such persons to the conduct of elections. No reason for omitting specific reference to deputy clerks of boards of deputy state supervisors of elections suggests itself if it were intended that they should be rendered ineligible to hold any office for which they might be a candidate at an election in which such deputy clerks participate in an official capacity.

In view of the plain and unambiguous language of the statute, I am of the opinion that deputy clerks of boards of deputy state supervisors of elections are not included within the provisions of section 5092, G. C., supra.

You make further inquiry as to the meaning of the term "election" as first used in said section 5092, G. C., supra. It will first be observed that the election referred to is one at which offices are to be filled or at which officers are elected. Section 1 of article XVII of the constitution provides:

> "Elections for state and county officers shall be held on the first Tuesday after the first Monday in November in the even numbered years; and all elections for all other elective officers shall be held on the first Tuesday after the first Monday in November in the odd numbered years."

From a consideration of this constitutional provision it is conclusive that elections at which officers may be elected may be held only on the first Tuesday after the first Monday of November of any year. So that it necessarily follows that the term "election" as used in the phrase "being a candidate for an office to be filled at an election" has reference only to the annual regular or general November election and special elections at which the final choice of officers is consummated. This opinion is not in conflict with opinion No. 1637, directed to Hon. Charles E. Ballard, prosecuting attorney, under date of May 31, 1916, in which it was held only that a person becomes a candidate within the terms of the above section when he begins to actively seek an office which is to be filled at an election, independent of whether candidates for such office are to be nominated at a primary and independent of whether the person seeking such office seeks any nomination as such candidate.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1755.

EMPLOYMENT OF FEMALES—INTERPRETATION OF SECTION 1008, G. C., 103 O. L., 555—NOT OPERATIVE AS TO FEMALES OVER EIGHTEEN YEARS OF AGE EMPLOYED IN *MERCANTILE* ESTABLISHMENTS LOCATED IN VILLAGES.

Section 1008, G. C., as amended 103 O. L., 555, while not operative as to females over eighteen years of age employed in mercantile establishments located in villages it is, however, applicable to the employment of females over twenty-one years of age employed in the various other occupations enumerated, wherever located.

COLUMBUS, OHIO, July 6, 1916.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your request for an opinion is as follows:

> "I enclose herewith a letter from George H. Hamilton, chief deputy of the division of workshops, factories and public buildings, addressed to the industrial commission, in which he asks for the construction of section 1008 of the General Code.
>
> "The industrial commission respectfully requests that you render an opinion in accordance with the request of Mr. Hamilton."

With your request you submitted a letter addressed to your commission by Mr. George H. Hamilton, chief deputy of the department of inspection of the division of workshops, factories and public buildings, which letter is as follows:

"There seems to be quite a difference of opinion as to the proper interpretation of that part of section 1008 of the General Code reading as follows:

"'Females over 18 years of age shall not be employed or permitted or suffered to work in or in connection with any factory, workshop, telephone or telegraph office, millinery, or dessmaking establishment, restaurant or in the distributing or transmission of messages or in any mercantile establishment located in any city, more than ten hours in any one day, or more than fifty-four hours in any one week, but meal time shall not be included as part of the work hours of the week or day, provided, however, that no restriction as to the hours of labor shall apply to canneries or establishments engaged in preparing for use perishable goods.'

"Girls between the ages of 18 and 21 are prohibited from working more than ten hours in any one day or 54 hours in any one week in any of the occupations mentioned in section 1008 by section 12996 of the General Code in any town or village of the state regardless of the size.

"Obviously section 1008 is not applicable to females over 21 years of age employed in mercantile institutions in towns and villages with a population of less than 5,000, but the question arises as to whether or not this law is applicable to female employes over 21 years of age employed in restaurants, dress making establishments and other establishments as mentioned in section 1008 in towns and villages with a population of less than 5,000.

"Will you kindly let us have an opinion as soon as possible and greatly oblige, * * *"

That part of section 1008 of the General Code quoted in Mr. Hamilton's letter is taken from the amended section 1008 to be found on page 555 of 103, Ohio Laws. The only change made in the section by the amendment is in the addition of the provision: "Or in any mercantile establishment located in any city."

The question propounded is as to whether or not section 1008, as amended, supra, is applicable to female employes over 21 years of age employed in the various occupations enumerated in the section, namely: "Any factory, workshop, telephone or telegraph office, millinery or dress making establishment, restaurant or in distributing or transmission of messages," when such employment is in villages with a population less than five thousand.

Prior to the enactment of the section in its present form, no question could exist concerning this point. As the provisions of the section are general, there being no limitation as to the place of employment, it is to be observed that the various employments mentioned, at least generally speaking, are to be construed as employments involving manual labor. There is nothing in the section in its present form to indicate an intention on the part of the legislature to exempt from its provisions females engaged in manual labor, and the provision: "Or in any mercantile establishment located in any city," does not tend to modify the effect of the section as it previously existed. On the contrary, it has the effect of extending the scope of its operation to mercantile establishments, so-called, when located in a city as distinguished from mercantile establishments located in villages.

The law under consideration is one of a number of provisions which is the result of an agitation in the interest of the health and welfare of female employes

in various occupations in which they are engaged, and there can be no question but that the general assembly did not have in mind any curtailment of the benefits flowing from the legislation when the amendment was passed. It is significant that when house bill No. 163, which is the present law, was introduced in the general assembly it did not contain the provision: "or in any mercantile establishment located in any city," that provision being inserted by way of amendment to the original bill.

It is, therefore, my opinion that while under the provision of section 1008 of the General Code, supra, female employes in mercantile establishments located in villages are exempt from its operation the insertion of the provision in the law "or in any mercantile establishment located in any city" does not serve to exclude from its benefits, females over twenty-one years of age, when employed in the various other occupations enumerated in section 1008 of the General Code, as amended supra, regardless of where they may be located.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1756.

MUNICIPAL CORPORATION—PLANNING COMMISSION—PERSONNEL OF SUCH COMMISSION—SEE SECTION 4366-1, G. C.—NO BOARD OF PARK COMMISSIONERS.

Under the provisions of section 4366-1, *G. C.*, 106 *O. L.*, 455, *the council of any city may by ordinance provide for the establishment of a city planning commission to consist of the persons named in said section. When such ordinance has been passed in any city, and such city has no board of park commissioners and no president thereof, said planning commission may consist of the mayor, service director and four citizens to be appointed by the mayor. If thereafter a board of park commissioners is established in said city and a president of said board elected, said president will become ipso facto a member of said board.*

COLUMBUS, OHIO, July 6, 1916.

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

GENTLEMEN:—I have your letter of June 29, 1916, submitting the following inquiry:

> "In cities where there is no board of park commissioners, and consequently no president of a board of park commissioners, would council have any authority to authorize the mayor to appoint a city planning commission, and if so, what would be the personnel of said planning commission in such cities?"

In connection with your foregoing inquiry I have a letter from a solicitor of a certain city in Ohio which states the facts upon which your inquiry is based. Said letter is as follows:

> "Section 4366-1 as passed by the legislature on the 27th day of May, 1915, Vol. 106, O. L., page 455, is as follows:
>
> "'The council of each municipality may establish a city planning commission, consisting of seven members: The mayor, the service director,

the president of the board of park commissioners and four citizens of the municipality, who shall serve without compensation and who shall be appointed by the mayor for a term of six years, except that the term of two members of the first commission shall be for three years. Whenever such commission is appointed, it shall have the powers conferred in section 4344, G. C.'

"*First.* In cities where there is no board of park commissioners and no officer who corresponds to the president of the board of park commissioners, would council have any authority to authorize the mayor to appoint five citizens instead of four?

"*Second.* In cities in which there is no president of the board of park commissioners, should the city planning commission consist of but six members?

"This matter was presented to me by a resolution of the city council of this city that I prepare an ordinance providing for a city planning commission. In the city of _____ we have no president of the board of park commissioners, the control of the parks being under the supervision of the service director. After an examination of the statutes I reached the opinion that there was no authority to substitute any one for the president of the board of park commissioners, owing to the fact that the service director is already a member of the commission, and, therefore, held that the commission in the city of _____ must consist of but six members, and an ordinance was passed and a commission appointed accordingly. There seemed to be some question as to the correctness of my holding in this matter and I was requested by the mayor and city council to get the opinion of your office upon this subject."

Under the facts above stated I am of the opinion that the ordinance providing for the establishment of a city planning commission in the city in question should follow the strict terms of said section 4366-1 aforesaid. That is to say, the ordinance should provide for the establishment of a city planning commission in said city to consist of seven members, viz.: The mayor, the service director, the president of the board of park commissioners and four citizens of the municipality.

When such ordinance is regularly passed the mayor may appoint four citizens as members of said commission who, together with the mayor and director of public service, will constitute a city planning commission for said city. Should a board of park commissioners thereafter be established in said city, the president thereof, upon his election as such president, will *ipso facto* become a member of said commission. However, until the happening of such event the six members hereinbefore named will constitute the commission which, in my opinion, will be legally invested with all the rights, powers and duties delegated to planning commissions by the act found in 106 O. L., page 455, of which said section 4366-1 aforesaid is a part.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1757.

COUNTY COMMISSIONERS—NOT AUTHORIZED TO EXPEND COUNTY FUNDS UPON BRIDGES WITHIN MUNICIPALITIES UNLESS SUCH BRIDGES ARE ON STATE OR COUNTY ROADS—SEE SECTIONS 2421 AND 7557, G. C.

County commissioners are not authorized to expend county funds upon bridges within municipalities unless such bridges are on state or county roads, or roads of the several classes referred to in sections 2421 and 7557, G. C.

COLUMBUS, OHIO, July 6, 1916.

HON. G. A. STARN, *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—I have your inquiry of May 29, 1916, which inquiry reads as follows:

"The city of Wooster in Wayne county receives no part of the bridge fund levied upon the property within the city.

"Is it the duty of the city or of the county commissioners to construct a bridge over a natural stream of water on a street within said city, which street is not a state or county road, free turnpike, improved road, abandoned turnpike or a plank road in common public use?

"The city officials claim that the county should construct this bridge, while the county commissioners claim it is not their duty, and that they have no authority to expend the county's money to construct this bridge, notwithstanding the fact that the city receives no portion of the bridge money.

"This matter is regulated by section 2421 of the General Code, and has been construed by the supreme court in the case of Piqua vs. Geist, 59 O. S., 163. According to the construction placed on this section by the supreme court in this case I am of the opinion that the county is not obliged to build this bridge, but the city officials call attention to the case of State ex rel. Sherman v. Carlisle et al. commissioners, reported in 15 O. D., 165, being a decision of the common pleas court of Franklin county. You will note that this is a more recent case than that of the supreme court, and that the last paragraph of the court's opinion is a rather broad, general statement which seems to be in conflict with the supreme court case."

Section 2421, G. C., referred to by you, reads as follows:

"The commissioners shall construct and keep in repair necessary bridges over streams and public canals on state and county roads, free turnpikes, improved roads, abandoned turnpikes and plank roads in common public use, except only such bridges as are wholly in cities and villages having by law the right to demand, and do demand and receive part of the bridge fund levied upon property therein. If they do not demand and receive a portion of the bridge tax, the commissioners shall construct and keep in repair all bridges in such cities and villages. The granting of the demand, made by any city or village for its portion of the bridge tax, shall be optional with the board of commissioners."

Section 7557, G. C., should also be considered in connection with your inquiry, the section reading as follows:

"The county commissioners shall cause to be constructed and kept in

repair, as provided by law, all necessary bridges in villages and cities not having the right to demand and receive a portion of the bridge fund levied upon property within such corporations, on all state and county roads, free turnpikes, improved roads, transferred and abandoned turnpikes and plank-roads, which are of general and public utility, running into or through such village or city."

In the case of Piqua v. Geist, 59 O. S., 163, cited by you, the court held that county commissioners are not required to construct and keep in repair bridges over natural streams and public canals on streets established by a city or village for the use and convenience of the municipality and not a part of a state or county road, though the city or village receives no part of the bridge fund levied on the property within the same.

The following is quoted from the opinion of the court in the case of City of Newark v. Jones, 16 O. C. C., 563, 9 O. C. D., 196:

> "There is no direct authority anywhere that county commissioners have the right to build a bridge on a street, as such. If it is a state or county road, or any of those denominated in those statutes, passing through a city, then they have that right under the statute; but not because it is a street, as such, that they have the right to construct these bridges."

To the same effect see the following cases:

> City of Newark v. McDowell, 16 O. C. D., 556; 9 O. C. D., 260.
> Jones v. Commissioners, 2 O. C. C., n. s., 14; 15 O. C. D., 510.

The above cited cases warrant the statement that the rule is well established that county commissioners are not authorized to expend county funds upon bridges within municipalities unless such bridges are on state or county road or roads of the several classes referred to in sections 2421 and 7557, G. C. Such was the holding of this department in opinion 1569, rendered to Hon. George Thornburg, prosecuting attorney of Belmont county, on May 11, 1916. The case of State ex rel. Sherman v. Carlisle, 15 O. D., 165, referred to by you, was reversed by the circuit court of Franklin county on March 30, 1905, and the decision of the circuit court, reversing the common pleas court, was affirmed by the supreme court without report on February 20, 1906. See 74 O. S., 430.

Since rendering the opinion to the prosecuting attorney of Belmont county, referred to above, my attention has been called to the cases of State ex rel. v. Menning, and Bramley v. Bernstein, being cases Nos. 15285 and 15289, in the supreme court of Ohio. These cases had to do with the construction of approaches to the Detroit Superior High Level bridge in the city of Cleveland, which bridge is being built by the county commissioners of Cuyahoga county. The one case instituted by the prosecuting attorney sought to stay the hands of the county authorities and the other, instituted by a tax payer, sought to stay the hands of the city authorities. The lower courts refused an injunction, and on May 29, 1916, the supreme court overruled motions for orders directing the court of appeals to certify its records in the cases to the supreme court on the ground that there was no error committed by the lower courts.

A careful examination of the facts in these cases does not, however, justify the conclusion that the supreme court of Ohio has overruled the case of Piqua v. Geist, supra. The two cases referred to above are in a way a continuation of the former litigation relating to the construction of the high level bridge in the city of Cleveland. This matter was first before the courts in the case of State ex rel. v.

Eirick, 17 O. C. C., n. s., 331, affirmed without report in 84 O. S., 503. It was urged in that case that the county authorities were not authorized to construct the proposed high level bridge for the reason that there was no state road or other road in common public use on which to build it. The court pointed out that inasmuch as the termini of the proposed improvement were located substantially within the limits of a county road, the fact that the roadway, as elevated above the valley by the proposed improvement, was not in a vertical line above the old roadway, was of no importance; that the obvious and proper way to erect a high level bridge across a valley, was to erect it in a straight line, and that if this involved a departure from the circuitous roadway theretofore existing, this fact did not oust the jurisdiction of the county commissioners.

Certain changes having been made in the plans for the structure, and the city of Cleveland entering into an agreement with the commissioners relative to the construction of the bridge, the matter was again brought before the courts in the two cases referred to above. The most substantial change involved an extension of the easterly approach of the high level bridge into Superior avenue, a city street, and not a road of any of the classes mentioned in sections 2421 and 7557, G. C. The facts before the court and considered in the recent cases of State ex rel. v. Menning, and Bramley v. Bernstein were, therefore, that the bridge was to be constructed in a general way along the line of a state or county road, and was designed for use in connection with and to facilitate traveling upon such road, and the westerly approaches were to be constructed in Detroit avenue and West Twenty-fifth street, the one being a state and the other a county road, but the easterly approach was to be constructed in Superior avenue, a city street only, the city having consented to the plan.

The trial court further found that the building of the approaches under the old plans would result in death traps, and that to refuse to sanction the extension of the one approach into Superior avenue would bring about an intolerable condition of affairs. The bridge was designed as a double deck structure; that is, with an upper level roadway for vehicular and pedestrian travel, and a lower level roadway for street car, suburban and rapid transit car travel. This lower level roadway was to be merged with the upper level roadway by means of open wells near each end of the bridge, through which the cars were to emerge to the surface of the streets. After the bridge was under construction it was realized that the location of the open wells as originally planned would divide the roadway into two separate and narrow roadways at each end, just at the points at which there should have been wider roadways to accommodate the slowing up of the traffic by reason of cross travel at the ends of the bridge. It was also found that to follow the original plans would result in seriously obstructing the easterly end of Superior viaduct, and in rendering necessary a heavy fill and dangerous grade on an important connecting street. With these peculiar facts and circumstances before it, the court sanctioned the arrangement with the city involving the construction of one of the approaches to the high level bridge in a city street, but it is clear that the decision of the court must be limited to the peculiar and unusual facts before it, and cannot be regarded as overruling or modifying the general rule laid down in the case of Piqua v. Geist, supra.

I therefore advise you that county commissioners are not authorized to expend county funds upon bridges within municipalities unless such bridges are on state or county roads, or roads of the several classes referred to in sections 2421 and 7557, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1758.

ROADS AND HIGHWAYS—MILAN-ELYRIA ROAD IN LORAIN COUNTY —CONTRACTORS NOT REQUIRED TO FURNISH ADDITIONAL MATERIAL—WHEN SUPPLEMENTARY CONTRACT MAY BE ENTERED INTO FOR SUCH ADDITIONAL MATERIAL.

Under the facts as submitted, the contractors for section "P" of the Milan-Elyria road, I. C. H. No. 288, contract No. 732, in Lorain county, are not required to furnish additional material in order to produce a base of any particular thickness between sections 174 *and* 183, *and between sections* 191 *and* 232-72. *If additional material is necessary for this purpose, a supplementary contract may be made therefor, but before such a contract may be entered into by the state highway commissioner, the county commissioners must agree to assume and pay in the first instance at least one-half the cost of such additional material.*

COLUMBUS, OHIO, July 6, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—Under date of June 28, 1916, I have the following request for an opinion from Mr. H. M. Sharp, chief highway engineer:

"On August 6, 1915, the state highway department received bids for improving 4.4 miles of road with waterbound macadam, contract being known as section 'P,' of the Milan-Elyria road, I. C. H. No. 288, contract No. 732, Lorain county.

"The lowest bidder was Knepper, Burr & Jeakle, who were awarded the contract some time shortly after the bids were received.

"This road previous to improvement was an old macadam road, and it was contemplated to use the two course waterbound macadam construction for specified distances, and also one course waterbound macadam for other specified distances. You will note by referring to the plan and profile for this work that two courses of macadam are specified between stations 0 to 174 and 183 to 191. One course macadam is specified between station 174 to 183 and 191 to 232+72, which is the end of the improvement.

"The surveys, plans and specifications for this improvement were gotten out early in 1915 by the county highway superintendent of Lorain county, assisted by our division engineer. At this time it was decided by the engineers that one course only of macadam would be necessary between the limit above noted.

"The contract was not completed in 1915 and carried the travel on this road over the uncompleted portions during the winter 1915-16. This spring it developed that a short distance where it was contemplated using one course macadam that this construction would be insufficient to insure a good and lasting improvement. In fact, the traffic was such during the winter that we have found it would be advisable, according to our judgment, to now place two courses for a short distance where it was contemplated using but the one course at the time the plans were made and the contract let.

"We therefore, proposed to let a supplemental contract covering the additional bottom course that would be necessary and, which, in our judgment, is not covered by the contract, and prepared a supplemental agreement for $630.00, which was submitted to the county commissioners of Lorain county for their approval.

. "Upon advice from the prosecuting attorney the commissioners feel that they should not approve the contract. In their letter of June 23, 1916, which you will find attached, they give their reasons for not approving same. They further request in this letter that we secure an opinion from your office as to the legality of proceeding as we have under the supplemental agreement.

"We have submitted to your office the profile tracing of this improvement and a copy of the contract for your convenience in acquainting yourself with this work.

"We respectfully request, at your earliest convenience, your opinion as to whether or not we may proceed with this supplemental agreement with the county commissioners in Lorain county."

The letter of the county commissioners of Lorain county, dated June 23, 1916, and referred to in the communication of Mr. Sharp, reads as follows:

"We hereby acknowledge the receipt of your communication of the 12th inst., in which reference is made as to the necessity of letting another contract to cover what your department terms additional material made necessary by unforeseen contingencies, to be used on top of the old macadam base on a part of the Milan-Elyria road, I. C. H. No. 288, section 'P.'

"Our prosecuting attorney sometime ago ruled that the contract now in force on this road covers everything necessary to be done so as to complete the improvement.

"However, for fear that there might possibly be some phase of the terms of the contract that we did not understand he made a special trip to Columbus, this week, to confer with your department on this subject, so as to be perfectly informed as to the exact status of the matter under consideration.

Upon his return he again advises that his first decision still stands, to wit: That the contract and specifications under which the improvement is now being made covers the furnishing of all the labor and material necessary to complete the road improvement in its entirety.

"We have carefully looked over the plans and specifications and do not find any allusion made whatsoever which would indicate that new material would be necessary at the point in question; on the other hand we do find in the specifications certain wording which convinces us that the decision of our prosecuting attorney is correct. We therefore respectfully refer you to page A-2, under the caption 'Old road as foundation,' which in part is as follows: 'Where the material in an old road does not conform to the established lines of the new highway, the old material, if of approved quality and when practical, (on this road it is, we understand) shall be used in constructing the foundation course.' Under the same heading, where there is not sufficient material in the old road foundation, and it is necessary to supply additional matter, the following phraseology covers: 'Should the surface of the old road be irregular, it shall be scarified, graded to the PROPER ELEVATION and all depressions shall be filled with the same kind of material as that of which the course consists."

"Further: page 13. 'Estimated cost' we find this wording. 'The estimates below are only approximate, although the result of calculations, and the contractor must be responsible for his own data on which to base his bid.'

"Further: Under 'Agreement' we find 'According to the plans and specifications.' And as stated before there being no mention of additional material for the point in question, we feel that this covers.

"However, we do not want to appear obstinate in this matter, and we would therefore respectfully suggest, that if your department will secure an opinion from the attorney-general's office, to the effect that we will be within our legal rights to let another contract and pay additional money on this improvement, and will then order us to proceed, we will carry your desires into effect."

If the opinion, which according to the letter of the county commissioners has been expressed by the prosecuting attorney of Lorain county, was founded upon the notice to contractors, instructions to bidders, general and detail specifications, agreement, proposal and contract bond, estimate and proposal for the work, I can readily understand how the prosecuting attorney reached his conclusions and would indeed be inclined to agree with him. An examination of the general and detail specifications indicates, however, that the general specifications are intended to apply in the case of all contract work with the state highway department, and this is true also as to a part of the detail specifications while the remainder of the detail specifications, relating to macadam, are intended to apply to all contract work of the state highway department involving the construction of macadam roadways. In other words, these specifications are manifestly prepared for general use, and it would not be possible for a contractor to determine from the general and detail specifications many of the facts which he must know in order to bid intelligently and with which he must be familiar in order to construct any particular road, and in order to get this information reference must be had by the contractor to the profile tracing and other plans and specifications prepared by the state highway department and relating to any specific work upon which a contractor desires to bid. I have examined the profile tracing of this particular road and find that, among other things, the same contains a cross section showing that the width of the roadway is to be fourteen feet and that each berme is to be five feet wide, and that from section 0 to section 174, and from section 183 to 191, there is to be a top course of waterbound slag, 4½ inches in thickness, and a lower course or base of rolled sandstone 6 inches in thickness. Underneath the drawing, showing the cross section of the road and the above information, is found the following language:

"From 174 to 183 and 191 to 232+72 the old macadam is to be reshaped and used as the foundation course, and top course will be as shown above."

An examination of the profile tracing discloses the further fact that from section 0 to section 174 and from section 183 to 191, an elevation line is shown on the drawing indicating the grade or elevation of the surface of the proposed improvement. From section 174 to 183 and from section 191 to 232+72, no elevation line is shown upon the tracing. In other words, the elevation of the proposed improvement from section 174 to 183 and from section 191 to 232+72 is to be the elevation of the present roadway plus any new materials that the contractor is required to use under the terms of his agreement. The commissioners in their letter refer to the following language found on page A-2 of the detail specifications: "Where the material in an old road does not conform to the established lines of the new highway, the old material, if of approved quality and when practical, shall be used in constructing the foundation course." This provision can have no application to the matter involved in your inquiry for the reason that between

sections 174 and 183 and between sections 191 and 232+72, no elevation line has been established for the new highway. The only possible conclusion that can follow from the failure to establish such elevation line is that the elevation of the new work is to be the same as that of the old highway, except as a higher elevation may incidentally result from the application of new material which the contractor is required to furnish.

The county commissioners also refer to the following language found on page A-2 of the detail specifications:

> "Should the surface of the old road be irregular, it shall be scarified, graded to the proper elevation and all depressions shall be filled with the same kind of material as that of which the course consists."

It is apparent from what has already been said that under this provision those portions of the highway in question lying between sections 174 and 183 and between sections 191 and 232+72 need not be graded by the contractor to any particular elevation, for the reason that as to these portions of the highway no elevation is established in the profile. The contractor will have fully complied with this provision, where the surface of the old road is irregular, when he has scarified and graded the same, unless, indeed, such a process does not produce an even surface, under which circumstances it will be necessary for him to fill only so far as may be necessary to produce an even surface. In other words, as to the portions of the highway now under discussion the contractor is not required to construct a base of any particular thickness. If the surface of the old road is regular, the only duty of the contractor, under this particular provision, and in so far as the base is concerned, is to sweep or scrub the old road clean of dirt, mud or other accumulation. Should the surface of the old road be irregular, the contractor is further required to scarify the same and grade it so as to produce an even surface and to resort to filling, so far as the same may be necessary to produce an even surface, in case he is unable to obtain the same by grading and to then see that the scraified material is filled, waterbound and compacted by rolling. As to these sections of roadway the plans were manifestly prepared upon the theory that enough of the old metal remained upon the roadway to constitute a proper and sufficient base and the contractor is not required to add any material for the purpose of increasing the thickness of this base. In so far as the base of these portions of the highway is concerned, the contractor is not required by the above enumerated operations to secure a base of any required thickness, and if on account of unforeseen contingencies it develops that the things which the contractor is required to do will not produce a base of sufficient thickness, then the addition of other and further material is an operation not contemplated by the original contract. The provision in the estimate that the estimates are only approximate, although the result of calculations, and that the contractor must be responsible for his own data on which to base his bid, can be taken as applying only to operations which by the terms of the plans and specifications the successful bidder is required to perform. The agreement on the part of the contractor to furnish all materials, appliances, tools and labor and perform all the work required for the improvement of the highway in question, according to the plans and specifications, could not be taken to require the contractor to do work falling clearly outside the plans and specifications, merely because it might subsequently develop that such work was to be regarded as desirable or necessary in order to produce a satisfactory roadway. There are oftimes certain incidental matters which are manifestly necessary to the proper performance of acts specifically required and which a contractor may be required to perform, although not specifically referred to in the contract, but I am unable to reach the conclusion that

the application of extra material, for the purpose of producing a base of proper thickness, on the portions of the highway referred to by Mr. Sharp, is to be regarded as incidental to the performance of the main stipulations in the agreement. I therefore conclude that under the terms of the agreement submitted by Mr. Sharp, the contractor is not required to add additional material for the construction of a bottom course between sections 174 and 183 and between sections 191 and 232+72, except in so far as the addition of material may be necessary to secure an even surface, and that if it has developed that the scarifying of the metal now on the road and the grading of the same to an even surface will not produce a base of sufficient thickness, the contractor may, nevertheless, fully perform his contract without adding any additional material, provided he is able to scarify the material on the road and grade the same to an even surface, and that if it is desired by your department and by the county commissioners of Lorain county to add additional material between the sections referred to above and construct a base of greater thickness than can be built out of the material now on the road, it will be necessary to enter into a supplemental contract for such work. I am further of the opinion that if the conditions set forth in Mr. Sharp's letter exist and are due either to inadvertence in the preparation of the original plans or to the wear of traffic during the time between the preparation of the plans and the performance of the work, or to a combination of such causes, the situation may properly be regarded as constituting an unforseen contingency within the meaning of section 1210, G. C. There is no statute under which the county commissioners of Lorain county can be compelled to assume any share of the cost and expense of the extra work. The commissioners will be fully within their legal rights if they decline to enter into such an agreement, but it is equally true that the state highway commissioner will be fully within his rights in refusing to have the extra work performed unless the county commissioners will agree to assume and pay in the first instance, at least one-half of the cost and expense thereof. In other words, the county commissioners are fully authorized to assume and agree to pay in the first instance fifty per cent. or more of the cost and expense of the extra work, but cannot be required to enter into such an agreement.

I learn by an examination of the certified copy of the original final resolution, providing for this improvement and on file in your office, that the state's portion of this improvement is being paid out of intercounty highway funds, and that the cost and expense of the improvement is being paid one-half by the state and one-half in the first instance by the county. Section 206 of the Cass Highway Law, section 1213, G. C., has the effect of limiting to fifty per cent. the proportion which may be paid by the state toward the cost and expense of constructing an improvement, the state's share of which is to be paid from intercounty highway funds. If, therefore, the county commissioners of Lorain county are unwilling to enter into a supplementary agreement to assume in the first instance at least one-half of the cost and expense of the extra work, referred to herein, then you will be without authority to do such extra work, and it will be necessary to construct the improvement in accordance with the original plans and specifications, as herein interpreted.

I am returning to you the letter of the county commissioners of Lorain county, and also the profile tracing and copy of contract submitted to me for examination.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1759.

ROADS AND HIGHWAYS—HOW COMPENSATION AND EXPENSES OF ASSISTANTS EMPLOYED UNDER SECTION 7181, G. C., ARE TO BE PAID—HOW ASSISTANTS, SUPERINTENDENTS AND INSPECTORS EMPLOYED UNDER SECTION 1219, G. C., ARE TO BE PAID.

1. *The compensation and expenses of assistants employed under section* 7181, *G. C., are to be paid from the general county fund.*

2. *The county's portion of the compensation and expenses of assistants, superintendents and inspectors, employed under section* 1219, *G. C., are to be paid from the special fund created for the construction of the particular improvement upon which such assistants, superintendents or inspectors may be engaged.*

COLUMBUS, OHIO, July 6, 1916.

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

GENTLEMEN:—I have your communication of May 26, 1916, which communication reads as follows:

> "We would respectfully request your written opinion upon the following questions:
>
> "(1) From what fund are compensations of assistants employed under section 138 of the Cass highway law (section 7181, G. C. 106 O. L., 612) to be paid, and from what fund are the expenses of said assistants to be paid?
>
> "(2) From what fund are compensations of assistants employed under section 212 of the Cass highway law, (section 1219, G. C., 106 O. L., 639) to be paid, and from what fund are the expenses of said assistants to be paid?"

Those provisions of section 138 of the Cass highway law, section 7181, G. C., pertinent to your inquiry, are as follows:

> "In the event the county highway superintendent cannot properly perform all the duties of his office, the county commissioners shall fix the aggregate compensation to be expended for assistants by the county highway superintendent during the year. Such compensation shall be paid out of the county treasury in the same manner as the salary of county officials is paid. In addition thereto, the county highway superintendent and his assistants, when on official business, shall be paid out of the county treasury, their actual, necessary traveling expenses, including livery, board and lodging."

The compensation and expenses referred to in your first question are, under the terms of section 7181, G. C., to be paid out of the county treasury, but the section in question does not expressly provide as to the fund from which payment is to be made. So far as compensation is concerned, it is, however, provided that the same shall be paid in the same manner as the salary of county officials is paid. Under the provisions of section 2989, G. C., county officials receive their salaries out of the general county fund and the same are paid monthly upon the warrant of the county auditor. It is also worthy of note that the assistants appointed under authority of section 7181, G. C., are not appointed for the purpose of carrying forward the engineering work in connection with any particular improve-

ment, but they are appointed to assist the county highway superintendent generally in the performance of all of the duties of his office. In view of the above considerations it is my opinion that the compensation and expenses of assistants, appointed under authority of section 7181, G. C., are to be paid from the general county fund.

Section 212 of the Cass highway law, section 1219, G. C., reads as follows:

> "The chief highway engineer may direct the county highway superintendent to make the necessary surveys and plans for the proposed highway improvement. The expense of such surveys and plans shall be equally divided between the state and county, except in cases where the improvement is being made on application of the township trustees, in which case the expense of such plans and surveys shall be equally divided between the state and township. The county highway superintendent, with the approval of the chief highway engineer, may employ such assistants as are necessary to prepare such plans and surveys, and also, with like approval, such superintendents and inspectors as may be necessary in the construction of said improvement. Each of said assistants, superintendents and inspectors shall receive such pay as the chief highway engineer may determine. All work in connection with such improvement shall be done under the direction of the chief highway engineer. The expense of supervision and inspection of said improvement shall be apportioned on the same basis as the cost of construction."

This section contains no provision as to the manner of payment of the county's portion of the compensation and expenses of assistants, superintendents and inspectors appointed thereunder, and no provision as to the fund from which such payment is to be made. The only provision of the section is that the expense of surveys and plans shall be equally divided between the state and county, except in cases where the improvement is being made on application of the township trustees in which case the expense of such plans and surveys shall be equally divided between the state and township, and that the expense of the supervision and inspection shall be apportioned on the same basis as the cost of construction.

Evidence as to the intention of the legislature is furnished by the provision of the section to the effect that the expense of supervision and inspection shall be apportioned on the same basis as the cost of construction. Under section 1222, G. C., tax levies are authorized for the payment of the county's and township's proportion of the cost and expense of construction, and under section 1223, the proceeds of bond issues may be used for paying the cost and expense of construction. Under section 1214, G. C., the cost and expense of an improvement made under this chapter of the Cass highway law is to be divided in certain proportions and a part thereof is to be assessed against abutting real estate. The use in section 1219 of the expression "cost of construction," and the use in the sections relating to tax levies, bond issues and division of cost of the expression "cost and expense," indicates that the legislature had in mind that the aggregate cost of an improvement under this chapter of the law would consist of two items, to wit: the actual cost of construction and the expense incident to construction. I think that from the above it is indicated that engineering expense incurred in connection with an improvement carried forward by the state highway department is to be regarded as a part of the aggregate cost and expense of such improvement, and that therefore the county's or township's share of such engineer expense should be paid from the special fund provided for the construction of the improvement in connection with which such expense is incurred. It is also worthy of consideration that appointees, under this section, are not appointed for the purpose of assisting

the county highway superintendent generally, but are appointed for the purpose of assisting in the making of surveys, the preparation of plans and the supervision of the work of construction of particular improvements. Under such circumstances and without reference to the reason above assigned the same principles may be invoked that are applicable in determining whether or not engineering expense in connection with an improvement is to be regarded as a part of the cost and expense of such an improvement, and all or some part thereof assessed against the benefited real estate. If compensation and expenses of assistants, superintendents and inspectors, appointed under section 1219, G. C., is to be regarded as a part of the cost and expense of constructing the improvement upon which they are employed, and if a part thereof may be assessed against the benefited real estate, then the compensation and expenses of such assistants, superintendents and inspectors should be paid from the special fund provided for the improvement upon which they are employed. If such compensation and expenses may not be regarded as a part of the cost and expense of the improvement and a part thereof specially assessed, then such compensation and expenses should be paid from the general county fund.

It was held in the case of Longworth et al. v. City of Cincinnati, 34 O. S., 101, that if a superintendent of a city street improvement is necessary, and one is employed by the city for a particular improvement, the amount paid by the city for his services may properly be included in the assessment. A similar conclusion was reached by the court in the case of State ex rel. Dolle v. Miller, et al., 18 O. D., N. P., 218, in which case it was held that where the board of public service of a city appoints an agent to inspect work on a particular street improvement as it progresses, the expense of such inspector is a proper charge against the cost of the improvement. To the same effect see City of Cincinnati v. Newell et al., 17 Weekly Law Bulletin, 287.

In view of the above considerations I am of the opinion that the county's portion of the compensation and expenses of assistants, superintendents and inspectors appointed under section 1219, G. C., should be paid from the special fund created for the construction of the particular improvement upon which such assistants, superintendents or inspectors may be engaged. The same would be true as to the township's portion of such compensation and expenses where an improvement is made on the application of township trustees. I understand that you desire an answer to your second question only in so far as the financial transactions of counties and townships are concerned.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1760.

JOINT COUNTY DITCHES—INTERPRETATION OF SECTION 6536, G. C., 103 O. L., 836—PROCEEDINGS NECESSARY—WHEN BOARD OF COUNTY COMMISSIONERS ACT JOINTLY AND SEPARATELY.

Since the amendment of section 6536, G. C., et seq., 103 O. L., 836, the provisions thereof are specifically made applicable to the improvement of a living stream.

In proceedings pursuant to section 6536, G. C., et seq., for the improvement of a joint county ditch, drain, watercourse or the channel of a river, creek or run, when the improvement has been determined upon and the damages and compensation of property owners assessed and the cost and expense of the improvement apportioned to the several counties, the further proceedings as to such improvement should be had by the commissioners of the several counties separately, as provided in case of the improvement of single county ditches by section 6442, G. C., et seq.

COLUMBUS, OHIO, July 6, 1916.

HON. T. B. JARVIS, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR:—Yours under date of June 20, 1916, is as follows:

'There has been filed a petition with our board of county commissioners asking for the straightening, widening and deepening of the run, the water course being the Black Fork of the Mohican, a living stream which is probably fifteen feet wide and from three to five feet deep, beginning in Richland county, and passing through into Ashland county and back again forming the county line between the two counties for some ten or twelve miles.

"This petition was filed under the authority of section 6535, as amended in the 102 Laws of Ohio, page 313. The petition contains the names of about twenty-five people who will be benefited by the improvement, some of whom are in Richland and some in Ashland county.

"The joint board of county commissioners have met relative to the matter, but the prosecuting attorney of Ashland county and myself as prosecuting attorney of Richland county, are unable to agree that this is the proper section under which the petition should be filed. We feel that the proceedings should be brought under section 6563-1. That attorney for petitioners maintain that if brought under this section, there is no authority by which the the stream may be deepened or widened, and that the ends to be accomplished cannot be obtained under the new law.

"Referring to Attorney-General Hogan's opinion as found in volume 2 of 1913 Opinions, page 1164 and following, it would appear that the petitions should be filed under section 6563-1. This section requires fifty or more signers to the petition. It is suggested that it will be almost impossible to obtain fifty signers to the petition who will be benefited by the improvement, and probably this is the reason the petition is filed under this section which permits of one or more signers to the petition.

"Our boards have adjourned to meet on the 30th day of June, awaiting a reply from your department as to the proper section under which the petition should be filed for the purpose of deepening and widening and straightening this stream of water.

"You will note in this section 6563-1, improve and straighten are the

words used. I think the word 'improve' implies deepening, widening, and locating, and is just as complete as the former.

"Second, should the improvement be made under section 6536, does the joint board act as a joint board throughout the entire construction, that is, letting the contract jointly, make the assessments jointly, etc., or does each board act independently if the petition is allowed. * * *"

Referring to an opinion of my predecessor, Hon. Timothy S. Hogan, found at page 1164 of the Report of the Attorney-General for the year 1913, you state "that it appears that the petitions should be filed under section 6563-1."

It is held in the opinion so referred to that at the time it and the opinion on page 1174 of the same volume were rendered, sections 6536, G. C., et seq., were not applicable to the improvement of rivers, creeks or runs, and it is assumed that it is upon this holding that you base the statement that the petition should be filed under section 6563-1, G. C., et seq., since it is further stated that the improvement of a living stream is sought by the proceedings under consideration.

It will be noted, however, that since the opinions above mentioned were rendered, section 6536, G. C., was amended in 103 O. L., 836, whereby it was made to specifically include the improvement of the channel of a river, creek or run as follows:

"Ditches, drains or watercourses which provide drainage, or, when constructed, will provide drainage for lands in more than one county, may be located and constructed, enlarged, cleaned, or repaired or boxed or tiled as provided in this chapter and the laws prescribed for constructing, enlarging, cleaning or repairing single county ditches, drains or watercourses, or the channel of a river, creek, or run, ditch, or part thereof which provides drainage, or when improved will provide better drainage for lands in more than one county, may be improved by straightening, widening, deepening or changing the channel or part thereof, of it, or by removing from adjacent lands, timber, brush, trees, or other substance liable to obstruct it, as provided in this chapter and the laws prescribed for the improvement of the channel of a river, creek or run or part thereof as provided in the laws for single county ditches."

Subsequent sections of the General Code were so amended in the same act as to prescribe proceedings and provided complete machinery for the improvement of rivers, creeks, and runs thereunder, so that there is a complete scheme for the improvement of rivers, creeks and runs, under sections 6536 to 6563, G. C., as amended in 103 O. L., 836, distinct from and independent of the scheme provided in section 6563-1, G. C., et seq., as enacted in 102 O. L., 575.

The initiatory steps under the two schemes of improvement are clearly distinct in that under the former application to the board of commissioners of each county therein required may be made by a single person, while under the latter a petition signed by fifty or more persons interested in the improvement, togther with a bond, is required to be filed with the auditor of one of the counties in which the proposed improvement is located.

By reason of the amendment of section 6536, G. C., et seq., 103 O. L., 836, it is made perfectly clear, and I am of opinion that proceedings may be had under said section for the improvement of a living stream.

Coming to a consideration of your second question, viz., do the several boards of commissioners act jointly throughout the proceedings for improvement of a ditch, drain, watercourse, river, creek or run, under the provisions of section 6536, G. C., et seq., it will be noted that while the application is required to be made to

each board of commissioners, it is provided by section 6537, G. C., 103 O. L., 836, that:

> "Application for damages shall be made and appeals from the finding of the commissioners, in joint session, locating and establishing such ditch or granting the improvement, of the channel of a river, creek or run or any part thereof, and from the assessment of damages or compensation, shall be taken to the probate court of the county in which the greatest length of such ditch or improvement, or the greatest length of the channel of a river, creek, or run, ordered improved is located. A majority of the joint board of commissioners, when in joint session, shall be competent to locate and establish such ditch or improvement, or to grant the order improving the channel of a river, creek, or run or part thereof.

Further provision is made in said section for the appointment of an engineer to sit with the joint board in case of an inability of the joint board to determine the matters before it by reason of an equal division of the membership thereof on such question.

By section 6539, G. C., 103 O. L., 837, it is provided:

> "If the majority of the joint board of county commissioners in joint session find in favor of the proposed improvement or improvements provided for in section 6537, and are unable to agree as to the proportion of the costs of location and construction of the improvement, or of the improvement of the channel or part thereof of a river, creek or run, which shall be assessed in each of the counties, respectively, the commissioners of either county may petition the court of common pleas of the county in which the greatest length of such ditch or improvement or the greatest length of the channel of a river, creek or run ordered improved, is located for the appointment of three disinterested freeholders, not residents of either of said counties, who, within thirty days thereafter, after being duly sworn and upon actual view of the improvement, shall estimate and report to the court the amount which would be charged to the land respectively in each county interested in the improvement. * * * Costs, including allowance to said freeholders, shall be charged to the parties as the court may determine. After final determination, the clerk of the court shall send a transcript of such proceedings, duly certified, to the commissioners of each county, who shall make the apportionment of costs of location and construction or the improvements of the channel or part thereof of a river, creek or run, *as provided by law for single county ditches,* giving to the property in each county the amount so determined in the court proceeding, including costs."

No further provision is found for joint action of the boards of county commissioners in respect to the improvement of a joint county ditch or a river, creek or run located in more than one county, in the scheme prescribed in section 6536, et seq. It is provided, however, by section 6536, G. C., supra, that joint county ditches may be located, constructed, etc., "as provided in this chapter, and the laws prescribed for constructing, enlarging, cleaning or repairing single county ditches, drains or watercourses," and that "the channel of a river, creek or run, ditch or part thereof * * * may be improved by straightening, widening, deepening or changing * * * as provided in this chapter, and the laws prescribed for the improvement of the channel of a river, creek or run, or part thereof, as provided in the laws for single county ditches."

The phrase "as provided in this chapter," found in section 6536, G. C., prior to the amendment in 103 O. L., 836, was substituted in the codification of 1910 for the phrase "as provided in this act," and when it received its present form in original section 6536, G. C., in the codification of 1910, the chapter in which said section was found contained only sections 6536 to 6563, G. C., inclusive, so that the phrase "as provided in this chapter," at that time and prior to its amendment in 103 O. L., meant only as provided in the last mentioned sections, and had no reference whatever to any proceeding prescribed or authorized by sections 6563-1, et seq.

While the provision as to rivers, creeks and runs came into section 6536 by amendment in 103 O. L., 836, after the enactment of sections 6563-1 to 6563-48, in 102 O. L., 575, I am inclined to the view that the phrase "as provided in this chapter" as found in the language of said section as to rivers, creeks and runs incorporated in said amendment, should be given the same interpretation as the same language previously used in the section. That is to say, the phrase "as provided in this chapter" in both instances adopts by reference only the provisions of sections 6536 to 6563, G. C., as amended in 103 O. L., 836.

I am therefore led to conclude that after the proceedings prescribed and authorized by sections 6536 to 6540, G. C., inclusive, have been completed in the case stated by you, and the improvement of the stream referred to accordingly determined upon and the damages or compensation assessed by the joint board and the costs and expenses of the improvement apportioned to the several counties, the further proceeding as to such improvement should be had by the county commissioners of the several counties separately, as provided in the case of the improvement of single county ditches by section 6442, G. C., et seq.

Since section 6536, G. C., et seq., as amended in 103 O. L., 836, and sections 6563-1, G. C., et seq., 102 O. L., 575, provide separate and distinct schemes for the improvement of ditches, drains and natural watercourses, either of which might be pursued in the improvement of a living stream, it would seem to be clearly a matter of choice as to which scheme should be adopted to be exercised by the persons by whom the improvement is proposed. If the application is made by less than fifty persons to the board of commissioners of each of the counties in which the proposed improvement is located, then the improvement must be made and the proceedings had as prescribed in sections 6536, G. C., above referred to. On the contrary, if the petition and bond are filed, as required by sections 6563-1 to 6563-4, G. C., inclusive, the improvement must be made and the proceedings had as prescribed by sections 6563-1 to 6563-48, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1761.

APPROVAL, RESOLUTION FOR IMPROVEMENT OF TWO ROADS IN WOOD COUNTY.

COLUMBUS, OHIO, July 6, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of June 30, 1916, transmitting to me for examination final resolutions relating to the following roads:

> "Wood County—Sec. 'E' of the Bowling Green-Perrysburg road, Pet. No. 3098, I. C. H. No. 282. (Also duplicate).
> "Wood County—Sec. 'F' of the Bowling Green-Perrysburg road, Pet. No. 3098, I. C. H. No. 282. (Also duplicate)."

I find these resolutions to be in regular form and am, therefore, returning the same with my approval endorsed upon the duplicate copies thereof.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1762.

BRIDGES—DUTY OF COUNTY COMMISSIONERS TO REPAIR BRIDGES BUILT BY THEM ON COUNTY ROADS IN CITIES AND VILLAGES—BOTH COUNTY COMMISSIONERS AND MUNICIPAL CORPORATIONS LIABLE FOR INJURIES WHEN SUCH BRIDGES BECOME DEFECTIVE AND DANGEROUS.

It is the duty of county commissioners, under sections 2421 *and* 7557, *G. C., to repair bridges built by them on county roads in cities and villages, and they are liable for injuries occasioned by failure to perform said duty.*

Municipalities in which said bridges are located also may be liable for a failure to protect the public against injury from such bridges when the same become defective and dangerous. (*Mooney, Admr. v. Village of St. Marys,* 15 *C. C.,* 446; *Newark v. McDowell,* 16 *C. C.,* 556.)

COLUMBUS, OHIO, July 7, 1916.

HON. CHARLES H. JONES, *Prosecuting Attorney, Jackson, Ohio.*

DEAR SIR:—I have your letter of July 1, 1916, submitting the following inquiry:

> "Whose duty is it, under the Cass road law, to repair bridges built by county commissioners, located in, 1st, cities; 2nd, villages, on county roads extending into such municipalities; and are the commissioners or the municipalities liable for injuries occasioned by a failure to repair?"

You first inquire whose duty it is under the Cass highway law to repair bridges, built by county commissioners, located on county roads extending into cities and villages.

It must be observed, in the first place, that no provision of the Cass highway law repeals or modifies either section 2421, G. C., or section 7557, G. C., which said sections provide as follows:

"Sec. 2421. The commissioners shall construct and keep in repair necessary bridges over streams and public canals on state and county roads, free turnpikes, improved roads, abandoned turnpikes and plank roads in common public use, except only such bridges as are wholly in cities and villages having by law the right to demand, and do demand and receive part of the bridge fund levied upon property therein. If they do not demand and receive a portion of the bridge tax, the commissioners shall construct and keep in repair all bridges in such cities and villages. The granting of the demand, made by any city or village for its portion of the bridge tax, shall be optional with the board of commissioners.

"Sec. 7557. The county commissioners shall cause to be constructed and kept in repair, as provided by law, all necessary bridges in villages and cities not having the right to demand and receive a portion of the bridge fund levied upon property within such corporations, on all state and county roads, free turnpikes, improved roads, transferred and abandoned turnpikes and plank roads, which are of general and public utility, running into or through such village or city."

In an opinion of this department rendered by Hon. U. G. Denman on October 28, 1910, reported in the Attorney-General's Reports for the years 1910-1911, page 781; it was held that:

"Under the General Code no cities are entitled to demand and receive any portion of the county bridge fund."

Commenting upon the right of cities to demand a portion of the bridge fund it is stated in said opinion that:

"I beg to advise that section 2824 of the Revised Statutes provided for certain cities receiving part of the bridge fund from the county. This section has been divided and written into the General Code as sections 5635 and 5636. Neither of these sections now provide for paying any portion of the bridge fund to any city. I note from the table of revision in the General Code that that portion of old section 2824, R. S., which provided for certain cities receiving a portion of the bridge fund, was considered special legislation by the codifying commission and was omitted in the General Code.

"Section 2421 of the General Code makes a reference to cities which receive a part of the bridge fund, but I am unable to find anywhere in the General Code any provision for any city to receive any portion of such fund, and I am, therefore, of the opinion that the city of Fremont is not entitled to demand and receive any portion of the bridge fund."

Following this opinion—in which I fully concur—it has been held by this department in various subsequent opinions that the sections above quoted, namely, sections 2421 and 7557, G. C., aforesaid, are of general application and that under their provisions county commissioners are charged with the duty of constructing and keeping in repair all necessary bridges on state and county roads, free turnpikes, improved roads, transferred and abandoned turnpikes and plank roads, which are of general and public utility in all cities and villages.

Therefore, answering your first question specifically the duty to repair the bridges specified in said inquiry is imposed on county commissioners, not, however, under the Cass road law but by virtue of the provisions of said sections 2421 and 7557, G. C., aforesaid.

Your next inquiry refers to the liability for injuries occasioned by failure to repair said bridges.

As the duty is imposed upon the board of county commissioners to make such repairs, it follows that primarily such liability rests upon them. But under some circumstances the municipality has been held by the courts liable for a failure to properly guard the public against danger from defective bridges located therein which it is the duty of the county commissioners to keep in repair.

Mooney, Admr. v. Village of St. Marys, 15 C. C., 446;
Affirmed without report, 60 O. S., 599;
Newark v. McDowell, 16 C. C., 556.

An examination of the above cases will disclose the theory and principle under which municipalities may be held liable for injuries sustained by reason of defective bridges in the class named in your inquiry.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1763.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, HANCOCK COUNTY.

COLUMBUS, OHIO, July 8, 1916.

The Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE:—Bonds of Hancock county, Ohio, in the amount of $190,000.00 for the improvement of that part of intercounty highway No. 22 (now being also a part of Main Market road No. 7) lying in Orange, Eagle, Union and Liberty townships, being 190 bonds of $1,000.00 each."

I have examined the transcript of the proceedings of the county commissioners and other officers of Hancock county relative to the above bond issue, also the bond and coupon form attached, and find the same regular and in accordance with the provision of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of Hancock county, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1764.

APPROVAL, LEASE OF PART OF ABANDONED HOCKING CANAL TO J. R. ELDER, FOR OIL AND GAS PURPOSES.

COLUMBUS, OHIO, July 10, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of June 30, 1916, transmitting to me for examination triplicate copies of a lease to J. R. Elder, of 10,700 feet of the abandoned Hocking canal near Haydenville, for oil and gas purposes, the lease providing for a bonus of $200.00 and a one-eighth royalty on all the oil and gas produced.

I find this lease to be in regular form and am, therefore, returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1765.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, BRIGHTON RURAL SCHOOL DISTRICT, LORAIN COUNTY, OHIO.

COLUMBUS, OHIO, July 10, 1916.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Brighton rural school district of Lorain county, Ohio, in the sum of $1,500.00, being three bonds of $500.00 each."

I have examined the transcript of the proceedings of the Brighton board of education and other officers of Brighton rural school district, relative to the above bond issue, also the bond and coupon form attached, and find the same regular and in conformity with the provision of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of said rural school district.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1766.

JUDGE OF LORAIN CRIMINAL COURT—COMPENSATION FIXED BY COUNCIL—IN STATE CASES SAME FEES AS JUSTICE OF PEACE—CHIEF OF POLICE ENTITLED TO NO COMPENSATION FOR SERVICES RENDERED IN LORAIN CRIMINAL COURT.

The judge of the Lorain criminal court is entitled not only to the compensation fixed by council but also in state cases to the same fees as a justice of the peace is entitled.

There being no provision for compensation of chief of police for services rendered in Lorain criminal court, he is not entitled to any.

The city is not entitled to bring suit to recover from chief of police moneys received by him from defendants in state criminal cases.

COLUMBUS, OHIO, July 10, 1916.

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

GENTLEMEN:—Under date of June 13, 1916, you requested my opinion upon two questions relative to the criminal court of Lorain, Ohio.

Your first question is as follows:

> "(1) Is the judge of the criminal court of the city of Lorain, Ohio, entitled to retain his fees collected in state cases when same are collected of defendants?"

Upon receipt of your request for opinion we wrote to the judge of the said criminal court in regard to the matter, and under date of June 30th received a brief on his behalf.

In the case of State ex rel. McCarty v. Oberlin, auditor, (unreported), the court of appeals of Stark county held that the criminal court in the city of Canton was essentially a police court and was governed by the laws relating thereto. However, the opinion was rendered in said case solely as to the disposition of fines collected by said court.

In opinion No. 137 of this department, rendered to your bureau under date of March 11, 1915, Opinions of the Attorney-General for 1915, page 264, I held that so far as the disposition of fines by the Lorain criminal court is concerned, said fines are to be disposed of in the same manner as if assessed by a police court. However, the matter under consideration here cannot be considered as in any way determined either by the case or by the opinion hereinbefore referred to.

The criminal court of Lorain was established by an act found in 101 O. L., 385. Sections 1 and 8 thereof were subsequently amended in 103 O. L., 397, but so far as the question here involved is concerned the amendments to said sections have no bearing.

Section 5 of said act (section 14740-17 of the Appendix to the General Code), provides as follows:

> "Such court shall have power to compel the attendance of witnesses, jurors and parties. Jurors shall have the qualifications and be subject to the challenges of those in court of common pleas in like cases. They shall be selected, summoned and impaneled in accordance with an ordinance of the city council; or if no such ordinance is in force, in accordance with a rule of the court and they shall receive the same fees as are allowed jurors and witnesses in courts of justice of the peace.

Other fees shall be the same as before the justice of the peace in like cases."

Section 10 of said act (section 14740-22 of the Appendix to the General Code) provides as follows:

"The bond and compensation of such judge shall be fixed by the council."

The question naturally arises as to whether or not the provisions of section 10 of the act referred to, that the bond and compensation of the judge of the Lorain criminal court shall be fixed by council, refers to the entire compensation of such judge both for acting in ordinance as well as state cases, or whether the provision of section 5 that "other fees shall be the same as before the justice of the peace in like cases" would entitle the judge of the court to charge the same fees as a justice would in the hearing of state cases. The general rule is that where there are specific provisions relative to a matter in an act, and likewise general provisions, the specific shall govern.

However, the act establishing the criminal court in Lorain was passed subsequent to the decision in certain cases in Ohio, which establish the rule that a mayor was entitled to receive and retain his fees in state cases, although council had enacted an ordinance providing that all fees received by him should be turned into the municipal treasury. Furthermore, the criminal court in Lorain is a successor to the mayor's court of said city, and prior to the enactment of the said act establishing the criminal court, the mayor was entitled to the fees fixed by council as well as to the fees fixed in state cases.

I am informed that there have been no allowances made by county commissioners to the judge of the Lorain criminal court for services performed in state cases, but that the judge thereof retains his fees charged in said cases as remuneration for the work done therein.

After careful consideration of the matter I am of the opinion that the provisions of section 10 of the act, that the compensation of the judge shall be fixed by council, refers solely to the compensation he is to receive for his services in ordinance cases, and that the provision of section 5 of the act entitles the judge to charge and retain the same fees as the justice of the peace in like cases.

Your next question is as follows:

"(2) Is the chief of police of said city, rendering service in said criminal court, entitled to retain the fees earned by him in such cases when collected of defendants prosecuted in said court?"

The above inquiry refers solely to state cases.

There are no provisions contained in the act establishing the Lorain criminal court prescribing who shall be the ministerial officer of said court.

Section 13500, G. C., provides as follows:

"The warrant shall be directed to the sheriff or to any constable of the county, or, *when it is issued by an officer of a municipal corporation,* to the marshal or other police officer thereof."

Under the provisions of section 8 of the act establishing the Lorain criminal court (section 14740-20 of the Appendix to the General Code), the judge thereof is elected by the electors of said city, and would therefore be an officer of the municipal corporation, and under the provisions of section 13500, G. C., would

direct the warrants to the chief of police or other police officer thereof. However, there is no provision made as to any fees for such chief of police.

The provision of section 5 of the act establishing the Lorain criminal court, "other fees shall be the same as before the justice of the peace in like cases," is not sufficient to provide the fee for the police officer serving the warrant, since there are no provisions of statute that I have been able to find which permit of a fee to be paid to the chief of police or other police officer in cases prosecuted before a justice of the peace. Therefore, there being no fees provided in such matter, the chief of police of Lorain, in rendering service in said criminal court, would not be entitled to charge any fees in state cases. However, if he has charged such fees and received the same from defendants, I am of the opinion that the city would not be authorized to bring suit to recover the same from him. See Delaware v. Mathews, 13 O. C. C., n. s., 539. Affirmed without report, 82 O. S. 423.

It is true that section 285, G. C., 103 O. L., 507, at page 509 provides:

> "The term 'public money' as used herein shall include all money received or collected under color of office whether in accordance with or under authority of any law, ordinance or order, or otherwise, and all public officials, their deputies and employes, shall be liable therefor."

However, on referring back to the earlier part of said section it is provided that "if the report sets forth that * * * any public money collected has not been accounted for, * * * " suit shall be brought "in the name of the political subdivision or taxing district to which such public money is due * * *."

The amount of money which has been received by the chief of police as fees in state cases from the defendants, but which was not properly charged in the costs, cannot be considered as moneys due to the subdivision. Therefore, I am of the opinion that if the chief of police has charged and received fees from defendants in state cases for services rendered in the Lorain criminal court no action can be instituted by the city for the recovery thereof.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1767.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY BOARDMAN RURAL SCHOOL DISTRICT, MAHONING COUNTY, OHIO.

COLUMBUS, OHIO, July 10, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

> "RE:—Bonds of Boardman rural school district, Mahoning county, Ohio, in the sum of $30,000.00, for the purpose of erecting a school building at Boardman Center, being sixty bonds of $500.00 each."

I have examined the transcript of the proceedings of the board of education and other officers of Boardman rural school district, relative to the above bonds,

also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of said district.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1768.

COUNTY COMMISSIONERS—REQUEST MADE BY COUNTY AGRICULTURAL SOCIETY FOR LEVY—COMMISSIONERS DETERMINE AMOUNT—MANDATORY TO LEVY TAX TO PRODUCE SAID AMOUNT.

Under provision of section 9894, *G. C., the commissioners of a county, on request being made by the agricultural society of such county, may determine the amount of money to be raised for the purpose expressed in said section, keeping within the limitations therein provided, and, subject to their discretion as to the amount to be named, it is mandatory on said commissioners to levy the tax which they estimate will produce said amount, the same to be set forth in the annual budget filed with the county auditor and by him placed before the county budget commission for consideration under provision of section* 5649-3*c, G. C.*

COLUMBUS, OHIO, July 10, 1916.

HON. GEORGE C. VON BESELER, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—In your letter of June 23rd you request my opinion as follows:

> "May I have your opinion please, as to whether or not the provisions of section 9894 of the General Code of Ohio are mandatory as to the maximum amount of one thousand five hundred dollars, in the event that a levy of one-tenth of one mill would produce that sum? In other words, is it discretionary with the county commissioners, when a county or a county agricultural society, holds and owns under a lease, real estate used as a site whereon to hold fairs, for the board of county commissioners to pay this sum of one thousand five hundred dollars, any amount less than that, or nothing at all."

Section 9894, G. C., provides:

> "When a county or a county agricultural society, owns or holds under a lease, real estate used as a site whereon to hold fairs, and the county agricultural society therein has the control and management of such lands and buildings, for the purpose of encouraging agricultural fairs, the county commissioners shall on the request of the agricultural society annually levy taxes of not exceeding a tenth of one mill upon all taxable property of the county, but in no event to exceed the sum of one thousand five hundred dollars, which sum shall be paid by the treasurer of the county to the treasurer of the agricultural society, upon an order from

the county auditor duly issued therefor. Such commissioners shall pay out of the treasury any sum from money in the general fund not otherwise appropriated, in anticipation of such levy."

This section prior to its amendment (102 O. L., 105) read as follows:

"When a county *owns* real estate used as a site whereon to hold fairs, and the county agricultural society therein has the control and management of the lands and buildings of the county, for the purpose of encouraging agricultural fairs, the county commissioners *may* annually levy taxes of not exceeding a tenth of one mill upon all taxable property of the county, which sum shall be paid by the treasurer of the county to the treasurer of the agricultural society; upon an order from the county auditor duly issued therefor. Prior to the levy of any such tax, if they determine it to be for the best interest of the county and society, such commissioners may pay out of the treasury any sum from money in the general fund not otherwise appropriated, in anticipation of such levy."

It will be observed that section 9894, G. C., supra, as amended and as now in force, is more liberal in its terms and gives to county agricultural societies coming within its provisions greater rights than were granted by said section as in force prior to its amendment. The old section merely permitted aid to be given to a county agricultural society of a county which owned the real estate used as a site whereon to hold county fairs, said agricultural society having control of such lands and buildings located thereon and used for agricultural fair purposes. The amended section provides that, under the conditions therein prescribed, the county commissioners *shall* levy a tax.

In this connection I note that section 9887, G. C., provides the conditions under which county commissioners *may* levy a tax upon all the taxable property of the county for the purpose of providing a fund to aid in the purchase or lease and improvement of an agricultural fair site, and section 9895, G. C., provides when the county commissioners *may* levy a tax upon all the taxable property of the county to provide a fund greater in amount than that authorized by section 9894, G. C., to be used for the purchase and improvement of county fair grounds.

In view of the use of the word "may" in said sections 9887 and 9895, G. C., as well as in section 9894, G. C., as in force prior to its amendment in 102 O. L., 105, it seems clear to my mind that the only purpose of said amendment was to extend the list of societies to which assistance should be given, to limit the maximum amount of such assistance and to make it mandatory upon the county commissioners, within the limitations provided in said statute, to make a levy for the purpose mentioned in said statute, providing the agricultural society requesting such assistance comes within the purview of said statute.

I do not think it can be said, however, that the agricultural society, qualified to request aid from the county commissioners, may, within the limitations prescribed in said section 9894, G. C., supra, fix the amount to be levied by said county commissioners. Its only right under said statute is to make the request and I think it is reasonably clear that if said society makes such representations as the commissioners deem proper showing the necessity for the amount requested, the commissioners should then determine how much in their judgment will be necessary, keeping within the limitations of the statute, and when this amount is determined it will be the duty of said commissioners to levy a tax which they estimate will be sufficient to produce said amount. This levy must, of course, be set forth in the annual budget as provided by section 5649-3a, G. C., and will be subject to reduction by the county budget commission.

In view of the foregoing I am of the opinion in answer to your question that your county commissioners, on request being made by the county agricultural society, may determine the amount of money to be raised for the purpose expressed in section 9894, G. C., keeping within the limitations therein provided, and that, subject to their discretion as to the amount to be named, it is mandatory on said county commissioners to levy the tax which they estimate will produce said amount, the same to be set forth in the annual budget filed with the county auditor, and by him placed before the county budget commission for consideration under provision of section 5649-3c, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1769.

INTERPRETATION OF SECTION 4740, G. C.—AMENDED TWICE BY SAME LEGISLATURE—EFFECT—THE WORD "SUPERINTENDENTS" DEFINED—"STATE AID" REFERS TO REGULAR PAYMENT BY STATE OF PART OF SALARY OF DISTRICT SUPERINTENDENT NOT TO AID TO WEAK SCHOOL DISTRICT—DISTRICT EMPLOYING PART TIME SUPERINTENDENT MAY RECEIVE STATE AID AS WEAK SCHOOL DISTRICT.

Section 4740, G. C., as amended by senate bill No. 282, 106 O. L., 396, was supplanted by the same section as amended by senate bill No. 323, 106 O. L., 439, which last section now is and at all times since it went into effect has been the law of this state. The effect of the successive amendments of this section is such as that the first of them never was the law of this state.

The word "superintendents" as used in the last two sentences of section 4740 as amended 106 O. L., 439, means and refers to the part time superintendent employed by a village or rural school district or union of school districts for high school purposes which maintains a first grade high school, and which has upon application been continued as a separate district under the direct supervision of the county superintendent. Whether or not a person employed by the board or boards of education of such district or union of districts is a "superintendent" within the meaning of said section is a question of fact not foreclosed by the name which may be given to the position.

The phrase "state aid" as used in section 4740 as amended, supra, refers to the regular payment by the state of a part of the salary of a district superintendent, and does not refer to the aid to weak school districts. Therefore, the prohibition in said section does not prevent a district employing a part time superintendent from receiving state aid as a weak school district on account of a deficiency in part due to the payment of salary to such part time superintendent, and such district is entitled to include as a part of its deficiency for the purpose of receiving state aid as a weak school district such proportion of the minimum salary of a high school teacher (seventy dollars per month) as is represented by the proportionate time given by such part time superintendent to teaching.

Whether or not authority exists to make new employments of part time superintendents under section 4740, G. C., as amended supra, query.

COLUMBUS, OHIO, July 10, 1916.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of June 26th, which in full is as follows:

"Section 4740, G. C., was amended twice by the last general assembly;

"S. B. 282 was passed May 27th, signed by the governor on May 27th, and filed with the secretary of state on May 28th, 1915;

S. B. 323 was passed May 27th, signed by the governor on June 2nd, and filed with the secretary of state on June 4th, 1915.

"We call your attention to the provisions of the veto and the referendum amendment to the constitution in regard to this situation. It appears that in the act first to have the approval of the governor, the word 'principal' is used, wherever in the act last to secure the governor's approval the word 'superintendent' is used.

"Assuming that the last approved and filed act governs in any construction of this section, then we are in the following quandary:

"Where a board of education has made the application required by the statute, and makes showing that it employs a superintendent, and is therefore under the direct supervision of the county superintendent, then does the word 'superintendent' thereafter appearing in relation to devoting part of each day to teaching, refer to the county superintendent, or to a district superintendent, or a principal? Does the same word 'superintendent' where it afterwards appears in connection with the payment of salaries and state aid, refer to the county superintendent, the district superintendent, or the principal?

"In other words, we desire an opinion giving a construction to section 4740, G. C., so that we may administer the weak school district aid laws intelligently and lawfully."

In opinion No. 463, addressed to Hon. Frank W. Miller, superintendent of public instruction, under date of June 8, 1915, and found in volume 1 Opinions of the Attorney-General for the year 1915, at page 944, I had occasion to consider the effect of the passage and approval of senate bills Nos. 282 and 323 referred to in your letter and now appearing in 106 Ohio Laws, pages 396 and 439, respectively. I then stated as my opinion, the reasons for which need not be now given in detail, that

"the general assembly * * * intended that the amendment of the section (4740, G. C.) in amended senate bill No. 282 should never become effective."

That is to say, I then was and still am of the opinion that section 4740, G. C., as amended in 106 O. L., 396, was in effect corrected by the later measure, and that the same is not now and substantially never was the law of this state.

It follows, of course, that your question must be answered solely in accordance with the provisions of section 4740, G. C., as amended by senate bill No. 323 (106 O. L., 439). That section provides in full as follows: (106 O. L., 439.)

"Any village or rural school district or union of school districts for high school purposes which maintains a first grade high school, and which employs a superintendent, shall upon application to the county board of education before September 10, 1915, or before June 1st of any year thereafter, be continued as a separate district under the direct supervision of the county superintendent. Such district shall continue to be under the direct supervision of the county superintendent until the board of education of such district by resolution shall petition to become a part of a supervision district of the county school district. Such superintendents shall perform all the duties prescribed by law for a district superintendent, but shall teach such part of each day as the board of education of the

district or districts may direct. Such districts shall receive no state aid for the payment of the salaries of their superintendents, and the salaries shall be paid by the boards employing such superintendents."

In my opinion, the word "superintendents" as used in the last two sentences of this section means and refers to the superintendent who must be "employed" within the meaning of the first sentence of the section in order to qualify the village or rural school district or union of school districts for high school purposes for continuance as a separate district under the direct supervision of the county superintendent. In other words, the section contemplates the employment in such districts of a part time superintendent, the remainder of whose time shall be devoted to teaching, and whose functions of supervision shall be exercised under the direct supervision of the county superintendent. That the last two sentences of this section can refer only to the part time district superintendent, previously referred to in the section, and not to the county superintendent, follows obviously I think from the provision therein to the effect that such superintendent shall teach such part of each day as the board of education of the district or districts may direct, and from the further provision that the salaries of such superintendents shall be paid by the boards employing them. Manifestly, neither of these provisions could have been intended to refer to the county superintendent, for he could not be required by any board of education to devote any time to actual teaching, nor is he employed by any board of education nor his salary paid by any such board.

For reasons above stated, the word "superintendents" as used in the last two sentences of section 4740, G. C., as amended 106 O. L., 439, cannot relate to a high school principal, as such. In short, it relates, as above stated, to the district superintendent employed by a village or rural school district or union of school districts for high school purposes to devote a part of his time to supervision and the remainder of his time to teaching. The salary of such a district superintendent must be paid by the board of education of the district employing him, without state aid applicable thereto.

It might conceivably happen that a person so employed might also discharge under his contract the duties of a high school principal. This would make no difference. Whatever part of the time of such a superintendent is given to supervision and whatever part is given to teaching or to the duties of a principal, his entire salary must be paid by the district without state aid therefor.

Section 4740, supra, does not apply at all to a district which employs no superintendent, as such, so that if a high school principal be the only general officer employed by the district, it would have no right under the section to continue as a separate supervision district.

This would be in a given case a question of fact. I assume that the department of public instruction has investigated all such cases, and determined the status of each district which may claim compliance with section 4740. I suggest that your department co-operate with that department and avail itself of the information which, I take it, must be on file therein, in determining whether or not the district officer of a given district or union of districts is a "superintendent" within the meaning of said section.

As I understand your question, however, something more than the interpretation of the word "superintendents" in section 4740, G. C., as amended and at present in force, is required in order to return a complete answer to it.

Your letter seems to assume that the phrase "state aid" as used in said section, refers to the state aid for weak school districts, and that because of the prohibition therein no state aid to such a school district is authorized to be furnished on account of the salary of such superintendent.

If this be your assumption, I advise that, in my opinion, it is erroneous. It is unfortunately true that the phrase "state aid" is used in the school laws in two distinct and wholly different senses. The sense in which the phrase is used in section 4740, G. C., in its present form can be best understood, I think, by noting the phraseology of the same section as it was in substance first enacted in 104 O. L., 141. I shall not quote the entire section as it was then framed, but content myself with the observation that the act of which it was a part constituted the pioneer legislation of this state looking toward the establishment of the present system of uniform county and district supervision. The law required the organization of supervision districts throughout the state and prescribed what might be termed the minimum qualifications of a supervision district. The section under examination constituted an exception to such minimum qualifications by continuing in existence as separate supervision districts certain districts which had theretofore availed themselves of the optional privilege of employing a superintendent. The following provision of the section will be sufficient to show the connection in which the term "state aid" was used therein:

> "Such districts shall receive such portion of state aid for the payment of the salary of the district superintendent as is based on the ratio of the number of teachers employed to forty, multiplied by the fraction which represents that fraction of the regular school day which the superintendent gives to supervision."

As a part of the same law section 4743, G. C., was enacted (104 O. L., 142), and this section is still in force in the form in which it was then enacted. It provides as follows:

> "The compensation of the district superintendent shall be fixed at the same time that the appointment is made and by the same authority which appoints him; such compensation shall be paid out of the county board of education fund on vouchers signed by the president of the county board. The salary of any district superintendent shall in no case be less than one thousand dollars per annum, *half of which salary not to exceed seven hundred and fifty dollars shall be paid by the state* and half by the supervision district, except where the number of teachers in any supervision district is less than forty in which case the amounts paid by the state shall be such proportion of half the salary as the ratio of the number of teachers employed is to forty. The half paid by the supervision district shall be pro rated among the village and rural school districts in such district in proportion to the number of teachers employed in each district."

It is clear to me that the "state aid" to which section 4740 as enacted in 104 O. L., 141, referred was the state's portion of the regular salary of the district superintendent. That is to say, it was "aid" which should be paid to all supervision districts in order to enable them the more easily to comply with the requirement of the law that they have a superintendent. It had nothing whatever to do with the "state aid to weak school districts," because it was paid for the benefit of every district in the state, whether such districts were "weak" or not. The idea of original section 4740 as enacted in 104 O. L., 141, was merely to fix the amount of the state's contribution to the salary of a part time superintendent, the remainder of whose time was given to teaching, and that proportion was fixed commensurately with the relative amount of time which such superintendent actually gave to the work of supervision.

When section 4740 was amended in 106 O. L., 439, supra, the legislature evi-

dently intended to discourage the exceptional or abnormal kind of supervision districts which the section provided for, by withdrawing wholly any contribution by the state to the regular payment of the salaries of the part time superintendents therein provided for; therefore it was provided that

> "such districts shall receive no state aid for the payment of the salaries of their superintendents, and the salaries shall be paid by the boards employing such superintendents."

This provision was necessary because section 4743 still remained in force and provided that half of the salary not to exceed seved hundred and fifty dollars of every district superintendent should be paid by the state. The superintendent referred to in section 4740 being a "district superintendent," section 4743 would have required the state to pay half of his salary but for the provisions of the last sentence of amended section 4740. In short, the legislation of 1915, among other things, imposed an additional condition upon the existence of the special or exceptional supervision districts referred to in section 4740, viz.: that such districts pay the entire salaries of their district superintendents.

(I think it is probably true that it is inaccurate to call the districts mentioned in section 4740 "supervision districts" and the "superintendents" therein referred to "district superintendents." I have done so in this opinion, however, as a matter of convenience to distinguish the superintendents referred to in the section from the county superintendents.)

This discussion will, I think, make it apparent that the last sentence of section 4740 as amended, has nothing whatever to do with state aid for weak school districts. That law is to be administered with respect to the salaries of teachers of a district within the purview of section 4740, G. C., as amended without regard to the prohibition contained in the last sentence of said section; so that the provision that "such districts shall receive no state aid for the payment of the salaries of their superintendents" would not of itself prohibit such district from receiving state aid as a weak school district for a part of the salary of such superintendent, if it were otherwise qualified to receive such state aid therefor.

This statement is equivalent to the statement that the amendment of section 4740, G. C., in nowise affected the question as to the application of state aid for *weak* school districts in a district employing a part time superintendent. The law therefore is just the same in this particular as it was prior to the amendment of section 4740.

On April 27, 1915, this department rendered an opinion to the Bureau of Inspection and Supervision of Public Offices, (found in the Opinions of the Attorney-General for that year, at page 567), in which the following question was put and the following answer given:

> "If a teacher is employed one-half his time in supervision and one-half in teaching, can the amount paid him as teacher be included in the expense going to make up the deficiency on which is based application for state aid under section 7595, General Code? If not, would the fact that a teacher had been so paid for one-half his time, prevent the district from receiving state aid, provided it had complied with the other requirements of the weak school district sections?
>
> * * * * * * * * * *
>
> "Your fourth question applies only to the case of a superintendent employed under authority of section 4740, G. C. District supervision * * * is mandatory, and the question arises whether a district which contributes

its proportionate part of the salary of the district superintendent, who gives one-half of his time to teaching in a school within said district, is, on this account, disqualified under the above provision of the statute relating to state aid. * * *

"The district superintendent must have the qualifications of a high school teacher under the provisions of section 4744-5, G. C., as found in 104 O. L., 143.

"For the time he teaches, his salary is more than $70.00 per month, the minimum for a high school teacher mentioned in item four of the schedule of salaries provided in section 7595-1, G. C., as amended in 104 O. L., 165. It does not follow, however, that the district which pays said superintendent for teaching one-half of his time, is on this account prevented from receiving state aid. * * *

"Replying to your fourth question, I am of the opinion that where a superintendent employed under the provisions of section 4740, G. C., gives one-half of his time to teaching, the proportionate amount paid him as teacher, based upon the minimum salary of $70.00 per month, should be included by the board of education of the district in which he teaches, in estimating its deficiency for the purpose of making application for state aid, and the fact that said superintendent has been paid for teaching one-half his time, would not prevent said district from receiving state aid providing said district has complied with the above requirements of the statutes relating thereto."

The principles laid down in the opinion from which quotation has been made apply as well at the present time as they did when the opinion was rendered.

A school district which is employing a part time superintendent under section 4740, G. C., and has a deficiency in its tuition fund may include, in estimating its deficiency for the purpose of making application for state aid as a weak school district, such proportionate part of the minimum salary of $70.00 per month for a high school teacher as represents the relative amount of time devoted by the part time superintendent under the direction of the board of education to actual teaching.

Of course, if the district officer is a mere high school principal, and in no sense a supervisor or superintendent, which fact can be determined by ascertaining the status of the district under section 4740 from the records of the department of public instruction, then if the district should apply for state aid as a weak district under section 7595, et seq., G. C., it would be entitled to include the entire sum of $70.00 per month on account of the salary of such principal as a part of its deficiency for the purpose of applying for state aid.

I wish to make it very clear that in answering your question as I have I do not mean to pass upon a question which has been suggested to me from another quarter, viz.: as to whether or not there is any authority under section 4740 or otherwise for making a contract of employment of a part time superintendent at the present time. Section 4740, as pointed out in opinion No. 463, above referred to, certainly has some force and effect so long as contracts entered into in "continued" separate districts therein referred to prior to the enactment of the amendment of 1915 subsist. As these contracts could be made for three years, at least prior to 1914, it is conceivable that some of them then made are still in force, and no question could be raised as to the validity of such employments and the status of the superintendents so employed. Your statement of facts does not advise me whether the question which you ask has been raised with respect

to a part time superintendent employed, or attempted to be employed, since the amendments referred to therein were made. If that is the case, I must advise you that this department has not yet passed upon the legality of such employment, and that no opinion with respect thereto is intended to be expressed herein.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1770.

BRIDGES AND CULVERTS—COUNTY COMMISSIONERS MAY BORROW MONEY UNDER SECTION 2434, G. C., TO CONSTRUCT AND REPAIR SAME—CONDEMNATION OF IMPORTANT BRIDGE.

County commissioners may borrow money under section 2434, *G. C., to construct and repair necessary bridges which also includes culverts.*

When an important bridge has been condemned for public travel and the commissioners deem the repair thereof to be necessary for public accommodation they may borrow money under section 5644, *G. C., to build or repair said bridge.*

COLUMBUS, OHIO, July 11, 1916.

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

GENTLEMEN:—I have your letter of June 15, 1916, submitting the following statement and inquiries:

> "The county commissioners of a certain county have made up a list of estimates for repair of bridges, culverts and stone arches in the various townships of the county aggregating about $21,000.00.
>
> "There is no money in the bridge fund and the county commissioners wish to borrow money under the provisions of section 2434, G. C., and section 5643, G. C., for the purpose of making the necessary repairs and improvements.
>
> "The list includes two or three bridges that are said to be unsafe for public travel, and if such conditions actually exist have they a legal right to borrow money under the provisions of section 5643, G. C.?
>
> "A part of the list is made up of reflooring, repairing and improving, or rebuilding various other bridges of the county, and if conditions actually warrant such action, may they borrow money for this purpose under the provisions of section 2434, G. C.?
>
> "The balance of the list is made up of stone culverts, box culverts, corrugated and sewer pipe culverts, stone arch culverts and cast iron pipe culverts. May they borrow money for such purposes under authority of section 2434, G. C., or section 5643, G. C.?"

Section 2434, G. C., to which you first refer in your foregoing inquiries, in so far as its provisions are pertinent to said inquiries, provides as follows:

> "For the execution of the objects stated in the preceding section, or for the purpose of erecting or acquiring a building in memory of Ohio soldiers, or for a court house, county offices, jail, county infirmary, detention home, or additional land for an infirmary or county children's home

or other necessary buildings or bridges, or for the purpose of enlarging, repairing, improving, or rebuilding thereof, or for the relief or support of the poor, the commissioners may borrow such sum or sums of money as they deem necessary, at a rate of interest not to exceed six per cent. per annum, and issue the bonds of the county to secure the payment of the principal and interest thereof. * * *"

This section provides, among other things, that the commissioners may borrow money to repair bridges. It invests them with a discretion to be exercised in the matter of making such loans, and the same must be in such amounts as they deem necessary and for the repair of necessary bridges.

It would seem to be the purpose of the law to provide money for immediate use when such use is necessary. In other words, as the law requires the money to be in the treasury before valid contracts may be made for the repair of bridges, this statute undertakes to provide a method for meeting such requirements and thus to enable the commissioners to repair necessary bridges without the danger of delay.

You do not state the facts under which each repair as contemplated by the commissioners is to be made. If such repairs are necessary, in the sense that any delay in making them would interfere with travel or imperil the public, I am of the opinion that such sum or sums of money as the commissioners deem necessary may be borrowed by them under said section 2434, G. C., to meet the situation. I am also further of the opinion that the repairs contemplated in said section may properly include the erection of stone culverts, box culverts, corrugated and sewer pipe culverts, stone arch culverts and cast iron pipe culverts, being the repairs specified in your last inquiry.

Referring now to section 5643, G. C., which provides:

"If an important bridge, belonging to or maintained by any county, becomes dangerous to public travel, by decay or otherwise, and is condemned for public travel by the commissioners of such county, and the repairs thereof, or the building of a new bridge in place thereof, is deemed, by them, necessary for the public accommodation, the commissioners, without first submitting the question to the voters of the county, may levy a tax for either of such purposes in an amount not to exceed in any one year two-tenths of one mill for every dollar of taxable property upon the tax duplicate of said county,"

it is manifest that no authority to borrow money is conferred by said section. Such authority is found in the succeeding section, 5644, G. C., which provides:

"If the county commissioners deem it necessary or advisable, they may anticipate the collection of such special tax by borrowing a sum not exceeding the amount so levied, at a rate of interest not exceeding six per cent. par annum, payable semi-annually, and may issue notes or bonds therefor, payable when said tax is collected, or the commissioners, without such submission of the question, may proceed under the authority conferred by law to borrow such sums of money as is necessary for either of the purposes before mentioned, and issue bonds therefor. For the payment of the principal and interest on such bonds, they shall annually levy a tax as provided by law."

These sections considered together may be said to furnish the means and method for building or repairing a bridge when an emergency exists. In the

first place, the bridge to be built or repaired must be an important bridge. This means that it must be a bridge of such necessity to the public, as without its use the latter would be seriously inconvenienced and interrupted in its travel; secondly, its condition must be such that it is condemned for public travel; and thirdly, the building or repair thereof must be deemed by the county commissioners to be necessary for the public accommodation.

When these conditions obtain the commissioners to repair the same may levy a special tax as provided in section 5643, G. C., aforesaid, and in anticipation of its collection may borrow money as provided in section 5644, G. C., aforesaid, or, as provided in said last named section, may proceed under authority conferred by law to borrow the necessary money and issue bonds therefor, and for the payment of the principal and interest they may levy a tax as provided by law.

You state that the list of bridges which the commissioners contemplate repairing, includes two or three bridges that are said to be unsafe for public travel, and you inquire if such conditions actually exist whether the money to make such repair may be borrowed under the provisions of said sections 5643, G. C.

I have already stated that said section 5644, G. C., aforesaid, is the section which furnishes the authority to borrow money for the purposes named in said section 5643, G. C., aforesaid. If, therefore, any or all of the three bridges in question are important in the sense above explained, and have been condemned for public travel, and the commissioners deem the repair thereof to be necessary for public accommodation, the commissioners under the provisions of said section 5644, G. C., aforesaid may borrow money to make such repairs.

The foregoing observations furnish as specific an answer as can be made to your inquiries in the absence of any further statement of the facts of each case involved in said inquiry in which the commissioners contemplate making the repairs named.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1771.

TOWNSHIP CLERKS—COMPENSATION ALLOWED UNDER SECTION 3298-12, G. C., SUBJECT TO LIMITATION OF $150.00 IN ANY YEAR AS PROVIDED BY SECTION 3308, G. C.

The compensation allowed to township clerks under the provisions of section 3298-12, *G. C.,* 106 *O. L.,* 592, *is subject to the limitation of* $150.00 *in any year as provided by section* 3308, *G. C.*

COLUMBUS, OHIO, July 11, 1916.

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

GENTLEMEN:—I have your letter of June 13, 1916, submitting the following inquiry:

> "Section 71 of the Cass law provides that a township clerk may receive a fee of ten cents for each one hundred words for making a record of road improvements, and also such reasonable compensation for other services in connection therewith as shall be allowed by the township trustees.
>
> "Is such compensation additional to the limit of $150.00 fixed by law for other official services required of township clerks?"

Section 71 of the Cass highway law, to which you refer, being section 3298-12, G. C., 106 O. L., 592, provides as follows:

> "The trustees shall provide the township clerk with a suitable book in which he shall keep a complete record of the proceedings for the improvement of such roads. For making such record, he shall receive ten cents for each hundred words and for all other services in connection therewith, he shall receive such reasonable compensation as may be allowed him by the township trustees."

Section 3308, G. C., is the section fixing the limit of $150.00, also referred to in your inquiry, and provides as follows:

> "The clerk shall be entitled to the following fees, to be paid by the parties requiring the services: twenty-five cents for recording each mark or brand; ten cents for each hundred words of record required in the establishment of township roads, to be opened and repaired by the parties; ten cents for each hundred words of records or copies in matters relating to partition fences, but not less than twenty-five cents for any one copy, to be paid from the township treasury; ten cents for each hundred words of record required in the establishment of township roads, to be opened and kept in repair by the superintendents; for keeping the record of the proceedings of the trustees, stating and making copies of accounts, and settlements, attending suits for and against the township, and for any other township business the trustees require him to perform, such reasonable compensation as they allow. In no one year shall he be entitled to receive from the township treasury more than one hundred and fifty dollars."

It is a well settled law of statutory construction that every new statute must be construed in connection with those already existing in relation to the same subject matter, and all should be made to harmonize if that may be done by any fair and reasonable interpretation. Black Interpretation of Laws, 112.

In the earlier and general statute the compensation of a township clerk is limited to $150.00 in any one year. Does this limitation apply to the compensation fixed by the later statute, being said section 3298-12, G. C., aforesaid, so that the compensation as earned and allowed under both sections shall be subject to the limitation of $150.00 in any one year? Undoubtedly said limitation does so apply. Its application to the new statute works no inconsistency between the two laws.

The determining feature, however, in my judgment in this matter is that in both statutes the same compensation is fixed for services in the establishment of roads, and that the provisions of the first statute, namely, "ten cents for each hundred words of record required in the establishment of township roads to be opened and repaired by the parties," and "ten cents for each hundred words of record required in the establishment of township roads, to be opened and kept in repair by the superintendents," are now obsolete because of the repeal by the present road law of the statute under which such roads were formerly established. In other words, the new law in effect simply substitutes compensation for services connected with improved roads for the same compensation for services provided for in the old statute in reference to township roads.

As observed, there are now no statutes under which such compensation may be earned, as provided in section 3308, G. C., aforesaid, and in lieu of said provisions we now have the compensation fixed by section 3298-12, G. C., aforesaid. This being so, the last named section therefore imposes no additional duties on

township clerks, but provides for compensation for those duties which now take the place of similar duties under the earlier statute, section 3308, G. C., aforesaid. The legislature enacted the latter statute with full knowledge of these facts, and of the limitation contained in the earlier general statute. If the legislature had intended the compensation thus allowed in the new law to be outside of such limitation, and in addition thereto, it must be assumed that it would have provided by some appropriate language to that effect. Failing so to do and because of the facts hereinbefore observed, we must conclude that the purpose of the new law is merely to fix a rate or basis for compensation for the services specified therein and to take the place of the compensation formerly allowed for similar services under said section 3308, G. C., aforesaid.

Had the legislature not enacted said section 3298-12, G. C., there would have been no legal authority whatever for compensating township clerks for services in and about the establishment of improved roads in townships.

I am of the opinion, therefore, that the compensation provided for in section 3298-12, G. C., aforesaid is subject to the limitation of $150.00 specified in the concluding clause of section 3308, G. C., aforesaid.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1772.

CIVIL SERVICE—OFFICES, POSITIONS AND EMPLOYMENTS IN VILLAGES AND VILLAGE SCHOOL DISTRICTS ARE NOT INCLUDED WITHIN PROVISIONS OF CIVIL SERVICE LAW.

Offices, positions and employments in villages and village school districts are not included in the operation of the civil service law of this state.

COLUMBUS, OHIO, July 11, 1916.

HON. E. A. SCOTT, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR:—I have your letter of July 6, 1916, submitting the following statement and inquiry:

> "Manchester, Ohio, is incorporated as a village, and the board of education of said village has employed the same janitor for public schools for some ten years. Recently the board of education employed another janitor—the old janitor refuses to surrender the keys to the building for the reason that he has been employed for a period of more than seven years, and that section 486-31 places him under civil service, and permits him to retain position.
>
> "Does this section or any other section give the janitor of a village school board (under the civil service law) the right to hold position by having been in the service of the board for more than seven years? In other words, does not the law apply to city school districts and not village?"

Paragraph 1 of section 486-1, G. C., as amended 106 O. L., page 400, provides that:

"The term 'civil service' includes all offices and positions of trust or employment in the service of the state and the counties, cities and city school districts thereof."

This paragraph specifies what offices, positions and employments are included in the civil service law of the state and it is exclusive. It will be observed that it does not include offices or positions in villages or village school districts. It follows, therefore, that the position held by the janitor named in your inquiry is not within the operation of the civil service law, and said janitor is not entitled to its protection or to hold his position under any of its provisions, including the provision of section 486-31, G. C., as amended 106 O. L., 418, referred to in your inquiry and commonly known as the seven-year service clause.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1773.

COUNTY COMMISSIONERS—MAY CONTRACT FOR SUPPLYING COUNTY INFIRMARY WITH ELECTRIC LIGHT—NO PUBLIC UTILITY MAY ENTER INTO SUCH CONTRACT AT RATE IN EXCESS OF THAT SHOWN BY ITS SCHEDULE FILED WITH PUBLIC UTILITIES COMMISSION OF OHIO.

The county commissioners may, pursuant to section 2435-1, *G. C., upon competitive bids therefor, award a contract for supplying a county infirmary with electric light.*

No public utility, as defined by statute, may enter into such contract at a rate in excess of that shown by its schedule filed with the public utilities commission of Ohio.

COLUMBUS, OHIO, July 11, 1916.

HON. JOHN E. BETTS, *Prosecuting Attorney, Findlay, Ohio.*

DEAR SIR:—Yours under date of June 22, 1916, is as follows:

"Under proceedings heretofore had a new infirmary building is being constructed in this county, at a distance of some two or three miles from the city. A commission was appointed by the common pleas judge, under section 2333, G. C.

"It is now apparent that there are not sufficient funds to provide a lighting plant for this new building. It is also desired by the commissioners to contract with the electric light company of this city to furnish current under and by virtue of section 2435-1. However, the question of constructing the line from the plant of the company in the city to the infirmary building is an item of expense which must be reckoned with.

"I am aware of your opinion at page 1032 of Vol. 2 of your report of the year for 1915, applying to a similar condition relative to furnishing light to the Children's Home in Knox county. The county commissioners do not desire to erect the poles and construct the line and own it, but prefer to have this done and maintained by the lighting company and simply to contract for the current by virtue of the section last quoted.

"This brings us to the proposition that the rate for which light could be furnished by virtue of the cost to the company of erecting this line will be greater than that authorized to be charged by the utilities commission, for light furnished by that company in this city. Therefore I submit for your opinion, which the commissioners will also be very glad to receive through me, as to whether or not a legal contract can be made on behalf of the county, with the Electric Light Company, to furnish current to the infirmary at a rate higher than the same company is permitted to charge in this city (the conditions being, of course, such as require a higher rate), or would you suggest application be made by the light company, or joint application of the light company and county for special rates in this instance?"

Section 2435-1, G. C., to which you refer, provides as follows:

"The commissioners of any county may, at any time, either before or after the completion of any county building, invite bids and award contracts for supplying such building with light, heat and power, or any of the same, for any period of time not exceeding ten years; but none of the provisions of section 5660 of the General Code shall apply to any such contracts."

There is here conferred upon the county commissioners general authority to enter into the contract referred to in your inquiry without restriction or limitation as to the character of persons, firms or corporations with whom such contract may be made. It will be observed that it is provided that such contracts shall be let upon bids. If any person, firm, corporation or association, operating a public utility, should seek such contract, the question would then arise as to whether such person, firm, corporation or association may, under the law, enter into the proposed contract, rather than as to the competency of the county commissioners in respect to the same. Since the Electric Light Company, to which you refer, is assumed to be such public utility, it would then be subject to the provisions of section 614-16 of the General Code, which require that every public utility shall print and file with the Public Utilities Commission of Ohio schedules showing all rates, joint rates, rentals, tolls, classifications and charges for services of each and every kind by it rendered or furnished, which were in effect at the time the act in which said section is found took effect, and to the further provision of section 614-18, G. C., as follows:

"No public utility shall demand, charge, exact, receive or collect a different rate, rental, toll or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the commission and in effect at the time."

So that it conclusively appears that no bidder for the contract in question, which is a public utility, could lawfully enter into such contract at a rate of charge for the services rendered in excess of that which is already shown by its schedule on file with the public utility commission. Provision is made, however, for change in such schedule of rates by section 614-20, G. C., as follows:

"Unless otherwise ordered by the commission, no change shall be made in any rate, joint rate, toll, classification, charge or rentals, in force at the time this act takes effect, or as shown upon the schedules which shall have been filed by a public utility in compliance with the requirements of this

act, or by order of the commission, except after thirty days' notice to the commission, which notice shall plainly state the changes proposed to be made in the schedule then in force, and the time when the change, rate, charge, toll, classification or rental shall go into effect; and all proposed changes shall be plainly indicated upon existing schedules, or by filing new schedules thirty days prior to the time they are to take effect, but the commission may prescribe a less time when they may take effect."

So that if the rates and schedules of the utility seeking to enter into the proposed contract with the county commissioners are, at the present time, prohibitive, a change therein may be effected pursuant to the above provision, and until such change is legally effected and becomes operative, such public utility could not legally enter into the proposed contract.

I find no authority or sanction for an application for such change of schedule to be made by the county commissioners in the present case.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1774.

COUNTY AUDITOR'S CERTIFICATE REQUIRED BY SECTION 5660, G. C., MUST BE MADE AS TO ALL THAT PART OF COST OF ROAD IMPROVEMENT WHICH UNDER SECTION 1218, G. C., IS ASSUMED BY COUNTY INCLUDING SHARES OF TOWNSHIP AND ABUTTING PROPERTY OWNERS—CERTIFICATE REQUIRED AS TO FULL AMOUNT.

The county auditor's certificate required by section 5660, G. C., must be made as to all that part of the cost of a road improvement which under section 1218, G. C., a county assumes in the first instance, including the shares of the township and abutting property owners. Where a contract is let for a road improvement under chapter VI of the Cass highway law, the county auditor's certificate required by section 5660, G. C., must be made as to the full amount of the proposed contract, including the shares of the township and property owners.

COLUMBUS, OHIO, July 11, 1916.

HON. G. A. STARN, *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—I have your request for an opinion under date of May 29, 1916, which request reads as follows:

"By reason of section 5660 of the General Code, the county auditor is obliged to certify that the money required for the payment of a contract is in the treasury to the credit of the fund from which it is to be drawn before a contract can be entered into by the county commissioners.

"The county commissioners have entered into several contracts for the improvement of public roads, a portion of which is to be paid by the township trustees and a portion by the owners of real estate benefited by the improvement. Also a portion is to be paid by the state.

"In determining whether or not the money is now in the treasury so that the auditor can make his certificate, should he take into consideration

only the portion to be paid by the county on contracts already let as well as those to be let, or should he take into consideration the amount to be paid by the county, township and property owner. The contract entered into provides that the commissioners shall pay the whole amount not paid by the state. The portion to be paid by the township trustees and the abutting property owners is not in the county treasury and therefore the auditor cannot certify that it is in the treasury."

In response to my request for additional information as to the exact question upon which my opinion is desired by you, you advised me under date of June 10, 1916, in part as follows:

"Suppose for instance we have in our treasury, for the purpose of improving or constructing roads, the sum of $100,000.00. An agreement is entered into by the county commissioners with the state highway department for the improvement of a road whereby the county agrees to pay, say $40,000.00, the balance to be paid by the state. Of this $40,000.00 which the county agrees to pay, the abutting property owners and the township trustees will pay $20,000.00, leaving the amount that the county will finally pay but $20,000.00, although it is primarily liable for $40,000.00.

"Other contracts for the improvement of highways in the county by the county commissioners have been entered into under authority of section 85, et seq., of the Cass highway law, being section 6906, et seq., G. C. By virtue of the provisions of these sections the township trustees and property owners benefited by the improvement have agreed to pay certain portions of the cost of the improvement.

"In determining what amount of money is in the treasury for the purpose of these contracts, should the county auditor deduct from the $100,000.00 originally in the treasury the $40,000.00 agreed to be paid by the county for the improvement of the state highway, leaving $60,000.00 in the treasury, or should there be deducted from the $100,000.00 only the $20,000.00 which the county will eventually be obliged to pay, and which would leave $80,000.00 in the treasury instead of $60,000.00?

"Again suppose contracts have been entered into by the county commissioners under section 85 et seq., of the Cass highway law amounting to $50,000.00, of which the township trustees and the benefited property owners have agreed to pay $25,000.00, should there be deducted the $50,000.00 or the $25,000.00 from the amount left in the treasury?"

Section 5660, G. C., referred to by you, reads as follows:

"The commissioners of a county, the trustees of a township and the board of education of a school district, shall not enter into any contract, agreement or obligations involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of money, unless the auditor or clerk thereof, respectively, first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate and in process of collection and not appropriated for any other purpose; money to be derived from lawfully authorized bonds sold and in process of delivery shall, for the purpose of this section, be deemed in the treasury and in the appropriate fund. Such certificate shall be filed and forthwith recorded, and the sums so certified shall not thereafter be considered unappropriated until the county,

township or board of education, is fully discharged from the contract, agreement or obligation, or as long as the order or resolution is in force."

I will first consider the question submitted by you in reference to improvements carried forward by the state highway department. It is provided by section 1218, G. C., in part as follows:

"No contract shall be let by the state highway commissioner in a case where the county commissioners or township trustees are to contribute a part of the cost of said improvement unless the county commissioners of the county in which the improvement is located shall have made a written agreement to assume in the first instance that part of the cost and expense of said improvement over and above the amount to be paid by the state. Where the application for said improvement has been made by the township trustees, then such agreement shall be entered into between the state highway commissioner and the township trustees. Such agreement shall be filed in the office of the state highway commissioner with the approval of the attorney-general endorsed thereon as to its form and legality."

Where a highway improvement is carried forward by the state on the application of county commissioners, the state looks only to the county for the payment of all that part of the cost and expense of the improvement over and above the amount to be paid by the state. All moneys disbursed in connection with the improvement, with the exception of the funds contributed by the state, are, under the provisions of section 1212, G. C., to be paid by the treasurer of the county in which the highway is located upon the warrant of the county auditor, issued upon the requisition of the state highway commissioner. Using your illustration, which is that of a county agreeing to assume in the first instance $40,000.00 of the cost and expense of an improvement, the balance to be paid by the state, and the $40,000.00 to be ultimately paid by the county, township and property owners, the county auditor is not authorized to make his certificate that the money required for the payment of the county's obligation is in the treasury to the credit of the fund from which it is to be drawn and not appropriated for any other purpose, unless this fact be true as to the entire $40,000.00. If only the $20,000.00 to be paid by the county is in the treasury and the $20,000.00 to be paid by the interested township or townships and the abutting property owners is not in the treasury, the county auditor is not authorized to make his certificate to the effect that the entire $40,000.00 is in the treasury. The entire sum of $40,000.00 so certified must thereafter be retained in the county treasury and applied only upon the obligation in question until the county is fully discharged from the same. If the sum of $100,000.00 is in the treasury and parts thereof are available for the payment of the shares of the county, interested township or townships and property owners respectively, then under the illustration used by you the $20,000.00 to be paid by the county must be deducted from the sum in the treasury applicable to the payment of the county's share of an improvement of this class, the amount to be paid by the township must be deducted from the sum in the treasury available for such purpose, and the amount to be paid by the abutting property owners must be deducted from the sum in the treasury applicable to that purpose, and only such sums as are left after this deduction is made may thereafter be regarded as available for use in connection with any other agreements made under section 1218, G. C.

Coming now to consider your question in so far as it involves improvements carried forward by the county commissioners, it should be observed that the contract for the improvement is made between the county commissioners and the contractor or builder. The latter knows only the county, and has a right to look

to the county for the payment of the full amount expressed in the contract. Under the scheme of road improvement provided by section 6906, G. C., et seq., all matters of finance are handled by the county commissioners; under the provisions of section 6927, G. C., the county commissioners levy the tax for that part of the cost of the improvement to be paid by the interested township or townships; under the provisions of section 6922, G. C., and the related sections, all special assessments are made by the county commissioners, and under the provisions of section 6929, G. C., county commissioners issue bonds not only in anticipation of taxes levied upon the county for the county's share of the cost, but also in anticipation of taxes levied upon the interested township for its share of the cost and in anticipation of special assessments levied against the benefited real estate. If it is proposed by the county commissioners to let a contract for the construction or improvement of a road involving an expenditure of $40,000.00, a part of which is to be paid by the county, a part by the township or townships in which the road is situated and a part by the owners of benefited real estate, the county auditor's certificate, made under section 5660, G. C., must be made as to the entire $40,000.00, and the same method as to deductions hereinbefore set forth must be followed and the result of the making of such certificate will be to reduce by $40,000.00 the amounts in the county treasury and applicable to the payment of the respective shares of the county, township and property owners.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1775.

COUNTY AUDITOR'S CERTIFICATE REQUIRED BY SECTION 5660, G. C. —LEVIES MADE UNDER SECTION 7419, G. C., MAY ISSUE AS SOON AS SUCH LEVIES ARE PLACED ON DUPLICATE AND ARE IN PROCESS OF COLLECTION—WHEN SUCH LEVIES ARE ON DUPLICATE AND IN PROCESS OF COLLECTION.

As to levies made under section 7419, G. C., the county auditor's certificate required by section 5660, G. C., may issue as soon as such levies have been placed on the duplicate and are in process of collection. Such levies cannot be regarded as placed on the duplicate and in process of collection until the duplicate of the books containing the tax list has been made up by the county auditor and delivered to the county treasurer.

COLUMBUS, OHIO, July 11, 1916.

HON. LINDSEY K. COOPER, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—I have your communication of June 13, 1916, which communication reads as follows:

> "Enclosed herewith find opinion which I have just rendered to our county auditor. The plan which I have suggested in this opinion, being out of the ordinary mode of procedure, the auditor felt that he would not be justified in so proceeding without your opinion in the premises. And, it may be, that I may have been influenced, to some extent, by the very urgent need of immediately having the roads of this county repaired.
>
> "Our county commissioners have arrangements to borrow the money to do this work, at once, if a valid contract can be made to start the work.

We are now entirely ready to enter into the contracts for the repair of the roads if the auditor can make this certificate. If it is necessary to wait for the clerical work to be done on the books in making up the extensions on duplicate, which could not be done before the middle of August, it will be entirely too late to procure good results from the work this year."

The opinion rendered by you to the auditor of your county, a copy of which was enclosed with your letter, reads as follows:

"Replying to your verbal inquiry as to whether or not you would be authorized to certify, that the money required for the payment of the obligation to be incurred by the contract of the county commissioners, for certain road repairs, 'has been levied and placed on the duplicate, and in process of collection,' will say:

"I understand the facts to be as follows:

"At the present June session of the board of county commissioners of this county, a tax of two (2) mills has been duly levied upon all taxable property of the county, for the purpose of making repairs upon certain of the principal highways of this county, under what is known as the Emergency Road Law, section 7419, General Code.

"I understand that the difficulty of entering this levy upon the tax duplicate, so that it may be certified by you as having been entered thereon, lies in the fact that the amount of taxes, other than this emergency road tax, cannot be determined until after the budget commission meets in August, and passes upon the various levies for taxes submitted to said budget commission.

"The duties of the budget commission are set forth in the sub-sections of section 5649, General Code, and I have been unable to find any duty resting upon the budget commission relative to the emergency road tax, above mentioned, and am of opinion that the amount having been levied therefor at two (2) mills on the dollar, being less than the amount plainly authorized by section 7419, General Code, the budget commission has nothing whatever to do with said levy.

"I am fully aware of the fact that it would be impracticable to make up the duplicate of the entire county in the extended form required for practical use in collecting the taxes, but am of opinion that, assuming that my determination that the budget commission has nothing whatever to do with this special levy, is correct, that you could enter upon the duplicate the fact and statement that this tax of two (2) mills upon all of the taxable property of the county is levied, and upon such statement and fact being entered upon the duplicate, that you would then be justified in making the certificate relative to the said tax being levied and placed on the duplicate, and in process of collection, required by section 5660, General Code, to be made as a condition precedent to the county commissioners entering into a contract for the expenditure of the same."

Section 5660, G. C., referred to by you, reads as follows:

"The commissioners of a county, the trustees of a township and the board of education of a school district, shall not enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of money, unless the auditor or clerk thereof, respectively, first certifies that the money required for the payment of such obligation or appropriation is in the

treasury to the credit of the fund from which it is to be drawn or has been levied and placed on the duplicate and in process of collection and not appropriated for any other purpose; money to be derived from lawfully authorized bonds sold and in process of delivery shall, for the purpose of this section, be deemed in the treasury and in the appropriate fund. Such certificate shall be filed and forthwith recorded, and the sums so certified shall not thereafter be considered unappropriated until the county, township or board of education is fully discharged from the contract, agreement or obligation, or as long as the order or resolution is in force."

It has been the generally accepted view that as to funds falling within the purview of section 5649-3d, G. C., so much of section 5660, G. C., as provides that the certificate may be issued by the auditor when the money needed for the expenditure has been levied and is in process of collection, has been repealed by implication by the enactment of said section 5649-3d, G. C. Such was the holding of my predecessor, Hon. Timothy S. Hogan, in opinion No. 97, rendered on February 1, 1912, and found at page 1128 of the Report of the Attorney-General for that year. It is my opinion, however, that said section 5649-3d, G. C., does not apply to the proceeds of levies made under section 7419, G. C., and that as to such funds the auditor's certificate may be issued as soon as the levies have been placed on the duplicate and are in process of collection. Such levies are special levies made for the construction, reconstruction or repair and maintenance of particular roads, and the purpose for which such levies are made is not one to be set forth in the annual budget. In view of the above it seems clear that as to levies made under section 7419, G. C., for the purpose of repairing specific highways, the auditor's certificate may issue as soon as such levies have been placed on the duplicate and are in process of collection. It therefore remains to consider the question of when such levies may be regarded as placed on the duplicate and in process of collection. It is the duty of the county treasurer to collect taxes, and it would seem clear that a tax cannot be regarded as in process of collection until the power and authority of the county treasurer has been invoked and the machinery of his office put in motion. This cannot be regarded as having been done until the county auditor has delivered to the county treasurer the duplicate of the books containing the tax list. Under the provisions of section 2595, G. C., this duty is to be performed on or before the first day of October of each year. Where, therefore, a levy has been made under section 7419, G. C., for the repair of certain specified roads, the county auditor's certificate, under section 5660, G. C., may not be issued as to such funds until the duplicate of the books containing the tax list for the current year has been fully made up by the county auditor and delivered to the county treasurer.

I deem it proper in this connection to call attention to the fact that section 7433, G. C., under which levies made under section 7419, G. C., might be anticipated by a bond issue, was repealed by the Cass highway law, 106 O. L., 574.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1776.

OHIO PENITENTIARY COMMISSION—PROPOSITION OF ARCHITECTS UNDER DATE OF JULY 6, 1916, LEGAL.

Proposition of architects to Ohio penitentiary commission under date of July 6, 1916, legal.

COLUMBUS, OHIO, July 13, 1916.

HON. SAMUEL J. BLACK, *Secretary Ohio Penitentiary Commission, Upper Sandusky, Ohio.*

DEAR SIR:—At the request of Hon. W. A. Greenlund, one of the members of your commission, I have gone over the proposition submitted to your commission on July 6th by Messrs. Richards, McCarty and Bulford, architects appointed by you with the approval of the governor, for the erection of the new penitentiary. The proposition submitted is as follows:

"We hereby propose to prepare such preliminary information, plans and reports in connection with the proposed new penitentiary for the state of Ohio, as are hereinafter described, upon the following terms and conditions, namely:

"You are to furnish us with topographical surveys of such portions of the penitentiary farm as may be necessary for our work. We will take these surveys, properly develop them, and prepare a general ground plan of the entire institution. This will show the location of all buildings proposed for the completed institution, their size and relation to each other; but will not show detailed plans of each of the buildings. This plan will locate the roads and drives; the landscape features; drainage; railroad tracks; power, water, and connecting steam lines, etc., complete, without giving the details as to sizes of such lines.

"In addition to the ground plans above described, we will furnish such sections and elevations as will show the general grade relations of the various departments of the institution; general elevations of the buildings; and we will also prepare a large bird's eye view of the complete institution showing all of the buildings and enclosures in perspective in such manner as to give a comprehensive and intelligent idea of the entire work to be undertaken.

"All of the plans and perspectives will be accompanied by such legends, charts and descriptions as will make clear the relation of the various units to each other; and also approximate estimates of cost of the various units. These estimates, of course, will be based upon cubic foot prices for the buildings, as the details will not be sufficiently worked out in these preliminary plans to make possible the preparation of itemized estimates.

"In addition to the drawings we will prepare a general description of the entire institution, and character of construction proposed for the various buildings complete.

"It is understood that in working this matter out we are to prepare any number of sketches that may be required to rearrange and bring into proper relation, satisfactory to you, the various departments of the institution proposed; that you are at all times to have the advantage of consultation with us upon any matters that may seem proper to you to incorporate in the work.

"It is understood that we are to commence this work immediately, pushing it forward as rapidly as possible; and the preliminary plans above

described are to be ready for inspection not later than the first of November, 1916.

"In addition to the above, we are to accompany you on such trips of inspection as you may deem necessary; visiting other institutions, and spending as much time as may be necessary for such visits to gather data for use in this work.

"For our professional services, as above outlined, it being understood that this also covers any and all assistants that we may be compelled to employ in the preparation of the work, we are to be paid a sum not to exceed five thousand ($5,000.00) dollars; and that this sum, or any sum less, is to be paid us upon the completion of the above described preliminary work to your satisfaction and approval.

"If, upon the completion of this service, you desire to go further with our employment in the preparation of other preliminary plans of each of the units of the institution, or working drawings, details and specifications for any or all of the buildings comprehended in the work, paying us therefor the customary percentage for complete plans and specifications; namely, three and one-half per cent. of the cost of the work for which complete plans are prepared, then, in that event, we will credit on our full fee for the units of the institution for which we prepare complete plans and specifications such a proportion of the five-thousand-dollar preliminary fee as the cost of the units for which complete plans are prepared bears to the cost of the entire institution.

"It is understood and agreed, however, that this proposition, if accepted by you, is not binding upon you beyond the preparation of the preliminary plans first above outlined; and it is entirely at your option as to whether our employment extends beyond this point; and it is not binding upon you or the state of Ohio to pay to us an amount in excess of the five thousand dollars first above named as our professional fee until a further agreement be entered into.

"In addition to the fee of five thousand dollars above mentioned, we are to be paid our actual traveling expenses in making investigations regarding this work, it being understood that no traveling expenses shall be incurred without first notifying you and receiving your approval as to whether same shall be necessary.

"It is further understood regarding the traveling expenses above mentioned, which we are to be paid in addition to our professional fee, that this does not apply to traveling expense required in making trips between the penitentiary farm, near London, Ohio, and our office in Columbus, that all expense incident to such trips is included in our first named professional fee.

"We agree that the preliminary plans and other data referred to above which may be prepared by us shall become the property of the state of Ohio in the custody of the Ohio penitentiary commission."

Section 11 of an act passed April 19, 1913, 103 O. L., 247, providing for your commission, is as follows:

"Such commission shall prepare ground plans of and plans for the erection of a new penitentiary upon the site so purchased or appropriated by the state; it shall, by visitation or otherwise, secure information, employ a competent architect, and do whatever else may be necessary and essential to obtain the best possible plans for this purpose. The compensation of such architect shall be fixed by the commission, and shall, to-

gether with other expenses incident to the preparation of such plans, be paid in the same manner as other expenses of the commission. The employment and compensation of such architect shall be subject to the approval of the governor."

The said section grants full authority to your commission to employ an architect and to do whatever may be necessary and essential to obtain the best possible plans for the new penitentiary. You are likewise given the authority to fix the compensation, which compensation is subject to the approval of the governor.

I have carefully gone over the proposition submitted by the architects, and find the same to be in every way legal, and find that your commission is fully authorized to accept the same not to be effective, however, until it likewise receives the approval of the governor, subject of course to their being a sufficient appropriation to meet the amount called for in the proposition.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1777.

COUNTY BOARD OF EDUCATION—WHERE PRIOR TO AUGUST 27, 1915, NUMBER OF TEACHERS EMPLOYED IN ANY SUPERVISION DISTRICT REDUCED BELOW TWENTY, SUCH SUPERVISION DISTRICT THEREBY ABOLISHED—IF BOARD ACTED PURSUANT TO SECTIONS 4692, 4736 OR 4738, G. C., 106 O. L., 396, REDUCED NUMBER OF TEACHERS BELOW THIRTY, DISTRICT ABOLISHED—WHEN POSITION OF DISTRICT SUPERINTENDENT IS ABOLISHED FOR ABOVE REASONS—QUESTION OF TERRITORY ALSO CONSIDERED.

When the county board of education, pursuant to sections 4736 *or* 4738, *G. C.,* 138 *and* 140, *prior to August* 27, 1915, *reduced the number of teachers employed in any supervision district below twenty, such supervision district was thereby abolished.*

Where the county board of education, pursuant to sections 4692, 4736 *or* 4738, *G. C.,* 106 *O. L.,* 396, *reduced the number of teachers in any supervision district below thirty, such supervision district was thereby abolished.*

Where a district superintendent was employed prior to the amendment of sections 4692, 4736 *and* 4738, *G. C.,* 106 *O. L.,* 396, *and the county board of education, pursuant to said sections reduce the number of teachers employed in any supervision district below twenty, such supervision district and the position of the district superintendent thereof so employed are abolished, and such district superintendent is not thereafter entitled to salary. Where the territory of a rural school district was reduced to less than fifteen square miles by action of the county board of education, pursuant to section* 4736, *G. C., prior to August* 27, 1915, *such rural school district was thereby abolished.*

COLUMBUS, OHIO, July 13, 1916.

HON. ROBERT C. PATTERSON, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—Yours under date of June 12, 1916, is as follows:

"The Montgomery county board of education have asked me for advice as to their duty in the equitable division of school funds and indebtedness

in cases of transfers of territory, under General Code, sections 4692 and 4736. As the questions involved are of general interest throughout the state, I would respectfully ask for an opinion from you upon them.

"The facts are as follows: During the past year, under the authority of General Code, sections 4692 and 4736, the county board of education has at different times transferred territory from Perry township to the Brookville village district, the Pyrmont rural district, and to a newly created district known as the Johnsville-New Lebanon rural district. In creating the latter district the entire territory of the Johnsville rural district was transferred and its board of education abolished. There now remains of the Perry township district only what is included in two former subdistricts, so that the old Perry township district is practically wiped out.

"Prior to any of these transfers the Perry township and Johnsville districts had made a contract with U. E. Erbaugh as district superintendent for a period of three years, two years of which are yet to run.

"The questions asked are: Is Mr. Erbaugh entitled to his salary under the above contract for the two years; and if so is the indebtedness for said salary to be apportioned by the county board of education between the Brookville village district, the Pyrmont rural district and the Johnsville-New Lebanon rural district?"

In a subsequent communication received June 26, 1916, you state that it is your information that Mr. Erbaugh was employed as district superintendent on April 8, 1915.

As I understand your statement of facts then, at the time of the election of the district superintendent in question for a term of three years on April 8, 1915, Perry township rural school district and the Johnsville rural school district constituted the supervision district for which such district superintendent was elected. Since the election of said district superintendent the entire Johnsville rural school district has been transferred to the Johnsville-New Lebanon rural school district, and the board of education of the Johnsville rural school district was thereby abolished. All of Perry township rural school district, except that part thereof originally constituting two subdistricts, has been in like manner transferred by the county board of education to other rural school districts which were not a part of the supervision district for which Mr. Erbaugh was elected. So that since the election of Mr. Erbaugh all of the territory of the supervision district for which he was elected, except what formerly constituted two subdistricts of Perry township school district, has been transferred to village or rural school districts outside of the supervision district for which the district superintendent in question was elected, for school purposes. If such transfer for school purposes effects a transfer for supervision purposes, then there is left of the supervision district for which the district superintendent was elected only what was originally two subdistricts of Perry township school district.

Section 4738, G. C., 104 O. L., 140, provided that:

> "The county board of education shall within thirty days after organizing, divide the county school district into supervision districts, each to contain one or more village or rural school districts."

Substantially the same provision was carried into the amendment of this section in 106 O. L., 396. This provision clearly indicates a purpose of the legislature that rural and village districts should be dealt with as units in the matter of supervision, and that supervision districts should be constituted of rural or village school districts. This purpose is emphasized by the provision of section 4743,

G. C., 104 O. L., 133, in reference to the payment of the compensation of district superintendents, that:

> "The half paid by the supervision district shall be pro rated among the village and rural school districts in such district in proportion to the number of teachers employed in each district."

Here again the rural and village school districts are treated as units. From the foregoing the intent that all of a rural or village school district should be included within the same supervision district seems manifest. That being true it would follow that when territory of a rural or village district in one supervision district is transferred to a rural or village school district in another supervision district such transferred territory thereby becomes a part of the supervision district to which it is transferred. Applying this conclusion to the facts under consideration, it would result that there is now left of the supervision district for which the superintendent was elected only what was two subdistricts of Perry township.

Section 4736, G. C., 104 O. L., 138, provided in part that:

> "In no case shall any rural district be created containing fifteen square miles."

So that if, prior to August 27, 1915, by reason of transfers of territory therefrom any rural school district was reduced in area below fifteen square miles, such rural school district was thereby abolished, and it became the duty of the county board of education to transfer such remaining territory to other rural or village district or districts. If all the transfers of territory spoken of in your inquiry were effected prior to August 27, 1915, and the territory of what remained of Perry township was not fifteen square miles or more in extent, the supervision district was thereby abolished and the position of district superintendent with it, because there was not then left in such supervision district either a rural or village district.

At the time of the election of the district superintendent in question it was provided by section 4736, G. C., 104 O. L., 138, that:

> "The (county) board shall arrange the schools according to topography and population in order that they may be most accessible to pupils. To this end the county board shall have power by resolution at any regular or special meeting to change school district lines and transfer territory from one rural or village school district to another."

Section 4738, G. C., 104 O. L., 140, provided that:

> "The county board of education shall, within thirty days after organizing, divide the county school district into supervision districts, each to contain one or more village or rural school districts. * * * The territory in the different districts shall be as nearly equal as practicable, and the number of teachers employed in any one supervision district shall not be less than twenty nor more than sixty.
>
> "The county board of education shall, upon application of three-fourths of the presidents of the village and rural district boards of the county, redistrict the county into supervision districts."

Thus we find that under sections 4736 and 4738, G. C., 104 O. L., 133, at the

time the district superintendent in question was elected there was not only full power in the county board of education to transfer territory from one rural or village school district to another, but under certain prescribed conditions it became the mandatory duty of the board to redistrict the county school district into supervision districts.

All contracts with district superintendents made while the above statutory provisions were operative must be deemed to have been made subject to the exercise of the power therein conferred and the obligations of such contracts are not impaired thereby. So that if the county board, in the exercise of the authority conferred by the statutory provisions, above referred to, prior to August 27, 1915, when the same were repealed, so transferred territory from one supervision district to another, or others, as to abolish the supervision district from which such territory was transferred, such action would operate to abolish the position of the district superintendent of the abolished supervision district.

It will be noted that by section 4738, G. C., 104 O. L., 140, supra, it was provided that the number of teachers employed in any one supervision district shall not be less than twenty. If during the life of this provision the number of teachers employed in any supervision district was reduced below twenty by reason of transfers of territory therefrom, as provided in sections 4736 and 4738, G. C., supra, the supervision district would thereby be abolished by operation of law and it would become mandatory upon the county board of education to transfer the remaining territory of such abolished supervision district to another supervision district.

Sections 4692, 4736 and 4738, G. C., were amended in 106 O. L., 396, to provide in part as follows:

> "Section 4692. The county board of education may transfer a part or all of a school district of the county school district to an adjoining district or districts of the county district. * * * nor shall such transfer take effect if a majority of the qualified electors residing in the territory to be transferred shall, within thirty days after the filing of such map, file with the county board of education a written remonstrance against such proposed transfer.
>
> "The county board of education is authorized to make an equitable division of the school funds of the transferred territory either in the treasury or in the course of collection. And also an equitable division of the indebtedness of the transferred territory.
>
> "Section 4738. The county board of education shall divide the county school district, any year, to take effect the first day of the following September, into supervision districts, each to contain one or more village or rural school districts. * * * The territory in the different districts shall be as nearly equal as practicable, and the number of teachers employed in any one supervision district shall not be less than thirty. The county board of education shall, upon application of three-fourths of the presidents of the village and rural district boards of the county, re-district the county into supervision districts.
>
> "Section 4736. The county board of education shall arrange the school districts according to topography and population in order that the schools may be most easily accessible to the pupils, and shall file with the board or boards of education in the territory affected, a written notice of the proposed arrangement; which said arrangement shall be carried into effect as proposed unless, within thirty days after filing, such notice with the board or boards of education, a majority of the qualified electors of the territory affected by such order of the county board, file a written remon-

strance with the county board against the arrangement of the schools so proposed. The county board of education is hereby authorized to create a school district from one or more school districts or parts thereof. The county board of education is authorized to appoint a board of education for such newly created school district and direct an equitable division of funds or indebtedness belonging to the newly created district."

Prior to this amendment section 4692 applied only to the transfer of territory by mutual consent of the boards of education from and to which territory should be transferred. By the amendment thereof the county board of education is authorized to transfer territory from one school district to another, subject to a remonstrance of a majority of the electors residing in the territory to be transferred. It is further provided by said section, as amended, that:

"If an entire district be transferred the board of education of such district is thereby abolished."

While section 4692, G. C., was very materially changed by this amendment, it is very questionable if a comparison of amended section 4692, G. C., with sections 4736, G. C., prior to its amendment, will disclose any enlargement of the power of the county board of education to transfer territory from one rural or village school district to another. Indeed the authority conferred in amended section 4692, G. C., is restricted by the provision for remonstrance not found in original section 4736, G. C. The provision as to the abolishment of the board of education, where all the territory of the district is transferred, certainly adds nothing to the power to transfer.

The most important, if not the only material change made by the amendment of section 4736, G. C., in respect to the power to transfer territory, is the restriction placed thereon by the provision that the proposed arrangement may be defeated in any case by a remonstrance of a majority of the electors of the territory affected by the order. It is true that there is here found specific declaration of power to create new districts, couched in more apt terms than is shown by the original section, but it will not be overlooked that it was provided in the original section that:

"In no case shall any rural district be created containing less than fifteen square miles."

It needs no strained construction of this provision to clearly disclose therein power and authority to create rural school districts.

As to the power of the county board of education in respect to the transfer of territory, no change was effected by the amendment of section 4738, G. C., 106 O. L., 396.

So that while there is a more complete setting out of detail by the amendment of the above mentioned sections, it is not believed that the general power and authority of the county board of education to effect a transfer of territory from one rural or village school district to another, and to thereby abolish a supervision district or to redistrict the county school district into supervision districts has been thereby enlarged or so changed in any way that the exercise of any of the powers therein conferred as to such matters would result in an impairment of a contract with a district superintendent, made prior to such amendment. I therefore conclude that it was within the power of the county board of education, both before and after the amendment of sections 4692, 4736 and 4738, G. C., 106 O. L., 396, to transfer all the territory of a supervision district to rural

and village school districts in another supervision district, thereby abolishing the supervision district from which such transfers were made, and the position of the district superintendent theretofore elected in such abolished supervision district.

It will be further remembered that prior to the enactment of Am. Senate Bill No. 282, 106 O. L., 396, by which section 4738, G. C., was amended, effective on August 27, 1915, the minimum number of teachers permitted in any supervision district was twenty. This minimum was increased by the amendment in 106 O. L., 396, supra, to thirty. There was then no authority for the existence of a supervision district in which there were employed less than twenty teachers before, and less than thirty teachers after August 27, 1915. So that if by the action of the county board of education, pursuant to law, in transferring territory from one supervision district to another, the number of teachers employed in any supervision district was reduced below twenty before or below thirty after August 27, 1915, the existence of the supervision district from which such territory was transferred was wholly without authority of law and therefore abolished. It then became the mandatory duty of the county board of education to transfer the remaining territory of such abolished supervision district to another district or districts for supervision purposes, and to so arrange the schools that there should not be less than the minimum number of teachers employed in any supervision district at any time. That is to say, if by reason of transfers of territory effected by the action of the county board of education prior to August 27, 1915, the number of teachers was reduced below twenty, or by reason of such action after that date the number of teachers was reduced below thirty, the supervision district having employed therein less than the minimum number of teachers, thereby became abolished, and it was the further duty of the county board to so transfer the remaining territory of such supervision district, and to arrange the schools that each supervision district should have not less than the minimum number of teachers.

It would then follow that if by reason of transfers of territory, made prior to August 27, 1915, from the supervision district in which the district superintendent in question was elected, the number of teachers employed in such supervision district was reduced below twenty, such supervision district and the position of the district superintendent were thereby abolished, and such superintendent was not thereafter entitled to any salary. If by similar action of the county board of education, after August 27, 1915, the number of teachers employed in any supervision district was reduced below twenty, a like result would follow, that being the established minimum at the time the superintendent was elected. The effect of the foregoing, stated briefly, is this: Transfers of territory could not be made by the county board of education prior to August 27, 1915, which would reduce the number of teachers employed in any supervision district below twenty nor after said date which would reduce such number of teachers below thirty without the whole of such supervision district being transferred and the schools so arranged that each supervision district employed the minimum number of teachers.

Another phase of this question demands notice. It has been observed that the increase in the minimum number of teachers took effect on August 27, 1915. So that, as was held in opinion No. 463 of this department, found at page 944 of the Opinions of the Attorney-General for the year 1915, it then became the mandatory duty of the county board of education, by force of such amendment alone, to re-district and to re-arrange the schools of the county district so that no supervision district should have less than thirty teachers. In other words, the operative effect of such increase of the minimum number of teachers in any supervision district was to abolish all those supervision districts then having employed less than thirty teachers—a result which follows not from the exercise of any authority of law in the county board of education prior thereto, but by

sheer operation of law alone. The amendment of section 4738, G. C., the operation of which effects the above result, was passed on May 27, 1915. The contract of employment entered into by a district superintendent, prior thereto, could not be said to have contemplated the operation of such amendment nor could the obligation of such contract be in any way abrogated or impaired by the operation thereof. It follows from the foregoing that if there were twenty or more and less than thirty teachers employed in the supervision district in question on August 27, 1915, by reason of which such supervision district was abolished by operation of the amendment above mentioned then becoming effective, and the territory of such supervision district was thereafter transferred to another, or other, supervision districts by the board, such abolishment of the district and transfer of territory could not operate to impair the contract of the district superintendent who was employed on April 8, 1915, as stated in your latter communication, who is entitled to have his contract carried out subject only to the law as it existed when the same was entered into, as held in opinion No. 643 of this department hereinbefore referred to. Such contract, as heretofore stated, is subject only to the exercise of the authority conferred by law upon the county board of education in respect to transfers of territory, re-arrangement of schools and re-districting of the county school district at the time such contract was entered into.

If by reason of the transfer of territory of one or more rural or village school districts to another supervision district, or re-districting the county school district or districts, by the county board of education pursuant to sections 4692, 4736 and 4738, G. C., after August 27, 1915, the number of teachers in the supervision district from which such territory was transferred is reduced below thirty and not below twenty, such supervision district would be thereby abolished as before stated, but the contract of the district superintendent could not be effected thereby because his contract was subject to abrogation by the reduction of the number of teachers below the minimum as fixed by law at the time his contract was entered into, viz., twenty.

You further inquire if the salary of a district superintendent is included in the indebtedness of the transferred territory.

By section 4692, G. C., supra, it is provided that the county board is authorized to make an equitable division of funds and indebtedness of a newly created district. Indebtedness as here used is difficult of definition, but it is not believed to include certain classes of liabilities or obligations. It does not include liabilities for current expenses not yet due. It would not include teachers' salaries contracted for but not yet due. For like reason it is not deemed to include the liability of village and rural school districts for their pro rata share of the compensation of the district superintendent not yet earned. Indebtedness within the meaning of the foregoing statutes must be an accrued liability.

I am therefore of opinion that the salary of a district superintendent is not an indebtedness subject to division by the county board of education, upon the transfer of territory. The proportion in which such salary shall be paid is definitely prescribed by section 4743, G. C., 104 O. L., 133, as follows:

> "The half paid by the supervision district shall be pro rated among the village and rural school districts in such district in proportion to the number of teachers employed in each district."

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1778.

APPROVAL, RESOLUTION FOR IMPROVEMENT OF CERTAIN ROADS IN CHAMPAIGN, FRANKLIN, LAKE, LORAIN, MAHONING, MEIGS, PREBLE AND SANDUSKY COUNTIES.

COLUMBUS, OHIO, July 14, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of July 7, 1916, transmitting to me for examination final resolutions relating to the following road improvements:

"Champaign County—Sec. 'P,' Urbana-West Jefferson road, Pet. No. 2146, I. C. H. No. 188.

"Franklin County—Secs. 'A' and 'L,' Columbus-Marysville road, Pet. No. ----, I. C. H. No. 48. 'M and R.'

"Lake County—Sec. 'A,' Euclid-Chardon road, Pet. No. 2560, I. C. H. No. 34.

"Lorain County—Sec. 'O,' Oberlin-Norwalk road, Pet. No. 2599, I. C. H. No. 290. 'M and R.'

"Mahoning County—Sec. 'O,' Akron-Youngstown road, Pet. No. 3133, I. C. H. No. 18. (Also duplicate.)

"Mohoning County—Sec. 'A,' Youngstown-Lowellville road, Pet. No. 3132, I. C. H. No. 14.

"Meigs County—Sec. 'M,' Middleport-Bradbury road, Pet. No. 2677, I. C. H. No. 492.

"Meigs County—Sec. 'M,' Middleport-Bradbury road, Pet. No. 2677, I. C. H. No. 492.

"Meigs County—Sec. 'K,' Athens-Pomeroy road, Pet. No. 2675, I. C. H. No. 159.

"Preble County—Sec. 'F-2,' Eaton-Richmond road, Pet. No. 2836, I. C. H. No. 249.

"Preble County—Sec. 'A,' Eaton-Greenville road, Pet. No. 2838, I. C. H. No. 210.

"Preble County—Sec. 'F,' Dayton-Indianapolis road, Pet. No. 2835, I. C. H. No. 28. 'M and R.'

"Sandusky County—Sec. 'K,' Fremont-Bellevue road, Pet. No. 2886, I. C. H. No. 274, MM No. 1."

I find these resolutions to be in regular form and am, therefore, returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1779.

APPROVAL, BOND OF JOSEPH R. BURKEY, BRIDGE ENGINEER OF STATE HIGHWAY DEPARTMENT.

COLUMBUS, OHIO, July 14, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of July 11, 1916, transmitting to me for examination the bond of Joseph Raymond Burkey, recently appointed bridge engineer of the state highway department.

I find this bond to be properly drawn and am, therefore, returning the same with my approval as to form endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1780.

CANDIDATES FOR OFFICE—FEE PRESCRIBED BY SECTION 4970-1, G. C., IS NOT REQUIRED TO BE PAID BY CANDIDATES WHO ARE NOMINATED BY HAVING THEIR NAMES WRITTEN UPON PRIMARY BALLOT.

The fee prescribed by section 4970-1, *G. C.*, 106 *O. L.*, 548, *is not required to be paid by candidates who are nominated by having their names written upon the primary ballot.*

COLUMBUS, OHIO, July 14, 1916.

HON. ARCHER L. PHELPS, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—Yours under date of July 10, 1916, is as follows:

"On May 27, 1915, the general assembly enacted section 4970-1, G. C. (105-106 O. L., 548), which provides as follows:

"'At the time of filing the declaration of candidacy for nomination for any office, each candidate shall pay a fee of one-half of one per cent., of the annual salary for such office, but in no case shall such fee be more than twenty-five dollars. All fees so paid in the case of candidates for state offices, office of United States senator and congressman-at-large, shall forthwith be paid by the officer receiving the same into the treasury of state. All other fees shall be paid by the officer receiving the same into the trasury of his county to the credit of the county fund. No fee shall be required in the case of candidates for committeeman or delegate or alternate to a convention or for president or vice-president of the United States, nor for offices for which no salary is paid.'

"On April 27, 1915, the general assembly enacted section 4984-1, G. C. (105-106 O. L., 207), which provides as follows:

"'That in the event of any office for which nominations are sought to be made at any primary election, and for which no nominating petitions or declarations of candidacy have been filed within the time prescribed by law by or in behalf of any candidate of a political party, so that in so far as such office is concerned, there is a vacancy on the primary ballot to be nominated, no valid nomination shall be made for such office unless the

name of the person attempted to be nominated and receiving the highest number of votes for said office, shall have been written on at least eight per cent. of all the ballots containing such vacancy, which have been voted at such primary election.'

"I have been asked for my opinion upon the question as to whether or not a candidate who has filed no nominating petition or declarations of candidacy and whose name is not printed upon the primary ballot, but at the primary election is nominated for an office by the writing in of his name upon eight per cent. or more of the ballots voted for at such primary election, is required to pay the fee of one-half of one per cent. of the annual salary of such office, into the county treasury to the credit of the general fund, under the provisions of said section 4970-1, G. C.

"I am of the opinion that section 4970-1 does not apply in cases arising under section 4984-1, for the reason that the fee to be paid by the candidate, under section 4970-1, is the means of securing and is a condition precedent to the printing of the name of the candidate on the ballot, which of course secures to the candidate a very great advantage at the primary election. The filing of a nomination petition and the declaration of candidacy are the voluntary acts of the candidate, and makes him in every sense a candidate for office.

"The provisions of sections 4984-1 are intended to provide a means to a political party to fill in a complete ticket in cases where there are vacancies on the ticket, caused by the failure of any candidate to file the necessary nomination petition and declaration. A person so nominated for an office in many cases has no intention of being a candidate, and has no desire to be a candidate, but being so nominated by the required number of votes, is placed upon the ticket without any voluntary act whatever on his part.

"It is true that an active candidate might seek this means of getting his name on the ticket, but the disadvantages of this means of securing a nomination are so great that any active candidate, for public office, would choose to comply with the provisions of section 4970-1. I am, therefore, of the opinion that it was the intention of the legislature to limit the payment of the fees required by section 4970-1, to those candidates who filed nomination petitions and declarations of candidacy, and that a person nominated for office in the manner provided by section 4984-1 are not required to pay these fees."

While it may be argued with some force that the purpose of the legislature in assessing a fee upon candidates for nomination at primary elections was to at least partially reimburse the public funds for the expenditures made necessary in conducting primary elections, and that the provisions of section 4970-1, 106 O. L., 548, as to the time of the payment of the fee therein prescribed is directory only, and if not paid at the time of filing the declaration of candidacy it might thereafter be paid or the payment thereof enforced, I am more inclined to the view that it was contemplated that only those persons who seek to have their names printed upon the primary ballot should be required to pay the prescribed fee.

In addition to the reasons stated by you in support of this conclusion, it seems that this position is strengthened somewhat by a consideration of the provision of section 4969, G. C., 106 O. L., 544, that:

"All nominations for offices or places on the primary ballot other than those hertofore provided for shall be made by the payment of the proper fees and by the filing of declarations of candidacy and certificates, which

shall be filed with the board of deputy state supervisors at least sixty days before the day for holding the primary election."

The payment of the proper fees herein required clearly has reference to the fee prescribed by section 4970-1, G. C., supra. This provision strongly tends to indicate the legislative intent that the payment of the fee is a condition precedent and that the requirement thereof is mandatory upon persons who file declarations of candidacy to entitle them to have their names placed upon the primary ballot, and that it is contemplated that such fee should be paid only upon the filing of a declaration of candidacy, whereby it is sought to have the name of the candidate printed upon the primary ballot.

I, therefore, concur in the opinion expressed by you and the reasons given therefor.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1781.

TOLEDO MUNICIPAL UNIVERSITY—BOARD OF DIRECTORS OF SAID UNIVERSITY HAVE FULL CONTROL OF FUNDS RAISED BY TAXATION FOR SAID PURPOSE—COUNCIL WITHOUT AUTHORITY TO APPROPRIATE SAID FUNDS.

It is not necessary for that portion of the funds of the municipal university of the city of Toledo, raised by taxation under provision of section 7908, G. C., to be appropriated by the council of said city under provision of section 5649-3d, G. C. The provisions of section 4601, G. C., taken in connection with the provisions of section 7902, et seq., of the General Code, and the provisions of sections 129 and 130 of the charter of said city of Toledo, applicable to the administration of said university funds, vest in the board of directors, created as provided in said section 4601, et seq., of the General Code, the administration and full control of said funds, the same to be paid out by the city treasurer upon the order of said board of directors and the warrant of the city auditor (director of finance of said city) under provision of the latter part of section 7909, G. C.

COLUMBUS, OHIO, July 14, 1916.

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

GENTLEMEN:—In your letter of June 16th you request my opinion upon the following question:

"The city of Toledo has a municipal university organized and operating under the provisions of section 4001, G. C., et seq. At the present time about 85% of the funds required for the maintenance and operation of said institution is raised by tax levy, and is disbursed upon warrants issued by the director of finance (city auditor) made upon the city treasurer who is the custodian of the university funds.

"QUESTION: Is it necessary for the funds of the university, or at least that portion thereof raised by taxation, to be appropriated by council (section 3797, G. C.), or do the provisions of sections 4001 and 4003, G. C., obtain and remove from council any control over the disbursements of the funds raised by taxation for university purposes?"

The provisions of section 3797, G. C., referred to in your inquiry, have been modified by the enactment of section 5649-3d, G. C., which provides as follows:

> "At the beginning of each fiscal half year the various boards mentioned in section 5649-3a, of this act (one of them being the council of a municipal corporation) shall make appropriations for each of the several objects for which money has to be provided, from the moneys known to be in the treasury from the collection of taxes and all other sources of revenue, and all expenditures within the following six months shall be made from and within such appropriations and balances thereof, but no appropriation shall be made for any purpose not set forth in the annual budget nor for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of receipts and balances."

Section 4001, G. C., relates to the administration and management of a university supported in whole or in part by a municipal corporation, and provides as follows:

> "In any municipal corporation having a university supported in whole or in part by municipal taxation all the authority, powers and control vested in or belonging to such corporation with respect to the management of the estate, property and funds given, transferred, convenanted (covenanted) or pledged to such corporation in trust or otherwise for such university, as well as the government, conduct and control of such university shall be vested in and exercised by a board of directors consisting of nine electors of the municipal corporation."

Section 4002, G. C., provides how the directors of said municipal university, referred to in section 4001, G. C., shall be appointed, and section 4003, G. C., provides:

> "Such directors shall serve without compensation and shall have all the powers and perform all the duties conferred or required by law in the government of such university, and the execution of any trust with respect thereto imposed upon the municipal corporation."

Section 7902, G. C., as found in the chapter of the General Code, relating to colleges and universities, provides in part that:

> "As to all matters not herein or otherwise provided by law, the board of directors of a municipal university, college or institution, shall have all the authority, power and control vested in or belonging to such municipal corporation as to the sale, lease, management and control of the estate, property and funds, given, transferred, covenanted or pledged to such corporation for the trusts and purposes relating thereto and the government, conduct and control of such university, college or institution. * * *"

Section 7908, G. C., provides:

> "The council annually may assess and levy taxes on all the taxable property of such municipal corporation to the amount of five-tenths of one mill on the dollar valuation thereof, to be applied by such board to the support of such university, college or institution, and also levy and assess annually five one-hundredths of one mill on the dollar valuation

thereof, for the establishment and maintenance of an astronomical observatory, or for other scientific purposes, to be determined by the board of directors and to be used in connection with such university, college or institution, the proceeds of which shall be applied by the board of directors for such purposes exclusively. But such taxes shall only be levied and assessed when the chief work of such university, college or institution is the maintenance of courses of instruction, in advance of, or supplementary to, the instruction authorized to be maintained in high schools by boards of education."

Section 7909, G. C., provides that:

"Such levies shall be made by the council at the time, and in like manner as other levies for other municipal purposes, and must be certified by it and placed upon the tax duplicate as other municipal levies. *The funds of any such university, college or institution shall be paid out by the treasurer upon the order of the board of directors and the warrant of the auditor.*"

Sections 7910 and 7911, of the General Code, provide for the issue of bonds for the erection of additional buildings or the completion of buildings not completed for such municipal university and for the disposal of said bonds, and section 7913, G. C., provides in part that:

"In the use of such fund for such purpose, all power and control shall be vested in the board of directors of the municipal university."

In your letter you enclose a copy of an opinion rendered by the law department of the city of Toledo to the director of finance of said city concerning the necessity of appropriation by the council of said city of money to be used by the aforesaid directors in the administration of their trust in connection with said municipal university.

Certain provisions of the charter of said city, applicable to the question under consideration, are referred to in said opinion and in substance set forth therein, and for the purpose of showing these provisions as considered by the director of law of said city in connection with the foregoing provisions of statute, in determining the answer to the question submitted to him by the director of finance of said city, I quote said opinion in full as follows

"March 8, 1916.

"Mr. Peter J. Kranz, Director of Finance, Toledo, Ohio.

"Dear Sir:—I am in receipt of your favor of March 3rd, calling attention to section 128 of the city charter, which provides that no money shall be drawn from the treasury of the city, nor any obligation for the expenditure of money incurred except pursuant to appropriations made by council. No appropriation of the Toledo university funds having been made by council, the question has been raised as to whether the commissioner of accounts is authorized to draw his warrants on such funds in custody of the city treasurer, merely upon the order of the board of directors of said university.

"On January 11th, this department had occasion to pass on substantially the same question as is now submitted by you. In an opinion rendered on that date to the president of the Toledo university, this depart-

ment held that the board of directors of said university was the body responsible for the appropriating of its funds, under authority of sections 4001 and 7902 of the General Code. These sections of the Code clothe the board of directors of municipal universities with full, complete and exclusive control and management of all university affairs, including its property and funds.

"An examination of sections 129 and 130 of the city charter discloses the existence of two classes of public funds, with the custody of which the city treasurer is charged: (1) The public money of the city which must be appropriated by council before being withdrawn from the treasury, and (2) other public money coming into his hands as such city treasurer, the lawful control of which is vested in authorities other than council, and which must be disbursed by him under such regulations as may be prescribed by such authorities. The funds of the Toledo university fall within the second class and, therefore, the power and authority to appropriate, control and manage the same is vested in the board of directors of the university, and not in the council.

"Without going into any citation or discussion of authorities on the subject, it clearly appears that the establishment and operation of municipal universities, as provided by the Code, is a part of the scheme adopted by the state for fostering and encouraging schools and the means of education. It is a matter of general state wide interest, and not merely of local, municipal concern. It involves the exercise of a state function, as distinguished from a municipal function.

"The classification of public funds as made in sections 129 and 130 of the charter, and the manner provided therein for their disbursement, would seem to be in recognition of the principle that as to educational and other matters in which the public at large is directly interested, the power and authority of the state is supreme and exclusive and must govern.

"You will, therefore, cause warrants to be issued from time to time in pursuance of such regulations as may be prescribed by the board of directors of the Toledo university.

"Very respectfully yours,
"Harry S. Commager, Director of Law.
"By Lewis E. Mallow, Assistant Director of Law."

It seems clear to my mind that when the tax levies for the support of said municipal university are made by the council of said city in any year, and when the same are placed upon the duplicate, collected and turned over to the city treasurer, the same become trust funds in the hands of said treasurer, to be held by him in trust for the uses and purposes of said municipal university, and to be paid out in the manner provided for in the latter part of section 7909, G. C. It seems equally clear that as soon as said funds come into the hands of the city treasurer they cease to be funds of the municipality in the ordinary sense and within the meaning of the provisions of section 5649-3d, G. C., supra, which must be appropriated by the city council before the same can be paid out by the treasurer on the order of the board of directors of said university.

In view of the provisions of the statutes above set forth taken in connection with the provisions of the charter of the city of Toledo referred to in the above opinion, and in substance set forth therein, I concur in the conclusion reached by the director of law of said city of Toledo as expressed in said opinion, and I am therefore of the opinion in answer to your question that it is not necessary for that portion of the funds of the municipal university of said city, raised by

taxation under provision of section 7908, G. C., supra, to be appropriated by the council of said city under provision of section 5649-3d, G. C., and that the provisions of section 4601, G. C., taken in connection with the provisions of section 7902, et seq., of the General Code, and the provisions of the charter of said city hereinbefore referred to, and applicable to the administration of said university funds, vest in the board of directors, created as aforesaid, the administration and full control of said funds, the same to be paid out by the city treasurer upon the order of said board of directors and the warrant of the city auditor (the director of finance of said city) under provision of the latter part of section 7909, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1782.

BOARD OF EDUCATION OF RURAL DISTRICT—WITHOUT AUTHORITY TO APPROPRIATE REAL ESTATE FOR PURPOSE OF CONSTRUCTING A SEWER TO BE USED IN CONNECTION WITH SEWAGE DISPOSAL PLANT.

The board of education of a township rural school district is without authority to appropriate real estate for the purpose of constructing thereon a sewer to be used in connection with a sewage disposal plant maintained by such board of education.

COLUMBUS, OHIO, July 15, 1916.

HON. FRANK L. JOHNSON, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR:—Yours under date of July 5, 1916, is as follows:

"The board of education of Ross township, this county, are erecting a new high school building, and it is outside of any incorporated village and they want to put in a sewage disposal plant, and of course will have to put in a sewer to make the proper drain. The party over whose land this sewer will pass is objecting to it, and what I want to know is, how is the board of education to proceed to get this land and put in the sewer?

"I am unable to find any section of the statute giving the board authority to condemn the land in a case of this kind.

"Section 7624 of the General Code, provides: 'When it is necessary to procure or enlarge a school site, and the board of education and the owner of the proposed site or addition are unable to agree upon the sale and purchase thereof the board shall, etc.' It seems to me that this section does not give the board any authority for a case like this, as it is not a site or addition that is desired but a drain.

"Section 6602-1 provides, 'For the establishment of a sewer by the county commissioners if it is within three miles of an incorporated village,' but in this case we are more than three miles from an incorporated village.

"Section 6596 of the General Code provides: 'When the state board of health finds that a trunk or main sewer is necessary in a county for sanitary purposes, the board of county commissioners of such county may cause surveys to be made thereof and plans and specifications prepared. Upon approval by the state board of health of such plans and specifications the commissioners may construct and maintain said trunk or main sewer or part thereof, within or without the limits of a municipal corporation, regu-

late the tapping thereof by lateral sewers and prescribe the conditions of such tapping.'

"Can we proceed under any of the above sections, or are there other sections which I am unable to find?

"Your early opinion on same would be greatly appreciated."

Section 6602-1, G. C., et seq., provides for the establishment of sewer districts, upon the order of the state board of health, by unanimous vote of the county commissioners or upon a petition of freeholders, by the county commissioners of any county when within three miles of an incorporated city. This chapter of the General Code is confined in its application to sewer districts so established, and could not, therefore, be available in the matter referred to in your inquiry.

Section 6596, G. C., et seq., to which you refer confers authority on the county commissioners to construct a trunk or main sewer when found necessary by the state board of health. Said sections are clearly inapplicable to the construction of a sewer by a board of education in the case stated by you.

Section 7624, G. C., 103 O. L., 466, to which you refer provides as follows:

"Section 7624.- When it is necessary to procure or enlarge a school site or to purchase real estate to be used for agricultural purposes, athletic field or play ground for children, and the board of education and the owner of the property needed for such purposes are unable to agree upon the sale and purchase thereof, the board shall make an accurate plat and description of the parcel of land which it desires for such purposes, and file them with the probate judge, or court of insolvency, of the proper county. Thereupon the same proceedings of appropriation shall be had which are provided for the appropriation of private property by municipal corporations."

It is said in Cooley's Constitutional Limitations, (7th Ed.) 759, that:

"The right to appropriate private property to public use lies dormant in the state, until legislative action is had, pointing out the occasions, the modes, conditions, and agencies for its appropriations."

That is to say, the right or power to appropriate private property to public use must rest upon statutory authority therefor. By the same authority it is said:

"The powers granted by such statutes are not to be enlarged by intendment, especially where they are being exercised by a corporation * * *. And substantially the same strict rule is applied when the state itself seeks to appropriate private property."

This rule is well established in Ohio by numerous decisions. Your question then narrows itself down to whether the purpose for which it is sought to appropriate land as stated in your inquiry comes within the terms of sections 7624, G. C., supra, "to procure or enlarge a school site."

In the case of State v. Jersey City, 36 N. J. L., 166, the statute under consideration provided that:

"The board shall have power to purchase sites for * * * school houses."

The court in the opinion of this case defines site as follows:

> "Site in the sense of this act means only so much land as is reasonably required or needed for the location and convenient use of some particular necessary building."

It would seem that there can be little, if any, difference in meaning in the phrases "sites for school houses" and "school sites." But it will not be overlooked that the power conferred by the New Jersey statute, above referred to, was to purchase only and not to appropriate property, and hence not subject to the rule of strict construction always applicable to statutes conferring authority to appropriate private property.

Site in its ordinary sense means situation or location. It would then mean in section 7624, G. C., supra, the situation or location of a school.

You state in your inquiry that the use to which the land sought by the board of education is to be applied is not the location of a school primarily but as a right of way over, or under which a sewer or drain is proposed to be located and constructed. While this is a use truly incident to the location of the school it is not believed to be a use in contemplation under the terms of section 7624, G. C., supra.

I find no other statutory provision which confers upon the board of education authority to appropriate property for any purpose.

I am, therefore, of opinion in answer to your inquiry that the board of education referred to is without authority to condemn property for the purpose of constructing a drain or sewer under the facts stated by you.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1783.

DECEASED CANDIDATE—DEPUTY STATE SUPERVISORS OF ELECTION SHOULD NOT PRINT SUCH NAME ON PRIMARY BALLOTS —HOW VOTES SHOULD BE COUNTED IF NAME DOES APPEAR— WHEN NO NAMES OF CANDIDATES FOR NOMINATION ON PRIMARY BALLOT AS WELL AS WHEN NAMES DO APPEAR—INTERPRETATION OF STATUTES FOR BLANK SPACES IN EITHER CASE ON BALLOT—WHERE NAME OF CANDIDATE IS WRITTEN IN EIGHT PER CENT. OF NUMBER OF BALLOTS CAST NECESSARY TO FILL VACANCY—WHEN NOMINATION IS MADE IF DECEASED CANDIDATE'S NAME APPEARS AND ANOTHER NAME IS WRITTEN ON BALLOT.

When it is found by the deputy state supervisors of elections, prior to printing the ballots for primary elections, that a candidate whose name has been duly presented has since deceased, the name of such candidate should not be printed upon the ballot.

Votes cast at a primary election for a candidate then deceased should be counted in the same manner as votes cast for other candidates.

When no name or names of candidates for nomination for any office for which a nomination may be made are presented there should be provided upon the primary ballot under the title of such office blank spaces equal to the number of candidates which may be nominated therefor.

Where names of candidates for nomination are duly presented and required to be printed upon the primary ballot, there should be provided below such list of candidates a blank space as required by section 5028, *G. C.,* 103 *O. L.,* 520.

Where no names are presented and required to be printed upon the primary ballot as candidates for any office for which a nomination may be made, a candidate for such office may not be nominated at the primary election by writing in the name of a candidate unless some candidate whose name is so written in receives at least eight per cent. of the number of ballots cast on which there is a vacancy for such office.

A person may not be nominated as a candidate for an office as to which office there appears upon the primary ballot the name of a deceased candidate unless such other person receives a number of votes in excess of the number cast for the deceased candidate. If no nomination of a candidate for any office for which a nomination may be made at the August primary is made thereat, a nomination of candidate may not thereafter be made by a controlling or central committee pursuant to section 4989, *G. C.,* 103 *O. L.,* 486, *or* 5013, *G. C.,* 103 *O. L.,* 845, *for such office.*

COLUMBUS, OHIO, July 15, 1916.

HON. JOHN V. CAMPBELL, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—I have a request from Hon. Smith Hickenlooper, assistant prosecuting attorney, for an opinion under date of July 3, 1916, as follows:

> "Not having had an opportunity on last Thursday of discussing with you informally the question with which the board of elections of this county are confronted by virtue of the death of Dr. Henry J. Cook, candidate for nomination upon the Republican ticket for the office of coroner, we have determined to ask your opinion in the matter.
>
> "Dr. Cook was the only candidate filing a declaration of candidacy for this office under section 4970 of the General Code (106 Ohio Laws,

546), and within the time provided by section 4946 (106 O. L., 544). Subsequently to the filing of his declaration of candidacy, and after the time had expired within which other declarations of candidacy could be filed, Dr. Cook died and the board of elections has been unofficially advised of his death through the daily papers.

"The questions we desire to submit are, first, whether Dr. Cook's name should be printed upon the primary ballots, and whether votes cast for him should be counted, notwithstanding his death; second, whether the Board of Deputy State Supervisors and Inspectors of Elections should provide a space for writing in the name of any other individual, and whether such individual could be nominated at a primary election if his name were written upon more than eight per cent. of the ballots cast, although more votes were cast for the deceased candidate whose name was printed upon the ballot; third, if Dr. Cook's name is permitted to remain upon the printed ballot and a majority of the votes at the primary are cast for him, can the vacancy be filled after the primary election by the Republican Central Committee under section 5013 (103 Ohio Laws, 845)?

"The conclusion we have reached is to the effect that under General Code, section 4970, the name of no other candidate can be substituted or printed upon the ballot notwithstanding the death of Dr. Cook. That inasmuch as General Code, section 4984-1 (106 O. L., 207), and General Code, section 5071 (which latter section is made to apply to primaries by virtue of the provisions of section 4967, 103 Ohio Laws, 481), apply only to cases where no nomination papers have been filed or nominations made, there is no provision authorizing the writing in of the name of another candidate at a primary election, where such nomination papers had been filed, as in the present instance. That the Board of Deputy State Supervisors and Inspectors of Elections have no authority to omit printing, Dr. Cook's name upon the primary ballot, notwithstanding his death. (See General Code, section 4967, and State ex rel. v. Taylor, 55 Ohio St., 385). And that if Dr. Cook's name were printed on the primary ballot more votes would necessarily be cast for him than for any other candidate whose name could be written thereon, thus necessitating the filling of the vacancy either as provided by section 4989, of the General Code (103 O. L., 486), or under the general power of filling vacancies on a party ticket as provided by section 5013 (103 O. L., 845)."

The first inquiry it will be observed, contains two separate and independent questions which may be stated in a general form thus:

> Must the name of a candidate who has died since the filing of his declaration of his candidacy be printed upon the primary ballot?
>
> Should votes cast at a primary election for a deceased candidate be counted in determining the result?

In support of the position that the board of deputy state supervisors and inspectors of elections have no authority to omit printing the name of a deceased person who has theretofore filed his declaration of candidacy for an office, candidates for which may be nominated at the primary election in question, section 4967, G. C., and the case of State ex rel. v. Taylor, 55 Ohio State, 385, are cited.

Section 4967, G. C., 103 O. L., 481, provides:

> "County boards of deputy state supervisors of elections shall have all the powers granted and perform all the duties imposed by the laws govern-

ing general elections, including furnishing materials and supplies, printing and distributing ballots, providing voting places, protecting electors, guarding the secrecy of the ballot, and making rules and regulations not inconsistent with law for the guidance of election officers. All statutory provisions relating to general elections, including the requirement that part of such election day shall be a legal holiday, shall, so far as applicable, apply to and govern primary elections."

That part of this section particularly material to the question under consideration is the provision that "all statutory provisions relating to general elections * * * shall, so far as applicable, apply to and govern primary elections." This provision effectually incorporates into the primary law of this state every statutory provision governing the conduct of general elections not inconsistent with specific provisions as to primary elections and which is applicable to the facts, conditions and purposes of such primary election. It then becomes necessary to examine not only the statutes which by their terms specifically relate to primary elections, but those relating to general elections as well.

In reference to the tickets to be voted at primary elections, section 4976, G. C., provides as follows:

"Separate tickets shall be provided for each political party entitled to participate in such primary. Such ticket shall contain the names of all persons whose names have been duly presented and not withdrawn, arranged under the designation of the office in alphabetical order, according to surnames, and bear the official signatures of the members of the board of deputy state supervisors. Such tickets shall conform, as nearly as practicable, to the form of ballot provided in this title for the use of electors in the election of public officers, except that no device or circle shall be used at the head of such tickets. On the back thereof shall be printed the words 'Official Ballot' and 'Primary Election,' and the name of the political party for which such ballot is printed."

If this section is to be given a strict literal construction without regard to the purposes of primary elections or the further statutory provisions relating thereto, the conclusion expressed in your inquiry as to the necessity of printing upon the primary ballot the name of a person duly presented, though he be since deceased, cannot be escaped unless the death of a person whose name is so presented operates as, or authorizes, or requires the withdrawal of the name of such deceased person.

The purpose of a primary election is not solely the selection of names to be placed upon the ballot at the general election. It is rather to make a choice for party purposes of candidates who seek election to public office. To this end it is required by section 4790, G. C., 106 O. L., 546, among other things, that the declaration of candidacy shall contain a statement of the residence of the candidate, that he is a member of the party the nomination of which he seeks, that he is a qualified elector of the place of his residence stated in such declaration, and that if nominated and elected such candidate will qualify for the office sought. It thus appears that the statement of the declarant that he is an elector of the precinct, township and the county or state for which nominations are to be made, is a material element of a valid declaration of candidacy. It is provided in part by section 4974, G. C., 106 O. L., 549, that:

"If it is found that such candidate is not an elector of the state, or of the district or county in which he seeks to become a candidate, or has not

fully complied with the provisions of law as herein provided, his name shall be withdrawn and shall not be printed upon the ballot; but no declaration of candidacy shall be rejected for more technical defects. Certificates shall be transmitted in the manner provided in this title for the transmission of certificates of nomination."

The effect of this provision is that conclusive ineligibility arising from nonresidence and a consequent failure to be an elector operates as a withdrawal of the name of a candidate, or requires that the same shall be withdrawn and not printed upon the ballot, upon the finding of such fact by the board of deputy state supervisors of elections. Clearer language could hardly have been selected than that above quoted. There is no qualification or limitation of the provision to the time of filing of a declaration, and I am clearly of the opinion that it is continuing in its operation until the ballots are printed. That is to say, if it is found at any time before the ballots are printed that a person whose name has been presented is not an elector of the state, district or county in which he seeks nomination, his name shall be withdrawn, and it becomes the duty of the deputy state supervisors of elections not to print such name upon the ballot.

Since a person whose name is presented ceases to be an elector upon his death, that fact, when found by the deputy state supervisor of elections, imposes upon them the duty of not printing such name upon the ballot.

It is unnecessary to discuss the case of State ex rel. v. Taylor, supra, further than to say that there was no such statutory provision as that of section 4974, G. C., supra, applicable to the question then before the court, and the effect of the decision in that case cannot be to override a subsequent specific statutory provision clearly applicable to the question under consideration.

I am therefore of opinion that when it is found by the deputy state supervisor of elections, prior to the printing of the ballots for a primary election, that a person whose name has been duly presented by a declaration of candidacy has since deceased, the deputy state supervisors of elections are required not to print the name of such person upon the ballot. If, however, for any reason the name of a person who is deceased should appear upon the primary ballot, then the second branch of your first question becomes pertinent.

There is no statute in this state which declares that votes cast for an ineligible or deceased person are void for that reason. While it is said in Throop on Public Officers and Offices, section 163, that the choice of a disqualified person is ineffectual, it is also stated that the great weight of American authority is that the person receiving the next highest number of votes is not thereby elected in those cases in which such deceased person receives the highest number of votes. In accord with this statement of the rule is the case of State ex rel. v. Speidel, 62 O. S., 156, the first branch of the syllabus of which is as follows:

"When the candidate for an office for whom a majority or plurality of votes was cast at the election, dies on the election day and before the polls are closed, the candidate for the same office receiving the next highest number of votes is not thereby elected; nor has he thereby acquired any right to be inducted into the said office."

So that from the application of this rule it follows that in the event votes are cast for a candidate who is deceased, it is necessary to count such votes to determine whether or not another candidate has a higher number of votes, since such other candidate cannot be chosen except by having received a greater number of votes than that cast for the deceased candidate. This rule would have equal application to candidates whose names are printed upon the ballots and those whose names may be written thereon.

I am therefore of opinion, in answer to the second branch of your first inquiry that votes cast for a deceased candidate should be counted, and in answer to the second branch of your second question that where the name of a deceased person appears upon the primary ballot, no other person may be nominated as a candidate for the office for which such deceased person was a candidate, except such other person receives a number of votes in excess of that cast for such deceased person.

The first branch of your second inquiry is whether space should be provided on the primary ballot for writing in the names for candidates other than those whose names are required to be printed thereon. By force of the provision of section 4967, G. C., supra, which makes applicable the statutes governing general elections, this question involves a consideration of the provisions of section 5025, G. C., in those cases in which there is no name required to be printed upon the ballot, as follows:

> "If upon a ticket there is no candidate or candidates for a designated office, a blank space equal to the space that would be occupied by said name or names, if they were printed thereon with the blank spaces herein provided for shall be left."

This provision requires that in case there is no name or names required to be printed upon the ballot as candidates for a designated office, there shall be provided on the ballot under the title of that office a number of blank spaces equal to the number of candidates which may be nominated for such office.

If there are names of candidates for a designated office duly presented, which are required to be printed upon the ballot, then by force of the same provision of section 4967, G. C., consideration must be given to the provision of section 5028, G. C., 103 O. L., 520, as follows:

> "A single blank line or space shall be left at the end of the list of candidates for each different office."

From a consideration of the foregoing statutory provision I am therefore of opinion that there should be provided upon the primary ballot, in case no name is presented, as a candidate for an office for which a nomination may be made, a blank space or spaces equal to the number of candidates which may be nominated for such office, and where names are required to be printed on the ballot as candidates for an office there should be provided at the end of the list of such names a blank space as required by the provision of section 5028, G. C., supra.

By subdivision 6 of section 5070, G. C., it is provided:

> "If the elector desires to vote for a person whose name does not appear on the ticket, he can substitute the name by writing it in black lead pencil or in black ink in the proper place, and making a cross mark in the blank space at the left of the name so written."

Section 5071, G. C., to which reference is made in your inquiry, provides as follows:

> "If there was no nomination for a particular office by a political party, or if by inadvertence, or otherwise, the name of a candidate regularly nominated by such party is omitted from the ballot, and the elector desires to vote for some one to fill such office, he may do so by writing the name of a person for whom he desires to vote in the space underneath

the heading or designation of such office, and make a cross mark in the circle at the head of the ticket, in which case the ballot shall be counted for the entire ticket, as though the name substituted had been originally printed thereon."

It will be observed that this latter section makes provision only for casting a vote for a person whose name does not appear upon a party ticket by placing a cross mark in the circle at the head of the ticket. Since no such circle may be placed on a primary ballot, this section cannot be applicable thereto.

From the above provisions of section 5070, G. C., however, it is clear that an elector may write in the name of an elector as a candidate for any office for which a nomination may be made, and vote for the nomination of such person by placing a cross mark in the blank space at the left thereof. Nominations of candidates made in this manner are subject to the provision of section 4984-1, G. C., 106 O. L., 207, as follows:

"That in the event of any office for which nominations are sought to be made at any primary election, and for which no nominating petitions or declarations of candidacy have been filed within the time prescribed by law by or in behalf of any candidate of a political party, so that in so far as such office is concerned, there is a vacancy on the primary ballot to be nominated, no valid nomination shall be made for such office unless the name of the person attempted to be nominated and receiving the highest number of votes for said office, shall have been written on at least eight per cent. of all the ballots, containing such vacancy, which have been voted at such primary election."

So that in case there is no name or names authorized to be printed upon the ballot as candidates for an office for which a nomination may be made, a candidate cannot be nominated for such office by writing in the name of a person or persons, as before pointed out, unless some person whose name is so written in shall receive a number of votes at least equal to eight per cent. of the number of ballots cast on which there is the name of no candidate for the office in question printed.

The provisions of section 4984-1, G. C., supra, are a palpable recognition of the authority to make nominations by writing in the names of candidates, and the application of the provisions of sections 5025 and 5028, G. C., 103 O. L., 520, relative to providing blank spaces in the primary ballot, and the method of voting for candidates whose names are not printed upon the ballot to primary elections.

Your third question refers to filling vacancies in a party ticket in the event no nomination is made at the primary election, and you direct attention to section 4989, G. C., 103 O. L., 486, and section 5013, G. C., 103 O. L., 845, which provide as follows:

"Section 4989. In case of a vacancy or vacancies in the list of nominations occurring by death or otherwise, after the result has been declared, such vacancy or vacancies shall be filled by the proper controlling committee of the party in which such vacancy, or vacancies, occur, and the names of the candidates, delegates or committeemen, as the case may be, selected by such committee shall, in the case of offices, the nomination papers for which have to be filed with the state supervisor of elections, be reported to such state supervisor and in the case of other offices, shall be reported to the proper board or boards of deputy state supervisors, and such state supervisor or board, or boards, shall cause such name or names to be placed on the official ballots, lists or rolls.

"Section 5013. The power to fill vacancies on a party ticket shall be vested in the central committee of such party or in the case of a vacancy occurring in a list of candidates nominated by petition in the committee named in such petition."

Section 4989, G. C., was passed April 17, approved May 3, and filed in the office of the secretary of state May 8, 1913. Section 5013 was passed April 10, approved May 9, and filed in the office of the secretary of state May 13, 1913.

It will be noted that section 4989, G. C., supra, is by its terms applicable only to vacancies in the lists of nominations, hence if no nominations are made it would seem quite clear that a vacancy in such list of nominations could not exist for the simple reason that there could be no such list, and if there is no nomination made for a particular office, such office could not constitute a part of such list, and a vacancy in such list of nominations would not result from the absence of the name of a candidate for an office for which no nomination has been made.

In an opinion of my predecessor, Hon. U. G. Denman, found at page 619 of the Report of the Attorney-General for the year 1909, it was held in effect that the provisions of section 34 of the act in 99 O. L., 214, which was carried into the General Code as section 4989 in the same form as found in the amendment in 103 O. L., 486, supra, were applicable only to cases in which a nomination had been made and the nominee, by reason of death, withdrawal or otherwise, ceases to be a candidate. With this opinion I fully concur.

While section 4989, G. C., supra, was amended, as above noted, the power to fill vacancies therein conferred was in no way affected thereby, and its provisions in that respect are the same now as originally enacted in 99 O. L., 222. At the time of its original enactment and until its amendment in 103 O. L., 845, section 5013 provided as follows:

"If a political party in its nominating convention fails to appoint a committee for the purpose of filling vacancies on a party ticket, the power to fill such vacancies shall be vested in the central committee of such party."

It appears there was material changes made in this section by the amendment referred to, in that prior to such amendment it had application only to cases in which political conventions failed to appoint a committee for the purpose of filling vacancies in the party ticket, while the amended form purports to confer power generally, without limitation or qualification, on the central committee of a political party to fill vacancies on the party ticket.

Section 5013, G. C., prior to its amendment, 103 O. L., 845, was rendered inoperative by the adoption of section 7 of article V of the Constitution, which abolished nominations by conventions.

It is deemed unnecessary to here undertake to determine from the order of passage, approval and filing of sections 4989 and 5013, G. C., 103 O. L., which is operative and controlling in a case to which either might be applicable or to distinguish between their application, in view of the provision of section 7 of article V of the Constitution, which makes it mandatory that all nominations for county offices shall be made at direct primary elections or by petition as provided by law.

It must be clearly borne in mind that the provisions of sections 4989 and 5013, G. C., supra, are limited in their application by express terms to the filling of vacancies in lists of nominations and party tickets, and cannot be given such interpretation or construction as to give authority thereunder to make original nominations. The authority to make original nominations of candidates for elective, state, district, county and municipal offices is limited by the terms of section 7 of

article V of the Constitution to two methods, viz.: (1) At direct primary elections, or (2) by petition as provided by law. The provision of said section referred to is as follows:

> "All nominations for elective, state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law."

It is unnecessary to here call attention to the familiar rule of construction which renders the methods of making nominations thus prescribed, exclusive or to again point out that to give to sections 4989 or 5013, G. C., supra, such construction as would confer upon any committee power to make a nomination would be a palpable contravention of this plain constitutional inhibition against making nominations by such method, and would do gross violence to every purpose in the adoption of this constitutional provision.

The only theory upon which the constitutionality of sections 4989 and 5013, G. C., may be maintained since the adoption of section 7 article V, supra, is that they authorize only the selection of a substitute for a candidate who has been nominated in a constitutional manner, made necessary by death, withdrawal or otherwise. The right of parties to have candidates or party tickets rests solely upon constitutional and statutory authority therefor, and unless such authority may be pointed to, none exists. If, however, there were no such plain constitutional inhibition against nominations by committees, the provision of section 4984-1, G. C., supra, as to nominations in cases where there is a vacancy on the primary ballot that:

> "No valid nomination shall be made for such office unless the name of the person attempted to be nominated and receiving the highest number of votes for such office shall have been written on at least eight per cent. of all the ballots containing such vacancy, which have been voted at such primary election."

would fully cover this phase of your inquiry.

The language of this section clearly precludes the nomination of a candidate by any other method than that therein prescribed in case there is no name of a candidate for a given office printed upon the primary ballot.

I am therefore of opinion that if no nomination is made by the Republican party for the office of coroner at the coming primary election, the vacancy in the party ticket resulting therefrom cannot be filled under the provisions of section 5013 or section 4989, G. C., supra.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1784.

MUNICIPAL CORPORATION—SPECIAL ASSESSMENT FOR NON-RESIDENTS WHO OWN REAL ESTATE IN CITY MAY INCLUDE SEVERAL PARCELS OF LAND IN ONE NOTICE—NEWSPAPER ENTITLED TO LEGAL COMPENSATION ACCORDING TO FORM SUBMITTED BY CITY OFFICIALS.

Several lots or parcels of land owned by non-residents in a special assessment improvement may be included in one notice.

If newspaper publishes notice upon form submitted by city officials separately as to each lot or tract of land owned by non-residents, said newspaper is entitled to legal compensation for such publication.

COLUMBUS, OHIO, July 15, 1916.

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

GENTLEMEN:—Under date of June 15, 1916, you submitted for my opinion the following questions:

> "(1) May several lots or parcels of land owned by non-residents in a special assessment improvement be included in one notice, or must each particular lot or parcel of land owned by non-residents be set up in separate notices?
>
> "(2) If a newspaper publishes such notice *upon forms submitted by city officials* separately as to each lot or tract of land owned by said non-residents, is said newspaper entitled to legal compensation for such publication?"

Section 3812-1, G. C., provides in part as follows:

> "The director of public service in cities and council in villages shall have authority to compel the making of sewer and water connections as hereinafter provided. Whenever said director in cities or council in villages deems it necessary in view of contemplated street paving or as a sanitary regulation that sewer or water connections or both be constructed, said director in cities or council in villages shall cause written notice thereof to be given to the owner of each lot or parcel of land to which such connections are to be made, which notice shall state the number and character of connections required. The director of public service in cities and council in villages shall appoint some competent person to serve said notice in the manner provided for the service of summons in civil actions * * *; provided that if any of said owners be non-residents of the corporation or cannot be found, such notice may be given publication twice in one or more newspapers of general circulation in the municipality. * * *"

Section 3818, G. C., which provides for the service of notice of street improvement, is as follows:

> "A notice of the passage of such resolution (resolution of necessity) shall be served by the clerk of council, or an assistant, upon the owner of each piece of property to be assessed, in the manner provided by law for the service of summons in civil actions. If any such owners or persons are not residents of the county, or if it appears by the return in any case of the notice, that such owner cannot be found, the notice shall be published at least twice in a newspaper of general circulation within the corporation."

Section 3843, G. C., referring to an ordinance for sprinkling with water, sweeping or cleaning of streets or alleys or parts thereof, provides as follows:

> "Notice of the passage of such ordinance shall be given the owners of lots and lands to be assessed for the payment of the cost and expense of the work provided for therein, by publishing the ordinance at least once in a newspaper published and of general circulation within the corporation and no other or further notice shall be required."

Section 3856, G. C., referring to the construction or repair of sidewalks, curbing or gutters, provides as follows:

> "If it appears in any such return (return of clerk of council), or that neither such owner, agent, or his place of residence could be found, publication of a copy of the resolution in a newspaper of general circulation in the corporation, in the manner provided for service by publication of resolutions for street improvements, shall be deemed sufficient notice to such owner. * * *"

The publication provided for in the foregoing sections, with the exception of section 3843, G. C., which provides that publication of the ordinance shall be all that is to be made, are in lieu of a personal notice to be served upon the property owner.

The statutes are silent as to whether or not a separate notice shall be published as to each non-resident owner, or whether or not the same may be included in the one publication. Being silent as to this matter, I am of the opinion, in answer to your first question, that several lots or parcels of land owned by non-residents in a special assessment improvement may be included in one notice. and for the sake of economy should be so included.

However, in answer to your second question, if the city officials submit forms of separate notice to each lot owner to a newspaper for publication, said newspaper would be entitled to legal compensation for each publication.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1785.

BUILDING AND LOAN ASSOCIATIONS—MAY ENGAGE IN BUSINESS OF MAKING CHATTEL LOANS—LICENSE FROM SUPERINTENDENT OF BANKS.

A building and loan association organized under the laws of Ohio may engage in the business of making chattel loans.

Such building and loan associations may engage in the business of making chattel loans under the Lloyd act, (106 O. L., 281) upon qualifying and securing a license from the superintendent of banks, as provided in said act.

COLUMBUS, OHIO, July 17, 1916.

HON. HARRY T. HALL, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have before me your request for my opinion upon the following questions:

(a) Can the City Loan and Savings Company of Lima, Ohio, lawfully engage in the business of making chattel loans?

(b) Can said company lawfully engage in the business of making chattel loans under the Lloyd act after qualifying and securing a license from the superintendent of banks as provided in said act?

The City Loan and Savings Company of Lima, Ohio, is a building and loan association organized under the laws of Ohio and having in its articles of incorporation the following purpose clause:

> "Said corporation is formed for the purpose of raising money to be loaned to its members and others, and to do all things authorized by title IX, division IV, chapter I, of the General Code of Ohio relating to building and loan associations."

Building and loan associations organized under the provisions of title IX, division IV, chapter I, (sections 9643 to 9675 of the General Code) of the General Code, are given authority under section 9657 of the General Code, "to make loans to members and others on such terms, conditions and security as may be provided by the association."

The kind or character of the security for loans which may be accepted by such association is not further defined or limited by the General Code. It therefore follows that such associations may make loans upon chattel securities.

The Lloyd act referred to in your question, being sections 6346-1 to 6346-10, inclusive, of the General Code, is found in 106 O. L., at page 281. This act amended in supplemented sections 6346-1 to 6346-7 inclusive of the General Code as enacted May 31, 1911 (102 O. L., 469). This latter act regulating and licensing the loaning of money upon chattels or personal property, etc., specially excluded and exempted banks and building and loan associations from the exercise of any authority granted or restrictions imposed by its provisions. The first sentence of the act contained the following language:

> "No person, firm or corporation, except banks and building and loan associations, shall engage or continue in the business of making loans upon chattels or personal property of any kind whatsoever, or of purchasing or making loans on salaries or wage earnings without first having obtained a license so to do from the secretary of state."

The Lloyd act which, as above stated, amended and supplemented the act of May 31, 1911, makes no mention of building and loan associations although section 6346-5 of the General Code, which is a part of the act, contains the following language:

> "* * * Nothing in this act shall apply to pawnbrokers who obtain a municipal license as provided in sections 6337 to 6346, inclusive, of the General Code, or to national banks or to state banks or any person, partnership, association or corporation whose business now comes under the supervision of the superintendent of banks."

The omission of the term "Building and Loan Associations" from the language just quoted is significant and clearly indicates the legislative intent to extend the scope of the act so as to include building and loan associations.

Specifically answering your enquiries I am of the opinion that the City Loan and Savings Company of Lima, Ohio, may under the terms of its purpose clause and the provisions of the General Code under which it is organized, lawfully

engage in the business of making chattel loans, and that such association may qualify and be licensed to make chattel loans under the provisions of the Lloyd act.

I might add that such association must qualify and be licensed under the Lloyd act before it can lawfully make chattel loans "at a charge or rate of interest in excess of eight per centum per annum, including all charges."

I am returning the certified copy of the articles of incorporation of the City Loan and Savings Company of Lima, Ohio. Respectfully,

EDWARD C. TURNER,
Attorney-General.

1786.

STATE BOARD OF PUBLIC BUILDINGS—AUTHORIZED TO PURCHASE BUILDING ALREADY CONSTRUCTED—SEE THE CASE OF THE COLUMBUS CHAMBER OF COMMERCE VS. A. V. DONAHEY, AUDITOR —COURT OF APPEALS FRANKLIN COUNTY, NO. 443.

The state board of public buildings is authorized to purchase a building already constructed which the board believes to be suitable for the housing of state officers, departments and commissions, which it is not possible to house in the state house and judiciary building.

COLUMBUS, OHIO, July 18, 1916.

HON. HERBERT M. MYERS, *Secretary State Board of Public Buildings, Columbus, O.*

DEAR SIR:—I acknowledge receipt of your letter of July 6th, in which you request my opinion as follows:

> "The state board of public buildings wishes an opinion from the department of the attorney-general, instructing such board whether it is empowered and authorized under the authority vested in it under amended senate bill No. 304, (106 O. L., 463) entitled 'An act to provide for the appointment of a commission to investigate the office requirements of the officers, departments and commissions of the state, and to proceed with the necessary work to adequately house such officers, departments and commissions' to purchase a building already constructed which such commission believes to be suitable for the housing of such state officers, departments and commissions."

I quote the following pertinent provisions of the act referred to by you, entitled.

> "An act to provide for the appointment of a commission to investigate the office requirements of the officers, departments and commissions of the state, and to proceed with the necessary work to adequately house such officers, departments and commissions.
>
> "Section 4. The board is authorized and empowered to proceed along the following lines and to perform the following duties:
>
> * * * * * * * * * *
>
> "4. To investigate locations contiguous to or conveniently near the state house grounds upon which to erect *or to acquire by purchase* a building or buildings for the housing of the state offices, departments and commissions, provided it is found upon investigation that such offices, departments and commissions cannot be housed in the state house and the judiciary building.
>
> "Section 5. Said board is authorized and empowered after it has

decided upon the method and plan which will efficiently and economically house the offices, departments and commissions of the state upon and with the approval of the governor:

"1. To proceed with additions to or alterations in or repair of the state house, judiciary building, or other building or buildings which may be acquired for the use of the state.

* * * * * * * * * *

"3. To purchase a suitable building or site contiguous to or conveniently near the state house grounds at the prevailing market price or value, on which to erect such building or buildings, or

"4. In the event that there is evidence that the price asked for said site is in excess of the prevailing market price, to condemn and take, by due process of law, such site at its actual value as determined by the selling price of property in the immediate vicinity of the site."

I assume that I may eliminate from consideration the question as to the authority of the board to condemn a building to be used, as such, for the purpose of housing the departments of state instead of the condemnation of a mere site upon which to erect a new building. Some doubt might be entertained as to the authority of the board in this respect, but your letter seems to be limited to the question of purchase as distinguished from that of condemnation.

I am of the opinion that the state board of public buildings has the authority to purchase a building already constructed upon being satisfied that it is suitable for the housing of the state officers, departments and commissions which the board upon inquiry and investigation has selected for housing outside of the state house and the judiciary building.

Section 4 clearly gives authority to investigate locations contiguous to or conveniently near the state house grounds upon which to acquire by purchase such a building. Section 5, paragraph 3, gives express authority to purchase a suitable building. It is true that the last named paragraph is ambiguous, and that its phraseology is involved and complicated. It might be argued that, having regard to the technical grammatical construction of the part of a sentence which constitutes this paragraph, a building could only be purchased by the board as a part of a site "on which to erect" a new building. This interpretation, however, is to my mind negatived by the fact that the thing which may be purchased according to the language of this paragraph is "a suitable building or site." In other words, the board may purchase a building, as such, or a site. Therefore, in my opinion, the phrase "on which to erect such building or buildings" modifies the word "site," but in no way qualifies the preceding word "building." I do think that the phrase "contiguous to or conveniently near the state house grounds," must be regarded as modifying both words, despite the violence done to the rules of syntax in so interpreting this phrase and making the discrimination above made with respect to the modifying effect of the following phrase. I conclude, however, that this is the case because of the somewhat clearer provisions of paragraph 4 of section 4 above quoted. That is to say, the two paragraphs read together, as I think they must be, make it clear that whether a building or a site be purchased, it must be "conveniently near the state house grounds," or contiguous thereto; though, of course, the convenience of the location of the building is a matter for the determination of the board in the exercise of a reasonable discretion.

For the foregoing reasons, then, and with the reservations above expressed, I am of the opinion that your question must be answered in the affirmative.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1787.

CIVIL SERVICE—NO ELIGIBLE LIST EXISTS—NAMES MAY BE CERTIFIED FROM OTHER LISTS MOST APPROPRIATE.

When no eligible list exists from which an appointment may be made to a position in the classified civil service, names may be certified from other lists most appropriate for the group or class in which is classified said position to be filled. Section 486-13, *G. C.,* 106 *O. L.,* 408.

COLUMBUS, OHIO, July 18, 1916.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your letter of July 8, 1916, as follows:

"For the purpose of inspection in the division of workshops, factories and public buildings of this commission, the state of Ohio has been divided into twenty-two districts. On May 16, 1916, the state civil service commission certified to the industrial commission for the appointment of a district deputy in district No. 22, of said division, three names, together with the name of the former non-competitive employe in the district.

"The three names certified on this eligible list are: Samuel R. Snyder, Millersburg; Nicholas L. Wagner, Steubenville, and Alvah S. Bragg, Dayton. Only one of these eligibles, namely, Samuel R. Snyder, resides within the confines of the 22nd inspection district, which district is made up of the counties of Coshocton, Holmes, Muskingum and Tuscarawas; Messrs. Wagner and Bragg residing outside of the limits of said district.

"The industrial commission was unwilling to make an appointment in this instance from an eligible list which contained the name of but one person who resides within the 22d inspection district, and accordingly the civil service commission was requested to hold another examination for deputy in said district, in order that there might be certified a full list of three names made up of persons residing within the district.

"In reply to the request of our commission, the state civil service commission, under date of July 6, 1916, with reference to the certification herein first referred to and the duplicate certification of the same made on June 19, 1916, states:

"'The certifications to the positions of district deputy in the division of workshops and factories for district No. 22, were made in accordance with a rule adopted by the commission that in districts where an incomplete eligible list existed, the list should be completed by the addition of sufficient names from the state list. I am, therefore, directed by the commission to inform you that certifications made for this district must stand.'

"Please advise us as to whether or not in this case, where an incomplete eligible list existed in the 22nd district, this commission is compelled to make the appointment, against its will, from a certification made up by the state civil service commission containing the names of two persons who do not reside within the inspection district."

There is no provision of statutory law requiring that deputy inspectors shall be residents of the districts in which they are assigned to work, and therefore there is no legal requirement that the deputy named in your letter shall be a resident of said district No. 22.

While this is true, it might be and doubtless is desirable in many cases for the purpose of proper administration and economy in the matter of expenses that deputies should be residents of the territory in which they are required to perform their official service. The matter, therefore, of which you complain is one of administration which should be adjusted by the departments involved with a view only to the best interests of the public service, and I have no doubt that the state civil service commission will lend every reasonable assistance to your commission in an effort to adjust such matters on a basis satisfactory to all.

The certification mentioned in your letter is authorized by section 486-13, G. C., as amended 106 O. L., 408, which section provides among other things that:

> "In the event that an eligible list becomes exhausted, through inadvertence or otherwise, and until a new list can be created, or when no eligible list for such position exists, names may be certified from eligible lists most appropriate for the group or class in which the position to be filled is classified."

Under this provision of said section the state civil service commission acted within its legal rights in making said certification. As is before observed if the facts, which permit your commission to request an eligible list from the district named, are presented to the civil service commission it is very probable, if it is possible for said commission to comply with your request it will be done.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1788.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY LYKENS TOWNSHIP RURAL SCHOOL DISTRICT, CRAWFORD COUNTY, OHIO.

COLUMBUS, OHIO, July 18, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

> "RE:—Bonds of Lykens township rural school district, Crawford county, Ohio, in the sum of $3,500.00 for the purpose of improving school properties in said district, being seven bonds of five hundred dollars each."

I have examined the transcript of the proceedings of the board of education and other officers of Lykens township rural school district relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of said district.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1789.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY HURON COUNTY, OHIO.

COLUMBUS, OHIO, July 18, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Huron county, Ohio, in the sum of $12,000.00 for the improvement of a section of intercounty highway No. 97, in Greenwich township, being twenty-four bonds of five hundred dollars each."

I have examined the transcript of the proceedings of the county commissioners and other officers of Huron county, and the township trustees of Greenwich township relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of Huron county.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1790.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUED BY HURON COUNTY, OHIO.

COLUMBUS, OHIO, July 18, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Huron county, Ohio, in the sum of $11,000.00 for the improvement of a section of intercounty highway No. 289, in Ridgefield township, being twenty-two bonds of five hundred dollars each."

I have examined the transcript of the proceedings of the county commissioners and other officers of Huron county, and the township trustees of Ridgefield township relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of Huron county.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1791.

COUNTY COMMISSIONERS—MAY NOT RECEIVE MORE THAN $300.00 FOR JOINT OR SINGLE COUNTY DITCH WORK—SEE OPINION NO. 1743 UNDER DATE OF JUNE 29, 1916.

County commissioners may not receive in any one official year as compensation for ditch work, whether in joint or single county ditch work, more than three hundred dollars.

COLUMBUS, OHIO, July 18, 1916.

HON. J. H. MUSSER, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—Yours under date of May 20, 1916, is as follows:

> "Two of our county commissioners have already charged up this year 100 days on ditch work, on single county ditches, and there is a number of joint ditches pending, and one of the commissioners claims that they are entitled, in addition to the 100 days allowed on county ditch work, to another 100 days, at $3.00 per day on joint county ditch work, he saying that the commissioners in Champaign county have been so drawing money, and that the money so drawn was approved by one of the state examiners.
>
> "I wish that you would please give me your opinion as to whether or not the commissioners are entitled to more than 100 days pay on all ditch work, without taking into consideration the fact that they might be entitled to fees and expenses under sections 6563-44, of the General Code."

The question submitted by you is covered by opinion No. 1743, under date of June 29, 1916, addressed to Hon. B. A. Myers, prosecuting attorney, Celina, Ohio, a copy of which is herewith enclosed and in which it is held that the compensation which a county commissioner may receive for ditch work within any official year may not exceed three hundred dollars as prescribed by section 3001, G. C.

Answering your inquiry specifically, I am, for the reasons stated in the opinion above referred to, of opinion that county commissioners may not receive in any one official year, as compensation for ditch work, whether in joint or single county ditch work, more than three hundred dollars. The delay in answering your letter has been due to the fact that the same was misplaced.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1792.

ROADS AND HIGHWAYS—WHEN COUNTY HIGHWAY SUPERINTENDENT REPAIRS ROAD BY FORCE ACCOUNT—MAY CONTRACT FOR MATERIALS UPON BASIS OF NUMBER OF TONS HAULED.

Where the county highway superintendent is repairing a road by force account, he may employ drivers and teams and contract to pay for such services upon the basis of the number of tons of material hauled, where such method of compensation is authorized by the county commissioners.

COLUMBUS, OHIO, July 18, 1916.

HON. JOSEPH W. HORNNER, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—I have your communication of June 27, 1916, which communication reads as follows:

> "Mr. John Swartz, our highway superintendent, is making repairs on our county roads and he would like to know whether or not he would have authority to contract to have the material hauled by the ton or must it be done by the day.
>
> "He says that in his opinion he can save money by having it hauled by the ton, and has the approval of the county commissioners."

My understanding of the situation in reference to which you desire my opinion, as gathered from your letter and from a conversation had by Mr. Swartz with a representative of this department, is that it has been determined by the county commissioners to repair a road by force account. I am not informed as to whether the material was purchased by the commissioners or whether they have authorized the county highway superintendent to purchase the material, but in so far as the necessary labor is concerned, the county highway superintendent has been authorized to employ the same under the authority conferred by section 155 of the Cass highway law, section 7198, G. C., which section reads as follows:

> "The county highway superintendent may, with the approval of the county commissioners or township trustees, employ such laborers, teams, implements and tools, and purchase such material as may be necessary in the performance of his duties."

The question now arises as to whether in the hauling of the necessary material drivers and teams may be employed to perform this service for an agreed compensation per ton of material hauled, or whether it is necessary to employ drivers and teams upon a per diem basis. There is nothing in the statute to warrant the conclusion that drivers and teams must necessarily be employed upon a per diem or any other particular basis. It is quite probable that under some circumstances it would be to the advantage of the county that the compensation of drivers and teams should be fixed upon the basis of the amount of material hauled, and in view of this fact and the further fact that the statute does not provide any basis upon which compensation is required to be fixed, I advise you that the county highway superintendent may employ drivers and teams and contract to pay for such services upon the basis of the number of tons of material hauled where such method of compensation is authorized by the county commissioners.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1793.

ROADS AND HIGHWAYS—COLLECTION OF ASSESSMENTS MADE BY COUNTY COMMISSIONERS FOR CONSTRUCTION OF ROAD UNDER CERTAIN PROVISIONS OF CASS HIGHWAY LAW MAY NOT BE ANTICIPATED BY ISSUE OF SHORT TERM NOTES OR CERTIFICATES OF INDEBTEDNESS—BONDS REQUIRED TO BE ISSUED.

The collection of assessments made by county commissioners for the construction of a road under the provisions of chapter VI of the Cass highway law may not be anticipated by the issue of short term notes or certificates of indebtedness, or in any manner other than by an issue of bonds in the method provided by section 6929, G. C.

COLUMBUS, OHIO, July 18, 1916.

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

GENTLEMEN:—I have your communication of June 13, 1916, enclosing a letter from the auditor of Van Wert county, and requesting my opinion upon the question propounded therein. The letter in question reads as follows:

> "Is there any reason why (when we start improving roads to be paid for by bond issue) the county commissioners, after having passed all necessary legislation, could not provide temporary money by issuing certificate of indebtedness at a rate not to exceed six per cent. for a short period of time until we know how much actual cash the farmers will be able to pay? Immediately after the receipt of the same we would proceed to issue bonds for the difference.
>
> "During the time that I was city auditor I followed the procedure which resulted in a reduced bond issue as well as a saving to the abutting property owners."

Section 108 of the Cass highway law, section 6929, G. C., being found in the chapter of that act relating to road construction and improvement by county commissioners, provides that the county commissioners, in anticipation of the collection of special assessments upon benefited real estate, may sell the bonds of the county. I am of the opinion that this provision is exclusive and that the collection of assessments made by county commissioners for the construction of a road, under the provisions of chapter VI of the Cass highway law, may not be anticipated by the issue of short term notes or certificates of indebtedness or in any manner other than by an issue of bonds in the method provided by section 6929, G. C.

It should be noted that under the provisions of section 6922, G. C., assessments for the construction of a road by county commissioners are made as soon as the improvement is granted. The estimated assessments are made by the surveyor upon actual view and a schedule of the apportionment made by the county surveyor is to be filed in the office of the commissioners, notice given and a hearing had by the commissioners, who are authorized to confirm the assessments as reported by the surveyor or to modify the same and approve and confirm the assessments as modified.

Under the provisions of section 6924, G. C., the commissioners are required to fix a time within which assessments may be paid in cash and give notice of their action by publication. It is clear from a reading of the several related sections of the General Code that the above mentioned steps are to be taken in the order indicated and that they must all be taken and the time within which assessments may be paid in cash must have expired before the county commis-

sioners are authorized to issue bonds in anticipation of the collection of unpaid assessments. When all of the above mentioned steps have been taken and when the time fixed by the commissioners for the payments of assessments in cash has expired, the county commissioners will be authorized to borrow money in anticipation of the collection of such assessments as are not paid in cash. The money is to be borrowed in the manner provided by section 6929, G. C., that is, by an issue of bonds, and as previously indicated I am of the opinion that this method is exclusive and that short term notes or certificates of indebtedness may not be issued.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1794.

COUNTY CHILDREN'S HOME—DESTROYED BY FLOOD OF 1913—REAL ESTATE DISPOSED OF—ABANDONMENT COMPLETE—MAY NOW PROCEED UNDER SECTION NO. 3077 G. C. TO ESTABLISH A HOME.

Through the destruction of the children's home in Morgan county by the flood of 1913, *and the subsequent action of the county commissioners in disposing of the real estate as not needed for public use, the abandonment of the children's home was rendered complete.*

There being no children's home located within the county, the commissioners thereof are authorized to proceed under section 3077 *G. C. to establish a children's home the same as if one had never existed in the county.*

COLUMBUS, OHIO, July 18, 1916.

Board of State Charities, Columbus, Ohio.

GENTLEMEN:—Permit me to acknowledge the receipt of your request for an opinion which is as follows:

> "The 1913 flood destroyed the buildings of the Morgan county children's home. The local officials then decided not to rebuild the institution and abandoned the home as such. The board of trustees which had charge of the affairs of the institution ceased to assume any more responsibility; not even for the wards which had previously been placed in foster homes. The county commissioners have not in subsequent years made any further appointments to this board. From the sale of real estate connected with the home and some insurance money there is now a fund of about $8,000.
>
> "It is proposed by the county commissioners to establish a new home. We wish to enquire whether the provisions of section 3077 of the General Code, will apply in such a case. In other words, is the proposition to create a children's home through purchase of a farm and the erection of buildings to be construed as the establishment of a home without regard to the previous existence of such a home?"

Section 3077 of the General Code, as amended, 103 Ohio Laws, 889, is as follows:

> "When in their opinion the interests of the public so demand, the commissioners of a county may, or upon the written petition of two hundred

or more tax payers, shall, provided the approval of the board of state charities has been first obtained, at the next regular election submit to the qualified electors of such county, or the counties forming a district, the question of establishing a children's home for such county or district, and the issue of county bonds or notes to provide funds therefor. Notice of such election shall be published for at least two weeks prior to taking such vote in two or more newspapers printed and of general circulation in such county or in the counties of the district, and shall state the maximum amount of money to be expended in establishing such home."

I am just in receipt of a letter under date of July 10, 1916, from Mr. John Whitney, auditor of Morgan county, which is as follows:

"You will find enclosed resolution taken from the Commissioners' Journal of August, 1913, relative to the sale of children's home farm.

"The trustees of the children's home continued to act after the destruction of the home until the next visit of the state examiner in April, 1914. Mr. Young, the examiner, advised that the destruction of the home terminated the office of trustees and after that time, April, 1914, the county commissioners took charge of the homeless children of the county, until May, 1916, when the new children's home was put in operation."

With his letter is enclosed a copy of the resolution for the sale of the children's home farm which was adopted by the commissioners of Morgan county on August 11, 1913, and which is as follows:

"RESOLUTION FOR SALE OF CHILDREN'S HOME FARM.

"Whereas, the building and structures situated upon the children's home farm, located in Malta township, Morgan county, Ohio, were destroyed by the flood of March and April of 1913, and by fire, and whereas said farm is now unfitted for use by the trustees of said home for maintaining a home for the dependent children of said county, and whereas the number of dependent children in said county is small and provision for their maintenance and support has been made at a less expense than would be necessary to rebuild and re-equip said farm as a suitable home and institution for said dependent children, therefore be it resolved, by the board of commissioners of Morgan county, Ohio, that it is for the best interest of said county, to sell the premises known as 'The Children's Home Farm.' That notice of the receiving of proposals for the purchase of farm will be published in two newspapers of opposite politics and of general circulation in said county as follows:

"Proposals to be submitted for the sale of said premises, structures, fixtures and equipments thereon, and also for the sale of the premises without any of said structures, etc., said sale to be for one-third cash in hand on day of sale, one-third in one year, and one-third in two years from date of sale, deferred payments being secured by first mortgage on the premises sold, and to bear interest at the rate of 6% per annum; the best bid according to the form thereof will be accepted, reserving the right to reject any and all bids.

"Bids to be opened at one o'clock p. m. on the 25th day of August, 1913."

The resolution recites that the premises were destroyed by the flood of March

and April, 1913, and by fire, and that it is for the best interests of the county to sell the premises known as the "Children's Home Farm." This action was taken under the provisions of section 2447 of the General Code, which was as follows:

> "If, in their opinion, the interests of the county so require, the commissioners may sell any real estate belonging to the county, and not needed for public use."

Section 2447 of the General Code, supra, has been amended and supplemented in 106 Ohio Laws, page 399, and at present is as follows:

> "If, in their opinion, the interests of the county so require, the commissioners may sell real estate belonging to the county, and not needed for public use; and, in case of the sale of such real estate not used for county purposes, the proceeds of such sale or such parts thereof as the board of commissioners may designate may be placed by the commissioners in a separate fund to be used only for the construction, equipment, maintenance or repair of other county buildings, and the provisions of section 5638 of the General Code, shall not apply to appropriations or expenditures of said fund."

From the copy of the resolution re-establishing the children's home, which resolution was entered on the commissioners' journal under date of March 9, 1916, it is made to appear that the money obtained from the sale of the children's home farm, together with some insurance collected amounting to $8,013.18, has been kept intact on deposit in bank. The resolution, among other things, recites:

> "And, whereas, there is now urgent need that said children's home be re-established to care for the thirty children who are now actually wards of the county, and whereas that certain farm now owned by Maud Rex, consisting of seventy-five acres with suitable buildings thereon, located about a mile from McConnelsville on the Barnesville road is a suitable place for a children's home, and whereas the same is offered to this board for such purpose for the sum of $8,000.00. Now, therefore, be is resolved, by the board of county commissioners of Morgan county, Ohio, in regular session: That said farm be purchased for said sum * * * be taken possession of by the proper authorities, and that said children's home be and the same is hereby re-established thereon."

A board of trustees is also named in the resolution and constituted with full power to control and manage the same according to law.

As to the full and complete abandonment of the children's home subsequent to the flood of 1913 there can be no question, as the buildings were completely destroyed, nothing being left but the land. This condition has existed for a period of over three years, was known to your department and, as stated before, was made the subject of official action by the board of county commissioners of Morgan county. With the sale of the real estate under the provisions of section 2447 of the General Code, supra, the abandonment of the children's home was complete, and so far as section 3077 of the General Code is concerned the conditions in Morgan county were the same as if the home had never existed.

The provisions of section 3077 of the General Code, as amended, supra, are clear and precise, and from the facts stated in your letter, coupled with the action taken by the county commissioners, there can be no question but that there is not at present a children's home in Morgan county. It is now proposed to purchase

a farm which is said to be suitable for the purpose of a children's home, the money necessary for payment for the farm is in hand and, subject to the approval of your board, which is required as a condition precedent to the establishment or erection of a children's home. It is my opinion that the necessary plan of procedure for the establishment of a children's home in Morgan county is provided by section 3077 of the General Code, as amended, supra, and the prior existence of a home which was abandoned under the circumstances and conditions described above does not rob the county commissioners of their authority to proceed under the section quoted. I do not know by what authority this money has been placed in bank, unless this is meant to refer to the regularly designated depository.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1795.

COMMISSION FOR THE BLIND—WHEN AN APPLICANT TO ITS INDUSTRIAL SCHOOLS RECEIVES AN AWARD FROM INDUSTRIAL COMMISSION ON ACCOUNT OF AN INJURY IN COURSE OF HIS EMPLOYMENT, SAID FACT DOES NOT OF ITSELF OPERATE TO DENY HIM BENEFITS OF SECTION 1366 G. C.—COMMISSION FOR BLIND SHOULD EXERCISE DISCRETION.

The fact that an applicant for admission to one of the industrial schools or shops operated by the Ohio Commission for the Blind for the purpose of learning broom making receives an award from the Industrial Commission of Ohio on account of the loss of his sight in the course of his employment does not of itself operate to deny him the benefits of section 1366 of the General Code, which authorizes the commission for the blind to provide board and lodging for workmen and pupils.

The question is one of administration to be determined by the commission in the exercise of sound discretion. The facts in each particular case govern.

COLUMBUS, OHIO, July 18, 1916.

The Ohio Commission for the Blind, Columbus, Ohio.

GENTLEMEN:—The request for an opinion submitted by the acting executive secretary of your commission is as follows:

> "We have had application for admission to our training school from Christo Space, a young man who has recently lost his sight in an explosion at the plant where he was employed in Marion, Ohio. He is now receiving $7.26 from the Industrial Commission, and we would like to know if he is entitled to assistance for paying his board during the time he is learning the trade of broom making. Of course, we make no charge for tuition, but the question has been raised as to whether or not we are justified in paying his board as we do in cases where the men have no income while learning to make brooms."

Section 1366 of the General Code, which is a part of the act governing the Ohio Commission for the Blind, is as follows:

> "The commission for the blind may establish, equip and maintain schools for industrial training and workshops for the employment of suit-

able blind persons, pay the employes suitable wages and devise means for the sale and distribution of the product thereof. The commission may also provide or pay for during their training the temporary lodging and support of pupils or workmen received at any industrial schools or workshops established by it."

The object of your commission, as set forth in section 1363 of the General Code, is that it should act as a bureau of information and industrial aid, assist the blind in finding employment and teach them industries which may be followed in their homes. In other words, the work of the commission is largely of a philanthropic and benevolent character.

The precise question involved in your enquiry is whether or not your commission would be justified in paying the board of the applicant for admission to your training school in view of the fact that he is receiving $7.26 (which I assume to be weekly) as an award from the Industrial Commission of Ohio growing out of the loss of his sight.

Under the provisions of section 1366 of the General Code, supra, your commission is clothed with discretion as to matters of this kind, there being no fixed standard by which the question of payment of maintenance is to be measured. The mere fact that the applicant in the present case is a beneficiary of the workmen's compensation act to the extent of $7.26 per week would not, in my opinion, necessarily determine the question as to his ability to maintain himself during the time when he might be learning the trade of broom-making as the entire amount of $7.26 might be expended by him in connection with his necessary home expenses, such as providing for a family, parents, etc.

While the provisions of the law authorizing the payment for lodging and support of pupils during their training under your supervision are, doubtless, meant to apply to needy persons, yet it is not to be assumed that one, in order to qualify under those provisions, should necessarily be a pauper or entirely without some income.

It is my opinion that this question is one of administration which calls for the exercise of sound discretion by your commission, and if it should be found that the amount received by the applicant from the Industrial Commission is consumed in the payment of obligations resting upon him, the fact of his receiving the award referred to should not deprive him of the benefits of the section. If, on the other hand, it should be found upon investigation that from the proceeds of the award the applicant for admission to the training school is able to maintain himself during his training period there would probably not exist any necessity for the payment of his board by your commission, and therefore no justification for such action on your part.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1796.

ROADS AND HIGHWAYS—NO STATUTES MAKING IT CRIMINAL OFFENSE FOR CONTRACTOR NOT TO MARK WITH RED LIGHT OR OTHER DANGER SIGNAL, OBSTRUCTION LAWFULLY PLACED IN HIGHWAY.

There is no statute making it a criminal offense for a contractor not to mark with a red light, or other danger signal, obstructions lawfully placed in a highway. There is, however, a civil liability for any negligence.

COLUMBUS, OHIO, July 18, 1916.

HON. C. ELLIS MOORE, *Prosecuting Attorney, Cambridge, Ohio.*

DEAR SIR:—I have your inquiry of June 16, 1916, which inquiry reads as follows:

> "I have not made an exhaustive investigation concerning the statute, but with what examination I have made I have not found any statutory provision with any penalty attached thereto, requiring a contractor or any one leaving anything upon the public highway, to have the same marked with danger signals or red lights. There was some complaint about a contractor improving some of our roads, not keeping lights upon his machinery used in the improvement. However, he has since complied with this, and there is no immediate necessity for this being used. However, I am anxious to know if you knew of any statutory provision covering this matter with reference to contractors and the public highway."

By the expression "a contractor or any one" I understand you to refer to a contractor or other person lawfully engaged in the construction, improvement, maintenance or repair of a public highway. Not every class of highway work requires the closing of the section of highway being improved, and it is apparent that where a highway is being improved and the same is not closed to public travel, it will be necessary at times to place materials or other obstructions in the road. Such placing of obstructions in or upon a public highway is not to be regarded as unlawful within the meaning of section 288 of the Cass highway law, section 13421-11 G. C., which provides that whoever unlawfully places any obstruction in or upon a public highway shall be fined, etc. Your inquiry, as I understand it, is as to whether there is any statute making it a criminal offense for a contractor or other person engaged in the construction, improvement, maintenance or repair of a public highway, which highway is not closed to traffic, to fail to mark with a red light or other danger signal any material, tools, or other articles which he may lawfully place in the highway.

I have carefully examined the statutes and do not find that the act referred to by you has been made a criminal offense by the legislature of Ohio. Where, however, the highway is unlawfully obstructed, the person placing the obstruction therein may be prosecuted under section 13421-11 G. C. referred to above, or under section 13421-14 G. C., which provides that whoever digs up, removes, excavates or places any earth or mud upon any portion of any public highway, or builds a fence upon the same without legal authority or permission so to do, shall be fined, etc.

I do not mean to hold, however, that a contractor lawfully placing material, machinery or other obstructions of a similar character within a highway and

failing to mark the same with red lights or other similar danger signals would not be liable civilly to a person suffering injury as a result of such conduct.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1797.

ROADS AND HIGHWAYS—CASS HIGHWAY LAW DOES NOT AUTHORIZE COUNTY COMMISSIONERS TO APPROPRIATE PROPERTY FOR SOLE PURPOSE OF WIDENING MAIN MARKET ROAD—INTERPRETATION OF STATUTES AUTHORIZING APPROPRIATION OF LAND FOR ELIMINATION OF RAILWAY GRADE CROSSINGS—EFFECT OF CASS HIGHWAY LAW UPON SUCH PROCEEDINGS—BOND PROVISION FOR COUNTY'S SHARE OF COST DISCUSSED.

1. *Neither section 1 of the Cass highway law, section 6860 G. C., nor section 19 of the act, section 6878 G. C. authorizes county commissioners to appropriate property for the sole purpose of widening a main market road.*

2. *Where the commissioners of a county are proceeding under section 8863 G. C. et seq., and it becomes necessary to purchase or appropriate land or property, the commissioners are authorized to make such purchase or appropriation by section 8867 G. C., and should proceed under that section. In making an appropriation of land or property under section 8867 G. C. the commissioners should act in the manner provided by section 91 and 92 of the Cass highway law, sections 6912 and 6913 G. C. and the related sections.*

3. *The elimination of a railway grade crossing or the change of an existing railway crossing cannot be considered an "improvement" under chapter VI of the Cass highway law. The power to appropriate lands or property necessary in the alteration of a railway crossing is not conferred by any provision of chapter VI of the Cass highway law, but is conferred by section 8867 G. C.*

4. *The issue of bonds for the county's portion of the cost of changing a railway crossing is controlled by section 8870 G. C.*

5. *It is not necessary that bonds for the county's portion of the cost of changing a railway crossing be sold before the agreement between the county and the railway company is made.*

6. *Where the county commissioners are proceeding under section 8863 G. C. et seq., section 2444 G. C. does not apply.*

7. *Where the commissioners are proceeding under section 8863 G. C. et seq., advertisement and service of notice should be made as provided by sections 6912 and 6913 G. C., although the railroad company constitutes the only abutting property owner and is the only owner whose property is purchased or appropriated.*

8. *Under such circumstances a trustee under a mortgage is to be regarded as an "owner" and is entitled to notice, and this is true without regard to whether default has been made in the condition of the mortgage.*

9. *The fact that the corporation line of a city bisects an improvement projected under section 8863 G. C. et seq., does not destroy the jurisdiction of the county commissioners, and the proceedings, plans, specifications, etc., need not be approved by the city council.*

COLUMBUS, OHIO, July 18, 1916.

HON. JOHN V. CAMPBELL, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—I have the following request for an opinion from Mr. Smith Hickenlooper of your office, under date of June 8, 1916:

"General Code, section 8864, provides for the alteration of a grade 'or other crossing' by unanimous vote of the county commissioners. General Code, section 8865, provides for the publication and service of notice. Section 8866 provides for a resolution determining to proceed with the proposed improvement that shall be passed in not less than thirty nor more than ninety days after the original resolution. General Code, section 8867, provides for the appropriation of land required to make the alteration in the highway 'in the manner provided by law for the appropriation of private property for public use.' Section 8868 provides for the apportionment of the cost of the improvement, including the cost of land purchased or appropriated, of which total cost the county shall pay not more than thirty-five per cent. and the railway company not less than sixty-five per cent.

"The C. H. & D. Railway Company crosses Springfield pike, a main market road, a short distance south of the former village of Hartwell, now a portion of the city of Cincinnati. The corporation line of the city of Cincinnati runs along the center of Springfield pike at this point, the eastern portion of the crossing being within the corporate limits, and the western half in the county. North and south of the crossing the roadway is sixty feet in width and at the point of crossing is approximately only twenty-two feet in width between the abutments of the railway supporting the overhead structure. An effort to compel the railway company to remove these abutments from between the lines of the roadway extended,, failed by reason of the decision of the supreme court holding that the statute of limitations had run in favor of the railway before the county acquired title to the Springfield pike (92 O. S., 513).

"This crossing, although an overhead one, is dangerous to travel by reason of its extreme narrowness, and the dip in the roadway at this point. The county commissioners, therefore, desire to enter into an agreement with the railway company to rebuild this crossing in such manner as to allow a roadway proper for the full width of forty feet with ten foot sidewalks on each side, the railway retaining the right to maintain supporting columns on the curb line and the railway company to perform the work of reconstruction. The commissioners also wish to issue bonds for the county's share of the cost of this improvement. It is estimated that the actual cost of construction of the new structure will be approximately $84,300.00, whereas a new twenty-two foot structure placed upon the present abutments would cost the railway only in the neighborhood of twenty-five thousand. Therefore, whether we figure the value of the property taken and the damage to the residue as the difference in the cost of the two structures, or as a capitalization of the increased depreciation charges, such value and damage to the residue would amount to more than thirty-five thousand dollars. A tentative understanding has been reached between the commissioners and the railway, that the commissioners will contribute to the cost of reconstruction a sum not to exceed thirty-five thousand dollars, and it is our desire to proceed under sections 8864 to 8868 of the General Code. In so doing we are confronted by several questions of procedure upon which we should like your opinion.

"Section I of the Cass highway law gives the commissioners power to widen all roads in the county 'except intercounty and main market roads.' Section 19 of this law apparently gives the commissioners authority to widen all roads, without exception. Chapter I of the Cass highway law, contains no provision for the issue of bonds for the payment of compensation for property taken. Section 85 gives to the county commissioners the

power to widen a roadway 'in connection with the proceedings for such improvement.' Sections 89 and 94 inclusive provide the procedure for making an 'improvement.' Section 108 of the Cass highway law provides for the issue of bonds in anticipation of the collection of taxes. Sections 253, 254 and 255 provide for a change of grade at railway crossings, but apparently do not cover an alteration of such crossing as here contemplated.

"The procedure contemplated by us is to agree with the railroad that the compensation for land taken and the damage to the residue shall be fifteen thousand, seven hundred dollars. This would make the total cost of the improvement, including the value of property taken, one hundred thousand dollars, of which the county would pay thirty-five per cent., but not to exceed thirty-five thousand dollars, and the railway company sixty-five per cent. The only act performed by the county would be the acquiring of additional width of roadway. In other words the county would not make any improvement, properly so-called, under chapter 6 of the Cass highway law. And as section 8867 of the General Code, provides that property may be taken by the county 'in the manner provided by law for the appropriation of private property,' the following questions arise.

"(1) Can the county commissioners appropriate property for the sole purpose of widening a main market road under either sections 1 or 19 of the Cass highway law?

"(2) If there is a limitation upon the power of the commissioners under the Cass highway law to appropriate property for widening a main market road, can this power be inferred from the right given under section 8867 of the General Code, which apparently limits such right to existing powers? And by what plan of procedure would the commissioners be governed?

"(3) If the right to appropriate property to widen a main market road be not given by chapter I of the Cass highway law, can the alteration of a railway crossing be considered an 'improvement' under chapter 6, and the power to appropriate thus be deemed created under section 85 of that law; or, on the other hand, are the improvements in connection with which the commissioners are given the power to widen such roadway under such chapter 6, limited to improvements of a character designated in that chapter?

"(4) If the right to appropriate is derived from the Cass highway law, would the issue of bonds be controlled, in part or in whole, by the provisions of section 108 of that law, or by General Code, section 8870?

"(5) Must the bonds be sold and the money be in the treasury, prior to the making of the agreement in question, under section 5660 of the General Code?

"(6) Is any advertisement necessary, in an appropriation or purchase agreement of this sort, under section 2444 of the General Code, as amended 106 Ohio Laws 423?

"(7) Where the railroad constituted the only abutting property owner and is the only owner whose property is purchased or appropriated, is it essential that advertisement and service of notice be made as required by either sections 11 or 12, or sections 91 and 92 of the Cass highway law, or can the commissioners enter directly into such agreement with the railway?

"(8) Would a trustee under a mortgage in which default had or had not been made, be considered an 'Owner,' and as such entitled to notice under either sections 11 and 12 or section 92 of the Cass highway law?

"(9) Does the fact that the corporation line of the city of Cincinnati bisects this improvement, limit the powers of the commissioners in reference thereto, or must the proceedings, plans, specifications, etc., be approved by the city council, the city contributing nothing to the improvement, as well as by the state highway commissioner?"

Complying with my request of June 24th for a restatement of his second question, Mr. Hickenlooper, in a letter to this office under date of July 3rd, has re-phrased this question to read as follows:

"Second: If there is a limitation upon the power of the commissioners, under the Cass highway law, to appropriate property for widening a main market road, is such power conferred by section 8867, which apparently limits the power of appropriation granted by it to powers already existing or granted elsewhere? And by what plan of procedure would the commissioners be governed in making the appropriation under this section (8867)?"

Sections 1 to 19 inclusive of the Cass highway law, being sections 6860 to 6878 G. C. inclusive, provide, among other things, a scheme for the widening of roads by county commissioners. Section 6860 G. C., being the first of these sections, reads as follows:

"The county commissioners shall have power to locate, establish, alter, widen, straighten, vacate or change the direction of roads as hereinafter provided. This power extends to all roads within the county, except the intercounty and main market roads."

Section 6861 G. C. relates solely to the width of roads to be hereafter located and established. Sections 6862 to 6877 G. C. inclusive, provide, among other things, a method of widening roads upon the petition of at least twelve freeholders residing in the vicinity of the proposed improvement. Section 6878 G. C. provides, among other things, a method of widening roads upon the initiative of the commissioners of any county or any joint board of commissioners of two or more counties, in which case no petition is necessary, provided the board or joint board acts by resolution adopted by a unanimous vote. There can be no question but that the provision of section 6860 G. C., to the effect that the power of county commissioners to widen roads shall not extend to intercounty or main market roads, relates to the scheme of procedure provided for by sections 6862 to 6877, G. C. inclusive, and I am also clearly of the opinion that this limitation on the power of the county commissioners was intended by the legislature to apply where a board of commissioners or joint board of commissioners acts without a petition under authority of section 6878 G. C. I therefore advise you that sections 1 to 19 inclusive of the Cass highway law, being section 6860 to section 6878 G. C. inclusive, do not confer upon county commissioners the power and authority to appropriate property for the sole purpose of widening a main market road. This conclusion is strengthened by the fact that under section 194 of the act, being section 1201 G. C., county commissioners are authorized to appropriate property where they are co-operating with the state in the construction of an intercounty highway improvement and land or property is needed by reason of the fact that the line of the proposed improvement deviates from the existing highway or by reason of the fact that additional right-of-way is required for the improvement; and by the provisions of section 226 of the act, section 1231 G. C., the procedure where commissioners co-operate in improving a main market road is the same as

in the case of co-operation in the improvement of an intercounty highway. The language of section 5860 G. C. is to my mind capable of only one interpretation, to wit: That the authority of the county commissioners under this and the eighteen ensuing sections does not extend to intercounty highways and main market roads. However, if there be any doubt as to the meaning of this language, and as to whether the limitation is effective when the commissioners, under authority of section 6878 G. C. act by unanimous vote and without a petition, then the fact that the legislature has in another part of the act conferred authority upon commissioners to appropriate land and property where they are co-operating in the improvement of an intercounty highway or main market road, supports the conclusion heretofore expressed in regard to the scope of their authority under sections 6860 to 6878 G. C. inclusive.

Coming now to consider the second question submitted by Mr. Hickenlooper, and having concluded that there is a limitation upon the power of county commissioners acting under sections 6860 to 6878 G. C. inclusive, to appropriate property for widening a main market road and that the commissioners do not have such power under the sections in question, it becomes necessary to consider the question submitted as to whether such power, is conferred by section 8867 G. C., which Mr. Hickenlooper observes apparently limits the power of appropriation granted by it to powers already existing or granted elsewhere.

Section 8867 G. C. 90 O. L. 361, reads as follows:

> "The land or property required to make the alteration in the street or highway necessitated by the proposed improvement, shall be purchased or appropriated by the municipality or county after the manner provided by law for the appropriation of private property for public use, and the land or property required to make the alteration in the railroad or railroads necessitated by the proposed improvement, shall be purchased or appropriated by the railroad company or companies, after the manner provided for the appropriation of private property by such corporation."

Mr. Hickenlooper's observation is evidently dictated by the provision of the section above quoted, to the effect that the land or property "shall be purchased or appropriated by the * * * county in the manner provided by law for the appropriation of private property for public use." I think it is clear from this section that it was the intention of the legislature to confer upon county commissioners the power to purchase or appropriate land or property where they are proceeding under section 8863 G. C. et seq., and I therefore advise you that where the commissioners of a county are proceeding under section 8863 G. C. and the succeeding sections, and it becomes necessary to purchase or appropriate land or property, the commissioners are authorized to make such purchase or appropriation by section 8867 G. C., and should proceed under this section. It is true that the power of appropriation granted by this section is limited to powers already existing or granted elsewhere, and the difficulty in determining the plan of procedure which would govern the commissioners in making the appropriation arises from the fact that they are required to proceed "in the manner provided by law for the appropriation of private property for public use," and the further fact that there is no general appropriation statute applicable to and available for use by the county commissioners. It might be thought upon a cursory examination that by the use of the language "in the manner provided by law for the appropriation of private property for public use," the legislature intended to refer to section 2446 G. C., which in its present form authorizes the appropriation of real estate, right of way or easement for a court house, jail or public offices or for a bridge and the approaches thereto *or other lawful structure.* However, this conclusion

cannot be sustained by reason of the fact that section 2446 G. C. has been amended since the enactment of section 8867 G. C., and at the time of the enactment of section 8867 G. C., section 2446 G. C. authorized the appropriation of real estate only for the purpose of a court house or a court house and jail. I am of the opinion that the plan of procedure by which the commissioners should be governed in making an appropriation under section 8867 G. C. is to be deduced from the fact that the purpose for which such appropriation of land or property is to be made is primarily the improvement of a highway, and that therefore the appropriation should be made in the manner provided by law for the appropriation of land for road purposes where the county commissioners make the appropriation as an incident to the ordinary improvement of such highway. This method is at the present time regulated by the provisions of several of the sections of chapter VI of the Cass highway law. Upon the adoption by the county commissioners of a resolution declaring the necessity of joining with the railroad company in the alteration of the crossing and the intent of the county commissioners and stating the manner in which the alteration is to be made and giving the method of construction, and also setting forth what land or property it is necessary to appropriate, and how the cost is to be apportioned between the county and railroad company and other necessary facts, there should be published in addition to the notice required by section 8865 G. C., the notice required by section 6912 G. C., being section 91 of the Cass highway law, in so far as such notice relates to the taking of land or property, and such notice should state briefly that the land and property of the railroad company are to be appropriated and should be served on the company at least ten days before the day fixed for the hearing on claims for compensation. Subsequent proceedings should be had in compliance with the provisions of section 6914 G. C. et seq., in so far as such sections refer to the allowance of claims for land or property taken.

Section 85 of the Cass highway law, section 6906 G. C. referred to by Mr. Hickenlooper, in his third question, reads as follows:

> "The board of commissioners of any county shall have power, as hereinafter provided, to construct a public road by laying out and building a new public road, or by improving, reconstructing or repairing any existing public road or part thereof by grading, paving, draining, dragging, graveling, macadamizing, resurfacing or applying dust preventives, or by otherwise improving the same. The county commissioners shall have power to alter, vacate or widen any part of such road in connection with the proceedings for such improvement."

This section makes no reference whatever to the elimination or abolition of grade or other crossings and the provisions of the subsequent sections of chapter VI of the Cass highway law are not such as to lead to the belief that the legislature intended that these sections should apply to the elimination, abolition or change of such crossings. The only argument in favor of such construction would necessarily be based on the use of the language "or by otherwise improving the same," and under the familiar rule of statutory construction that where general terms follow specific words of a like nature, they take their meaning from the latter and are presumed to embrace only things or persons of the kind designated by them, I am of the opinion that the use of the language "or by otherwise improving the same" is not to be taken as conferring upon county commissioners the authority to alter or abolish grade or other crossings under the provisions of chapter VI of the Cass highway law. This conclusion is strengthened by the fact that full authority to deal with such crossings existed at the time of the passage of the Cass highway law under sections of the General Code which were left

unrepealed. I therefore advise you that the elimination or change of a railway crossing cannot be considered as an improvement under chapter VI of the Cass highway law and the power to appropriate lands or property necessary in the alteration of a railway crossing is not conferred by any provision of said chapter of the Cass highway law, but is as has been heretofore stated, conferred by section 8867 G. C., and the provisions of chapter VI of the Cass highway law are applicable only in so far as they are referred to by section 8867 G. C. by the use in said section of the language "in the manner provided by law for the appropriation of private property for public use." In other words, the improvements in connection with which the commissioners are given the power to widen roadways under chapter VI of the Cass highway law, are only such improvements as are designated in that chapter and the power to widen a roadway in connection with the alteration of a railroad crossing and to purchase or appropriate land for such widening is to be found in said section 8867 G. C.

The answer to the fourth question submitted by Mr. Hickenlooper must be apparent from what has already been said. The right to appropriate land or property being conferred by section 8867 G. C., and not by the Cass highway law and the commissioners proceeding under section 8863 G. C. et seq., which sections provide a special method of procedure for the alteration or abolition of grade or other crossings, and this method of procedure including an authorization for the issuance of bonds, such bonds are to be issued under authority of section 8870 G. C.

The fifth question submitted by Mr. Hickenlooper was considered by the court in the case of State ex rel. v. Amlin, 1 N. P., n. s. 517, which case was affirmed by the supreme court without report in 74 O. S., 447. The sections of the General Code now under consideration, to wit: sections 8863 to 8873 G. C. inclusive, were, prior to the codification of 1910, known as sections 3337-8 to 3337-17 inclusive, of the Revised Statutes. The above cited case had to do with the proposed construction of a structure intended to carry the street traffic over a railway and the construction of which was projected under the statutes now under consideration. The fifth branch of the syllabus reads as follows:

> "Such a structure must be built under the provisions of section 3337-8 to 17, which is complete in itself, and permits county commissioners to contract with railway companies with reference to a division of the cost, and issue bonds therefor, without reference to the emergency bridge fund or the fact that there is not in the county treasury or in process of collection sufficient funds to meet the expense."

I understand that the agreement referred to in Mr. Hickenlooper's fifth question is the agreement to be effected between the county and the railroad company, and in accordance with the decision of the court in the above cited case I advise you that it is not necessary that the bonds be sold and the money be in the treasury prior to the making of the agreement between the county and the company.

Section 2444 G. C. as amended in 106 O. L. 423, reads as follows:

> "Before the county commissioners purchase lands to erect a building or bridge, the expense of which exceeds one thousand dollars, they shall publish and circulate handbills, and publish in one or more newspapers of the county notice of their intention to make such purchase, erect such building or bridge, and the location thereof, for at least four consecutive weeks prior to the time of that purchase, building or location is made; except in case the county has land or buildings on or in or under which a public comfort station can be erected or installed, in which case the publi-

cation of such handbills and in newspapers shall not be necessary. Such county commissioners shall hear all petitions for, and remonstrances against such proposed purchase, location or improvement. When a public comfort station has been erected or installed as herein provided by a board of county commissioners, such board shall have control over and maintain the same."

It is doubtful whether this section could be construed as applying to the alteration of railroad crossings in any view that might be taken of the same. In construing the scope and effect of this section, the following language was used in opinion No. 1058 of this department, rendered to Hon. Dean E. Stanley, prosecuting attorney of Warren county, on November 30, 1915, and found at page 2303 of the Opinions of the Attorney-General for that year:

"It is obvious that the purpose of this statute is to give the people of the county wherein such action is to be taken an opportunity to object to the purchase of land and the consequent location and erection of the building or bridge thereon. In other words, the facts which bring into operation the provisions of this statute are the proposed purchase of lands and the location and erection thereon of a building or bridge."

A railroad crossing certainly cannot be regarded as a building, and it has not been generally regarded by the courts as a bridge. In any event, the reason for the application of section 2444 G. C. fails by reason of the fact, that advertisement is necessary under the provisions of section 8865 G. C., and this advertisement will serve to bring to the attention of the public the intention of the county commissioners in the premises. In view of the language of section 2444 G. C., and in view of the fact that the purpose of this section will be fully accomplished by the advertisement made under section 8865 G. C. I am of the opinion, and advise you, that no advertisement is necessary under section 2444 G. C. in an appropriation or purchase agreement of the sort referred to by Mr. Hickenlooper. This is in accordance with the holding of the court in the case of State ex rel. v. Amlin, supra.

It has been sufficiently indicated, I think, in my answers to the second and sixth questions submitted, that in so far as the purchase or appropriation of land or property is concerned the advertisement and service of notice should be made as required by sections 91 and 92 of the Cass highway law, sections 6912 and 6913 G. C., and that the commissioners should not attempt to enter directly into an agreement of purchase with the railway company, but should proceed in the manner set out in the Cass highway law. In view of the provision of section 6914 G. C., that all claims for compensation for land and property to be taken shall be in writing, setting forth the amount of compensation claimed, together with a description of the property to be taken, and the further provision of section 6912 G. C., that unless such claims are filed in writing on or before the time fixed for hearing said claims, the same shall be waived except as to minors and other persons under disability, it is my view that the publication and service of notice might be regarded as jurisdictional to the power of the county commissioners to take and pay for the land. In any event there is a sufficient argument in support of the proposition that advertisement should be made and notice served in accordance with the provisions of section 6912 and 6913 G. C. to warrant the statement that the publication and service of such notice should, as a matter of precaution, be made in the manner provided by the sections in question.

Coming now to consider the eighth question submitted by Mr. Hickenlooper,

it has generally been held that in condemnation or appropriation proceedings a mortgagee is entitled to notice and compensation. The following is quoted from 10 American and English Ency. of Law, 2nd Edision, 1192:

> "The courts are not agreed as to the proper disposal of compensation when mortgaged property is taken under the power of eminent domain. A large number of cases hold that it is the moregagee who should be paid.
>
> "And it is an established rule that he is an 'owner of real estate' or 'a person interested' in such a sense that he is entitled to compensation for the loss he sustains; and if in the condemnation proceedings the mortgagor alone is recognized, the title of the mortgagee is not divested. He may bring trespass or he may foreclose and sell under the mortgage, first, the land subject to the right of way. If this proves insufficient to discharge the mortgage deed, then he may sell the right of way."

The following is quoted from 15 Cyc., 845, under the title "Eminent Domain," and under the sub-head "Persons Entitled to Notice:"

> "A mortgagee is a party interested and is entitled to notice of the proceedings."

This matter was before the court in the case of Harrison v. Village of Sabina, 1 O. C. C., 49. Section 2237 R. S., then in force and relating to the appropriation of property by municipal corporations, provided that notice of the time and place of the application should be given to all the owners of the property sought to be appropriated. The court held that in proceedings under this and the related sections a mortgagee whose mortgage is duly recorded, is an owner within the meaning of the act in question and entitled to notice of the pendency of an appropriation proceeding.

In view of the foregoing I advise you that a trustee under a mortgage should in the proceeding now under consideration be considered an owner and entitled to notice under the provisions of sections 91 and 92 of the Cass highway law, sections 6912 and 6913 G. C., and this without regard to whether default has been made in the condition of the mortgage.

In considering the last question submitted by Mr. Hickenlooper, attention is directed to the fact that section 8863, G. C. was amended in 106 O. L., 206, so as to confer upon county commissioners the same powers with respect to that part of a state, county or township road which lies within the limits of a municipal corporation as are conferred upon municipal corporations to alter or require to be altered any railroad crossing, or to require any impovement in connection therewith to be made, and to apportion the cost thereof between the county and such railroad or railroads. It is true that under section 8863 G. C. this action is to be taken in the manner provided in section 8874 G. C. et seq., but it is not conceivable that the legislature intended to confer the greater power without conferring the lesser. In other words, section 8874 G. C. and succeeding sections are so framed that a railroad company may, under their provisions and subject to the approval of the proper court, be compelled to make changes in its crossings, while under section 8864 G. C. et seq., the matter is left to agreement. Since a board of county commissioners may now act under section 8874 G. C. et seq., as to state, county and township roads within municipal corporations, it seems clear that as to such roads they may also enter into an agreement with the railroad company under the provisions of section 8864 G. C. et seq.

I therefore advise you that the fact that the corporation line of

the city of Cincinnati bisects this improvement does not limit the powers of the commissioners in reference thereto, and it is my opinion that the proceedings, plans, specifications, etc., do not require the approval of the city council. No objection could be made, however, to the securing of such approval.

This department has never directly considered the question of whether a road, bisected by the corporation line of a city, may properly be regarded as an intercounty highway or main market road, and it will not be necessary to determine that question in connection with the matter submitted by Mr. Hickenlooper. I suggest that as a matter of precaution, and in view of the provisions of section 169 of the Cass highway law, section 1203 G. C., to the effect that where county commissioners improve an intercounty highway, the plans and specifications for the proposed improvement shall first be submitted to the chief highway engineer and shall receive his approval, the safe course to pursue in the present instance would be to submit the plans and specifications for the improvement contemplated by the commissioners of Hamilton county to the chief highway engineer for his approval, and I understand there will be no difficulty in obtaining the same. Mr. Hickenlooper, in his letter, has referred to sections 253, 254 and 255 of the Cass highway law, being sections 6956-2, 6956-3 and 7480 G. C. As suggested by him, these sections seem to apply in terms only to the raising or lowering of the grade on any road or highway above or below railroad tracks, and there is a serious question as to whether, under these sections, it would be possible to secure an alteration of an existing under crossing. In any event, it seems to be the desire of the county officials of Hamilton county to proceed under section 8863 G. C. et seq., and these sections furnish ample machinery for the accomplishment of the desired purposes and are not in my opinion modified in any way by the passage of the sections of the Cass highway law last above referred to. It is therefore my view that proceedings should be had under said section 8863 G. C. and succeeding sections of the General Code, rather than under sections 253, 254 and 255 of the Cass highway law.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1798.

STATE HIGHWAY COMMISSIONER—AUTHORITY TO APPROPRIATE LAND OVER RAILROAD TRACKS—STATE COMMISSIONER SHOULD NOT EXERCISE AUHTORITY—NO MACHINERY FOR SUCH OFFICER TO ENFORCE CONTRIBUTION BY RAILWAY COMPANY.

The state highway commissioner should not attempt to exercise the authority conferred by section 7480, G. C., where a railway company is unwilling to enter into an agreement to assume and pay at least sixty-five per cent. of the cost of the work involved, for the reason that no machinery is provided by which the state highway commissioner may enforce contribution by a railway company.

COLUMBUS, OHIO, July 18, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—Your recent communication relating to the improvement of intercounty highway No. 160 in Vinton county reads as follows:

"The state highway department and Vinton county desire to improve a section of intercounty highway No. 160, in Vinton county, where said highway now passes under the Baltimore & Ohio Southwestern Railway.

"It is proposed to change the location of the highway from the point where it now crosses under the railway, something as outlined in the sketch accompanying this letter.

"The department has already improved this road from McArthur to within a point of several hundred feet from the under crossing on the present highway. At this time it was deemed advisable to discontinue the improvement far enough back from the railroad to allow for a new location at this point in order to give a better and safer under crossing.

"The legislation for the under crossing as it now exists is found in Vinton County Commissioners' Journal No. 5, pages 209-225-236-239, which shows that the road and crossing were established in December, 1896. At present this crossing is nothing more than a railroad bridge over Elk Fork creek whereby the highway was located through and under this bridge with a very limited amount of right of way. At this particular point the alignment is extremely bad, as you will note from the sketch, and the road is subject to overflow a number of times each year.

"It seems impossible to build a satisfactory highway under this bridge and secure a proper and safe width to the highway without seriously interfering with the flow of the stream under the bridge.

"The department desires to be advised on the following questions:

"First. Have we the authority to locate an under crossing for this highway at some other point, such as shown for the proposed highway by the accompanying sketch?

"Second. If we have such authority by law, will you kindly outline the necessary steps to be taken by the department in order to get the railroad company to submit to such proposed under crossing?

"Third. How is the cost of the proposed under crossing, if decided upon, to be divided between state, county and railroad company?

"You will note from the sketch that the height of the railroad grade above the general level of the ground at the proposed under crossing is 18 feet, and that the estimated yardage for a crossing 36 feet in width is 1,000 cubic yards of earth to be removed. This, of course, is only approximate but will serve the purpose, I believe, for such calculations as we now desire to make for the proposed under crossing."

Replying to my request for additional information you advised me that according to a statement made by the county auditor to your division engineer, Mr. Ozias, the original grade crossing has been vacated but that there seems to be nothing on the commissioners' journal to indicate this fact. You further state that the old grade crossing, the existing under crossing and the proposed under crossing all intersect the railroad at different points. You have also transmitted to me certified copies of the proceedings as found on the commissioners' journal relative to the change made in this highway several years ago. On September 8, 1896, the auditor was instructed to notify the general superintendent of the Baltimore & Ohio Southwestern Railway to meet the board of county commissioners for a conference in reference to the crossing. On December 12, 1896, the commissioners put an entry on their journal reciting an application for the alteration of this road and ordering that before further proceedings be had upon said application a bond be given. An undated resolution of the county commissioners recites the filing of a bond and petition and the giving of notice of the filing of the petition

which appears to have been for an alteration of the highway, and in this resolution the bond is accepted and approved and viewers are appointed and they and the county surveyor ordered to meet on January 12, 1897, perform their duties and report their proceedings to the county commissioners. It appears that on March 1, 1897, the viewers having reported favorably on the change in the road, the report was publicly read for the first time. On March 2, 1897, the report was publicly read for the second time. On March 3, 1897, the report of the viewers was publicly read for the third time. Compensation and damages were allowed to certain land owners and it was ordered that the county auditor, after twenty days, if no appeal be taken, draw his order upon the county treasurer for the compensation and damages allowed, that the costs and expenses be paid out of the county treasury, that the several reports of the viewers, with the survey and plat of the road, be recorded, and that the road be established as a public highway. Assuming that you have been furnished with a complete transcript of the proceedings of the commissioners and have transmitted the same to me, these proceedings shed but little light upon the present status of the matter, inasmuch as no copy of petition is set forth and the report of the viewers is not entered in full on the journal of the commissioners. A transcript of the proceedings, also, fails to show what, if any, agreement was made with the railroad company relative to the location of the road under the bridge over Elk Fork creek.

Section 255 of the Cass highway law, section 7480 G. C., reads as follows:

> "The state highway commissioner, county commissioners or township trustees shall have power to appropriate a right of way or crossing over railroad tracks, and lands held by railway companies, whether operated by steam or electricity, and shall also have the right to appropriate the necessary property and right to construct said crossing above or below the grade of said railway. Such proceedings shall be had thereon as are provided for appropriation of property by municipal corporations. In case the grade of the road at such crossing shall be raised or lowered above or below the railroad tracks thereon, by agreement or order of the court, the cost of raising or lowering such grade shall be apportioned between the county commissioners or township trustees and the railroad company in the same proportion as in cases where a grade is raised or lowered on a crossing already established or existing."

This section confers in terms upon the state highway commissioner the right to appropriate the necessary property and right to construct a crossing above or below the grade of a railway. It could hardly be argued that the legislature intended to confer upon the state highway commissioner the right to appropriate property and right of way for the construction of a crossing above or below the grade of a railway, without also conferring upon that official the right to construct such crossing. In view of the provision of the last sentence of this section, to the effect that the cost shall be apportioned in the same proportion as in cases where a grade is raised or lowered on a crossing already established or existing, there might be a question as to the applicability of this section where a road is merely diverted, and it might possibly be argued that the section applied only in the case of the establishment of a new road. However, in view of the scope of certain other provisions of this section, I do not deem it necessary in connection with your inquiry to pass upon the applicability of this section where a highway is merely diverted in order to obtain a more favorable location for the construction of a crossing under or over the tracks of a railway company. You will note that the section in question provides for a division of cost between the county

commissioners or township trustees and the railroad company, and there is no provision in the section in question to the effect that the provisions of law applicable to a municipality in securing changes in railway crossings shall be applicable to the state highway commissioner, or that the state highway commissioner shall have the power and authority to invoke the jurisdiction of any court. In the view that I take of this statute it would not be possible for the state highway commissioner, acting under the same, to compel a railroad company to bear a share of the cost of eliminating a grade crossing or of constructing a crossing under or over the tracks of a railway company for use in connection with a newly established road. In other words, while the state highway commissioner clearly has the power to appropriate a right of way or crossing over railroad tracks, under certain conditions, and while the legislature has in terms conferred upon him the right to appropriate the necessary property and right to construct a crossing above or below the grade of a railway, from which express grant of power may be inferred the right to construct such crossing, at least under certain conditions, yet even if it be assumed that the section now under consideration is applicable where an existing highway is diverted, as well as where a new highway is established, no authority is conferred upon the state highway commissioner, where he might undertake to construct a crossing, to institute proceedings or take steps which would result in compelling the railroad company to bear a part of the cost of a crossing. It appears from your communication that Vinton county is co-operating in the improvement of this road, and in view of the fact that your authority in the premises, conferred by section 7480 G. C. is not as clear as might be desired, and in view of the further fact that it clearly appears from the section in question that no machinery is provided by which you can compel contribution on the part of the railway company in case you should attempt to construct the crossing, and that, as I understand the situation, the railway company is in this instance unwilling to co-operate unless forced so to do, it is my view that you should not atttempt the construction of the crossing, but should refer this portion of the improvement to the county commissioners, who are given ample authority in the premises under the provisions of section 7480 G. C. and the two preceding sections of the Cass highway law. The two preceding sections, being sections 6956-2 and 6956-3 G. C., are as follows:

> "Sec. 6956-2. The county commissioners may raise or lower, or cause to be raised or lowered the grade on any road or highway above or below railroad tracks thereon, and may require a railroad company operated by steam in such county, to raise or lower the grade of its tracks, and may construct ways or crossings above the tracks of any such railroad, or require such railroad company to construct ways or crossings that are to be placed under its tracks. The county commissioners of a county may require such railroad company to erect permanent piers, abutments or other appropriate supports in the ways, crossings, streets, roads or alleys, whenever in the opinion of the county ccommissioners the raising or lowering of the grade of any such railroad tracks, or the raising or lowering of the construction of such ways, crossings, or supports may be necessary upon the terms and conditions, hereinafter set forth."
>
> "Sec. 6956-3. The provisions of law applicable to a municipality in securing the changes pointed out in the foregoing section shall be applicable to a county in securing such changes with reference to such roads when located outside of a municipality, and the proceedings authorized in the case of a municipality by its council are authorized to be had by the county commissioners in securing the changes hereinbefore mentioned, and the county surveyor shall take the place of the engineer of said munici-

pality in all proceedings with reference to such changes, and the county commissioners are authorized to make application to the court in cases where the county and the railway company cannot agree as in the case of a municipality where there is a failure to agree and the same provisions of law as to the division of the expense of such changes shall apply to the county and railway company as are applicable in the case of a municipality and railway company, and all the provisions of law relating to such changes within a municipality shall, when applicable, apply to proceedings on behalf of the county commissioners."

The matter can be worked out by the county authorities of Vinton county under the above sections, which sections adopt the provisions of law applicable to a municipality in securing the elimination of grade crossings. These provisions are found in section 8874 G. C. et seq., and under the same the railroad company is required to pay not less than sixty-five per cent. of the cost. As previously stated herein, I understand that the railway company is unwilling to enter into any voluntary arrangement looking toward an assumption of a part of the cost and expense of constructing an under crossing on the highway referred to by you, and I therefore advise you, in answer to your first and second questions, that whatever may be your authority in the premises, in view of the fact that it is proposed to divert an existing highway rather than to establish a new highway, you should not undertake to exercise any authority that you may have for the reason that no machinery is provided by which contribution on the part of the railway company may be enforced. In any view that may be taken of section 7480 G. C., you should only attempt to exercise your authority thereunder where the railway company is willing to enter into an agreement to assume and pay at least sixty-five per cent. of the cost of the work.

Referring to your third question, if the railway company and the county are able to reach an agreement, the cost of the crossing may be divided as may be mutually agreed between them, with the qualification that the railway company shall pay not less than sixty-five per cent., and the county not more than thirty-five per cent. of such cost. Where resort is to be made to the courts and the court finds that the public security and convenience require that the changes be made and that the plans presented are reasonable and practicable, and orders the changes made, the county will be required to pay thirty-five per cent. and the railroad company sixty-five per cent. of the cost of the work.

I will not in this connection endeavor to point out the exact procedure to be followed by the county, as that is a question for the county authorities.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1799.

STATE BOARD OF PUBLIC BUILDINGS—NO AUTHORITY TO LEASE A PART OF BUILDING ACQUIRED BY PURCHASE—ADJUTANT GENERAL MAY EMPLOY NECESSARY ASSISTANTS BUT CANNOT DELEGATE HIS POWERS.

No statutory authority exists for the leasing by the state, through any officer thereof, of rooms in or portions of any building or buildings which might be acquired by the state for the primary purpose of housing state officers, departments, etc.

While the adjutant general may employ necessary assistants, he may not delegate any of his powers with respect to public buildings.

COLUMBUS, OHIO, July 19, 1916.

HON. HERBERT M. MYERS, *Secretary State Board of Public Buildings, Columbus, O.*

DEAR SIR:—I acknowledge receipt of your letter of July 17th, and hasten to give an answer thereto. You inquire as follows:

> "The state board of public buildings wishes to be advised, whether it would be possible for the state of Ohio to own and operate a building and lease portions of it to individuals or corporations engaged in private enterprises; and whether, under the law providing for the supervision of public buildings by the adjutant general, the state could employ a manager to operate the building, who would be authorized and empowered to employ janitors, engineers, etc."

That the state of Ohio, meaning thereby the government of the state as organized under the constitution, can own and operate a building, primarily (I presume) for the purpose of housing state offices and departments, and incidentally lease portions of it not needed for such primary purpose to individuals or corporations engaged in private enterprises, is a question which I think is not difficult of solution as a matter of constitutional law. The state is now leasing to private individuals and corporations, for private industrial purposes, real estate acquired by it as a part of its public works. I may dismiss this feature of your inquiry with the statement that I know of no constitutional objection to such a course; and when you inquire as to what the state may do the only question raised is a constitutional one.

The powers of the state, however, must be exercised through some appropriate agency; and where the constitution does not itself designate the agent who shall exercise a sovereign power, the legislature must make the selection and delegate the power, if it be executive, to some executive or administrative officer. Therefore, it does not follow that because the state as a government in which as a whole certain sovereign powers have been vested by the constitution may undertake a given enterprise, any particular executive officer of the state may execute this power on its behalf.

In view of these considerations I assume that your inquiry requires me to ascertain whether under existing laws authority is committed to any state officer to do the things about which you inquire; in short, whether adequate machinery exists for the accomplishment of the purpose described by you.

As the second part of your question suggests, it would be most natural to look to the statutes prescribing the powers and duties of the adjutant general for authority to do the things contemplated.

Section 146 G. C., as amended 106 O. L. 319, provides as follows:

> "By virtue of his office the adjutant general shall be superintendent of the state house. He shall have the supervision and control of the state house and heating plant therein, the fixing and placing of all offices, commissions, departments and bureaus of the state therein, and full control and supervision of fixing and placing all officers, commissions, departments and bureaus of the state in offices, buildings and rooms outside the state house when the same cannot be placed therein, materials and persons employed in and about the state house, the grounds and appurtenances thereof and all work or materials required in or about them. He shall rent all offices, buildings, and rooms for all officers, commissions, departments and bureaus of the state located outside the state house, and execute all leases in writing for the same on behalf of the state subject to the approval of the governor and deposit a copy thereof in the office of the secretary of state within ten days after the lease has been executed."

As you have been previously advised, the act providing for the appointment of a commission to investigate the office requirements of the officers, departments and commissions of the state, etc. (106 O. L. 463), authorizes the acquisition of a building other than the state house and the judiciary building for the housing of such state officers and departments as cannot be accommodated in the latter. Reading these two enactments together I am clearly satisfied that by necessary implication at least the adjutant general would have the authority to control and supervise any building other than the state house or the judiciary building which might be acquired by the state for the housing of state departments.

So far as the express provisions of section 146, supra, go it must be admitted that they do not authorize the adjutant general to exercise any supervision and control of such outside building or buildings, or rooms, other than to "fix and place" the several departments, commissions, offices and bureaus of the state therein. That is, he may determine, subject, of course, to the provisions of positive law relative to the location of particular state offices, where a given department shall be housed; and to that end he may lease from others suitable rooms outside of the state house and the judiciary building. But no *express* authority beyond this is conferred upon him by section 146. However, it is my opinion that the general assembly intended that should the state acquire a building outside of the state house, the management and control thereof should be vested in the adjutant general and not limited to the mere matter of the assignment of rooms. For example, his authority would go so far as to employ janitors and engineers for such building to the extent that the appropriations made for such purposes in 106 O. L. 792 might be adequate for such purpose, together with any additional funds made available by valid transfers or emergency allowances. But to hold that the adjutant general has implied power and authority to operate and conduct a building for the housing of state officers and departments, when acquired by the state, would fall short of holding that there is reposed in him the power to lease rooms in or parts of such building not immediately needed for the state's uses and purposes to private individuals and corporations for commercial and industrial purposes.

Whenever the power to lease public property has been conferred upon an agent of the state ample and adequate machinery has been created for the exercise thereof and limitations and safeguards have been thrown around the same. This is evidenced by the provisions of the law relative to the powers and duties of the superintendent of public works in the leasing of canal lands, and those of the auditor of state in the leasing of school and ministerial lands for oil and gas

purposes. In other words, as a matter of legislative policy in this state the power to lease is not and cannot be an implied power; therefore, it does not spring from the mere power to control and manage. Thus, the superintendent of public works has the management and control of the public works of the state, but he would have no authority to lease any part thereof without express statutory provision granting him such authority.

I find no statute or constitutional provision committing to any other state officer than the adjutant general any powers whatsoever with respect to a building which might be acquired by the state for the housing of state officers and departments.

It therefore follows that under the statutes as they exist at present no executive officer is authorized on behalf of the state to execute a binding lease on any part of a building which might be acquired by the state for the housing of state officers and departments. To this extent then your first question must be answered in the negative.

Your second question, in so far as a delegation of powers is concerned, must likewise be answered in the negative. The adjutant general has the authority to employ such necessary assistants as the legislature has made provision for by appropriation; but nowhere in the statutes is there any authority for the adjutant general to delegate his powers to any other person.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1800.

CIVIL SERVICE—INTERPRETATION OF STATUTE PROVIDING FOR COLLECTION OF FEES FROM APPLICANTS WHO TAKE CIVIL SERVCE EXAMINATIONS.

Fees collected from applicants for civil service examinations under the provisions of section 486-11 *G. C. as amended* 106 *O. L.* 407, *may be deemed to be moneys "received for the state" under section* 24 *G. C. as amended* 104 *O. L.* 178, *when the examination is held for which said fees are paid. After said examination is held said fees may not be returned to applicants for any reason.*

If any applicant is unable to attend such examination for reasons which are satisfactory to the civil service commission it may permit him to take a subsequent examination without additional charge.

If an examination is annulled for fraud participants therein who are not personally culpable may also be permitted to take the examination held in lieu thereof without additional charge.

If an examination is cancelled by order of the civil service commission the fees collected for such examination may be returned to the applicants paying in the same as such fees have not been received for the state within the meaning of said section 24 *G. C., supra, or under such circumstances applicants who have paid fees for such examination may be permitted to take a subsequent examination without additional charge if they so desire.*

COLUMBUS, OHIO, July 19, 1916.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—I have your letter of July 8, 1916, submitting the following statement and inquiry:

"Section 486-11 of the civil service law reads in part:

"'No fee or other assessment shall be charged for examination for positions, provided for by this act or by the rules of the commission prescribed thereunder, where the annual salary does not exceed six hundred dollars; for positions where the annual salary exceeds six hundred dollars, and is less than one thousand dollars, an examination fee of fifty cents shall be charged; for positions where the annual salary is one thousand dollars or more, an examination fee of one dollar shall be charged. All fees collected under the provisions of this act shall be paid into the state treasury to the credit of the general revenue fund, or in the case of cities into the city treasury.'

"Section 6 of rule IV adopted by the commission, reads as follows:

"'Every applicant for a position in the classified service must pay at the time his application is submitted, the fee provided by section 486-11 of the General Code. No fee thus paid shall be returned under any circumstances after the application has been accepted, unless the applicant is prevented from qualifying or competing by act of the commission itself or its employes.'

"Applicants frequently fail to appear for examination and ask that their fees be returned. Examinations are sometimes annulled by the commission, and it has been our custom to return fees paid along with the applications.

"Has the civil service commission authority, under the law, to return fees paid, and under what conditions may such fees be returned?"

Section 486-11 G. C., to which you refer, requires that you shall pay into the state treasury to the credit of the general revenue fund all fees for examination collected by you. This requirement must be considered in connection with the provisions of section 24 G. C. as amended 104 O. L. 178, which section reads as follows:

"On or before Monday of each week every state officer, state institution, department, board, commission, college, normal school or university receiving state aid shall pay to the treasurer of state all moneys, checks and drafts received for the state, or for the use of any such state officer, state institution, department, board, commission, college, normal school or university receiving state aid, during the preceding week, from taxes, assessments, licenses, premiums, fees, penalties, fines, costs, sales, rentals or otherwise, and file with the auditor of state a detailed, verified statement of such receipts. * * *"

The provisions of this section apply to all fees for examination collected by you, and such fees must be paid to the treasurer of state as therein specified. The question therefore to be determined is when may such fees be deemed to have been "received" by you for the state within the meaning of that term as used in said section. Under the rule quoted in your letter an applicant is required to pay his examination fee at the time he files his application. While this requirement is proper, and you have a right to enforce the same, yet the statute which authorizes the collection of the fee specifies that it shall be for an examination. Your commission reserves the right, and properly so under section 486-11 G. C. supra, to investigate all applications and may, after such investigation, refuse to examine an applicant. In such a case the applicant does not receive as a consideration for the payment of an examination fee the thing which the statute

specifies shall be given him for said fee. It therefore would be wrong to retain his examination fee under such circumstances.

I am of the opinion that fees for examination may be regarded as "received for the state," within the meaning of said section 24 G. C. supra, when the examination is held for which they are collected by you and after the date of such examination they may not be returned by you for any reason. If any applicant has failed to attend such examination for reasons which are satisfactory to you he may be permitted to take a subsequent examination without charge. If an examination is cancelled by your order then the fees collected for such examination may be returned as they have not been received for the state within the meaning of section 24 aforesaid, or applicants who have paid the fees for such examination so cancelled may be permitted to take a subsequent examination without additional charge.

You mention in your inquiry that examinations are sometimes annulled. I do not know upon what legal grounds examinations may be annulled except for fraud which makes it reasonably apparent that the whole transaction is vitiated by reason thereof. When an examination is annulled under such circumstances you may permit participants in such examination (who are not personally culpable) to take a subsequent one held in lieu of the examination annulled without additional charge.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1801.

CIVIL SERVICE—SUPERINTENDENT OF COUNTY INFIRMARY—IN CLASSIFIED CIVIL SERVCE.

The position of superintendent of a county infirmary is within the classified civil service, and a vacancy therein may only be filled as provided by the civil service law in respect to appointments to positions in the classified service.

COLUMBUS, OHIO, July 19, 1916.

HON. HENRY W. CHERRINGTON, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—I have your letter of July 12, 1916, as follows:

> "Our infirmary superintendent, who had been appointed under the civil service act, last April, was killed by a K. & M. train on July 3rd. The civil service commission has certified a list of three persons (and wives), eligible to the appointment of infirmary superintendent and matron.
>
> "The death of the superintendent was a great shock to his family and to the county commissioners, one of whom owned the automobile which was struck by the train. The superintendent has a son who has been at the infirmary, and he is considered by the commissioners perfectly capable of acting as superintendent. I advised the commissioners that they were compelled under the law to appoint from the eligible list furnished by the civil service commission, the list being obtained as a result of competitive examination held here in April, 1916.
>
> "The commissioners desire to appoint a superintendent who is not on the eligible list. At their request I respectfully ask if there is any way by which this can be accomplished."

Your advice to the county commissioners in respect to the appointment of said superintendent of the county infirmary was proper, and said commissioners may not make a legal appointment in any manner other than as advised by you. The position of superintendent of the county infirmary is within the classified civil service of the state and the vacancy therein must be filled from the competitive list certified to said commissioners by the state civil service commission. There is no provision of law which would warrant or sanction an appointment made in any other manner.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1802.

ROADS AND HIGHWAYS—COUNTY COMMISSIONERS WITHOUT AUTHORITY TO COMPEL TRACTION COMPANY TO PAY PART OF COST OF PAVING A ROAD RUNNING THROUGH A VILLAGE—PLANS ADOPTED THEN ALTERED SHOULD BE APPROVED BY VILLAGE COUNCIL AND NOTICE AGAIN GIVEN—NORTHERN OHIO TRACTION AND LIGHT COMPANY—VILLAGE OF NEW BERLIN.

1. *Where after plans and specifications have been approved and notice given, in compliance with the provisions of section* 6952 *G. C., it is discovered that something has been omitted from the plans, specifications, profiles, cross-sections and estimates, or where it is desired to make any change in the same, a copy of the completed or altered plans, etc., should be filed with the clerk of the village, and the plans, etc., as completed or as changed, should be approved by the council of the village, and notice should be again given in the manner provided in the section in question.*

2. *Under the facts as submitted no authority exists to compel the Northern Ohio Traction and Light Company to pay a part of the cost of paving a road running through the village of New Berlin, and which road the commissioners of Stark county are improving under section* 6949 *G. C. et seq.*

3. *The one per cent. bond limitation provided by section* 3940 *G. C. applies to bonds issued under section* 6953 *G. C.*

COLUMBUS, OHIO, July 19, 1916.

The Bureau of Inspection and Supervision of Public offices, Columbus, Ohio.

GENTLEMEN:—I have your request for an opinion under date of May 5, 1916, which request reads as follows:

> "We would respectfully request your written opinion upon the following question submitted by the solicitor of the village of New Berlin, Ohio. As the letter of Mr. C. G. Herbruck clearly sets forth the matter, we simply submit his letter and would ask an interpretation thereof for transmittal to the officials of said village.
>
> "'I am writing as solicitor of the village of New Berlin, Ohio. The commissioners of Stark county, under and by virtue of the recently enacted Cass road law, are paving a road running through said village, and the

village, under provision of section 6950 of the General Code, has expressed its desire of paving said road to an increased width, and the county surveyor prepared the necessary plans, profiles, specifications and estimates for said improvement to said increased width, which were in due time received by the council of said village and were approved and confirmed, and the necessary notice was given as provided in section 5962 of the General Code, and it now develops that the estimate as made by the county surveyor did not include an 8-foot strip occupied by the N. O. T. & L. Co. for street railway purposes, and a new estimate is being prepared covering this additional expense, and we desire to know whether or not this new estimate must be approved by council, and thereafter a notice be published as provided by section 5962, G. C.

"'Also kindly advise whether or not the cost of paving the 8-feet strip of ground in said street occupied by the N. O. T. & L. Co., or the 5-foot strip between the rails, can be assessed against the N. O. T. & L. Co., and collected. I might add for your information that the N. O. T. & L. Co. secured its franchise from the county commissioners a number of years ago, at which time the village of New Berlin was not incorporated, and said original franchise does not provide that the street car company should pave its right of way.

"'Also kindly advise whether or not the one per cent. bond limitation, as provided by section 3940 of the General Code, applies to bonds issued for paying the city's portion of an improvement under the Cass road law.

"'As the village is anxious to expedite the legislation as much as possible, an early reply would be greatly appreciated.'"

I assume that the solicitor of the village of New Berlin intends to refer in his communication to section 6952 G. C., rather than section 5962 G. C.

Section 6951 G. C. contains the following provision:

"After the plans, specifications, profiles, cross-sections and estimates have been returned to the county commissioners by the county surveyor, and by them approved, the county commissioners shall cause a copy thereof to be filed with the clerk of said municipality."

Section 6952 G. C. contains the following provision:

"Upon receipt of such copy the council of such municipality may approve such plans, specifications, profiles, cross-sections and estimates * * *. After such plans and specifications have been approved * * *, council shall cause notice to be given that said plans have been approved * * *, by one publication in some newspaper in general circulation in the municipality. * * *"

While the provision of the statute relating specially to notice refers only to plans and does not refer to specifications, profiles, cross-sections and estimates, it is apparent from the context that the word "plans," as last used in the above quoted provision, is intended to include specifications, profiles, cross-sections and estimates. In other words, a copy of the completed plans, specifications, profiles, cross-sections and estimates should be on file with the clerk of the village before the notice provided by section 6952 is given. Where after the plans and specifications have been approved and the notice given, in compliance with the provisions of section 6952 G. C., it is discovered that something has been omitted from the

plans, specifications, profiles, cross-sections and estimates, or where it is desired to make any change in the same, a copy of the completed or altered plans, specifications, profiles, cross-sections and estimates, as the case may be, should be filed with the clerk of the village and the plans, specifications, profiles, cross-sections and estimates, as completed or as changed, should be approved by the council of the village, and notice should be again given in the manner provided in the section in question. Irregularities in procedure, while not always fatal, are to be avoided where the validity of bonds or special assessments is involved, and the first question contained in the inquiry of the village solicitor of New Berlin is, therefore, to be answered in the affirmative.

Referring to the second inquiry submitted by the solicitor of the village of New Berlin, the statement of facts excludes the proposition that the traction company might be required to pay for or do any paving by reason of a provision in its franchise. It should also be observed that the road or street in question is being improved by the county commissioners and not by the village and any right which the statute might confer on the village to require the traction company to pave between the rails or between the ends of the ties, in case the improvement were being constructed by the village, need not be considered in connection with the present inquiry. If the traction company can be required to do or pay for any paving, in the absence of a franchise provision, authority to enforce such action on the part of the company must therefore be found in the statutes relating to road improvements by county commissioners or must be conferred upon the village by the statute now under consideration. The authority of the county commissioners in the premises is to be found in section 137 of the Cass highway law, section 6956 G. C. This section relates to two conditions, the one where railway tracks cross a street or road, and the other where a street or interurban or other railroad or railway lies within the improved portion of a roadway.

It is apparent from the statement of facts submitted that the first condition does not obtain in the case now under consideration. The tracks of the Northern Ohio Traction and Light Company do not cross the street or road being improved, but they lie within the portion of roadway which it is proposed to improve.

In so far as the power of the county commissioners in the premises is concerned, the same is therefore limited to the express authority conferred by the latter part of section 6956 G. C. The pertinent provision of the section in question reads as follows:

> "Whenever a road or street is improved where a street or interurban or other railroad or railway lies within the improved portion of the roadway, such railroad or railway grade shall in all respects be changed to meet the approval of the county surveyor unless otherwise provided for in the grant or franchise, by virtue of which such railway operates on or occupies said highway, and costs of such change of grade be paid by such company under the law or by the terms of its franchise or grant, shall be a lien upon the property of such company and the proper authorities may provide for the payment of the amount chargeable against said company under the law or by the terms of its franchise or grant, in installments as in the case of other property owners, and such installments shall bear interest as in other cases, and the board of county commissioners or other authorities may issue bonds in anticipation of the collection of said installments."

It is apparent that under the above quoted provision the county commissioners are without authority to require the Northern Ohio Traction and Light Company

to pave any portion of the street or road occupied by its tracks. The authority of the county commissioners, unless restricted by the terms of the franchise heretofore granted to the company, is only sufficient to enable the commissioners to require the company to change its grade to meet the approval of the county surveyor and to collect the cost of such change of grade from the company in the manner provided in the section in question.

Coming now to consider the authority of the village in the premises, it should first be observed that the county commissioners cannot extend the improvement into or through the village without the consent of council. If the council does not desire the street improved to a greater width than that contemplated by the proceedings for said improvement by the board of county commissioners, the council may or may not assume and pay a part of the cost, but if the council desires to improve to a greater width than is contemplated by the proceedings for the improvement by the county commissioners, then it would seem from the statute that the village must assume a portion of the cost and expense, and, under these circumstances, the village must also pay all compensation and damages on account of the improvement. Where the village is a party to the improvement, to the extent of assuming any part of the cost and expense, the method of providing the funds for the village's share of the cost is expressly provided by the statute. It is apparent from a consideration of section 6952 and section 6953, G. C., that the village may raise by general taxation all of the funds necessary to meet its portion of the cost and expense, or it may assess against abutting property owners all of the cost and expense of the improvement to be paid by it, or it may raise a part of its contribution by general taxation and specially assess the remainder against abutting property owners. The traction company cannot be regarded as an abutting property owner and there is no authority in the special scheme of road improvement now under consideration for compelling the traction company to pave any portion of the roadway occupied by it, or authorizing an assessment against it on account of the construction of the improvement.

I therefore conclude, in answer to the second inquiry submitted by the solicitor of the village, that where, under the facts submitted by him, an improvement is projected under authority of section 6949 G. C. et seq., there is no authority, in the absence of a franchise provision, for compelling a street or interurban railway company, occupying with its tracks the road to be improved, to pave any portion of said roadway, and there is no authority for assessing against such company any portion of the cost of the improvement.

Replying to the third question submitted by the village solicitor, reference must first be had to section 6953 G. C., which provides that in anticipation of the collection of assessments to be made against abutting property and in anticipation of taxes levied for the purpose of providing for the payment of the village's share of the cost of the improvement, the village is authorized to sell its bonds under the same conditions and restrictions imposed by law in the sale of bonds for street improvements under the exclusive jurisdiction and control of the council. The sale of bonds for street improvements under the exclusive jurisdiction of a village council is authorized by section 3939 G. C. The one per cent. limitation provided by section 3940 G. C. expressly applies to bonds issued under authority of section 3939 G. C., and is adopted by reference as to bonds issued under authority of section 6953 G. C.

I therefore advise you that the one per cent. bond limitation provided by section 3950 G. C. applies to bonds issued for paying the village's portion of an improvement under the Cass highway law. The village solicitor, in his communication, refers in his third question to cities, but I understand his inquiry is intended to apply only to villages. As has been heretofore pointed out in the opinions of

this department, county commissioners are not authorized to extend proposed road improvements into cities.

This opinion, in so far as it relates to the second question submitted, is based on the facts of the particular case, one of these facts being that the franchise of the company through what is now the incorporated village of New Berlin was granted by the county commissioners prior to the incorporation of the village. Section 1231-4 G. C., 103 O. L. 461, cannot be invoked as it is applicable only to intercounty highways and main market roads which are being improved under the direct supervision of the state highway commissioner.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1803.

OHIO AGRICULTURAL EXPERIMENT STATION—ADAM-HATCH FUND RECEIVED FROM FEDERAL GOVERNMENT FOR PURPOSE OF CONDUCTING AGRICULTURAL EXPERIMENTS—HOW SUCH FUND SHOULD BE APPROPRIATED.

Funds appropriated by the general government under the Adams-Hatch laws for the purpose of conducting agricultural experiments and accepted by the state for such purpose should be paid into the state treasury under the provisions of section 24 of the General Code. Such funds and the accretions thereto should constitute a special trust fund for the uses and purposes designated and not subject to appropriations for general purposes. The appropriation of "all moneys appropriated by the United States government which are now in the Adams-Hatch fund or which may be credited to such fund prior to July 1, 1917," is to be regarded as an appropriation of the Adams-Hatch fund and accretions thereto.

COLUMBUS, OHIO, July 19, 1916.

MR. CHARLES E. THORNE, *Director of the Ohio Agricultural Experiment Station, Wooster, Ohio.*

DEAR SIR:—Your request for an opinion is as follows:

"Under another cover I am sending you copies of bulletin No. 1 of this station, containing a copy of the national law, providing for agricultural experiment stations in the several states, known as the Hatch act, and of the twenty-fifth annual report, containing a copy of the supplementary national act, known as the Adams act, (p V)and of instructions of the secretary of agriculture respecting work under act (p XVI). Both of these acts have been accepted by the general assembly of the state.

"Under the provisions of the Adams act this station is conducting, as one of several projects carried by this fund, a series of investigations on the nutrition of the milch cow, which requires the purchase of a herd of 6 to 12 cows, the care and feeding of these cows for 3 to 6 months, after which they must be replaced by fresh cows.

"For many years the national appropriations to this station, which are sent quarterly in advance, were deposited in bank by the treasurer of the station and drawn upon as required. Under this arrangement, in such experiments as the one above described, the money received from the sale

of the cows and their milk was used to purchase the new herd and consequently a large amount of work could be accomplished with a relatively small amount of money.

"Under recent rulings the station is required to deposit these national funds in the state treasury, to be re-appropriated biennally by the state legislature. It is also required to turn into the state treasury all receipts from sales of produce of whatever kind, to be placed to the credit of the general revenues of the state.

"Under this requirement it will be impossible to conduct such an investigation as that above described, because the necessary funds would be almost immediately converted into the general revenues of the state. We therefore ask your opinion upon the following point, namely:

"Is it proper for the state to require funds appropriated by the general government for a specific purpose and accepted by the state for that purpose to be converted into the general revenues of the state, subject to reappropriation by the state legislature?"

In response to my request for additional information you advised me by subsequent letter as follows:

"In reply to yours of the 29th, I have to say that special separate accounts of the Adams and Hatch funds are kept, apart from the fund appropriated by the general assembly. Expenditures for cows, forage and all other supplies, and for all labor involved in the particular experiments referred to were made from the Adams fund exclusively. No expenditures contributing to the value of the cows or of their products were made from the state appropriation. The only expenditures from state appropriations, in the interest of this investigation, were for the major parts of the salaries of the chief of the department of the station having this experiment in charge, and of chemists, working under his direction, on the products of the experimental feeding."

Section 5 of the Hatch act, passed by congress and approved March 2, 1887, page 7 of bulletin No. 1, Ohio Agricultural Experiment Station, is as follows:

"That for the purpose of paying the necessary expenses of conducting investigations and experiments and printing and distributing the results as hereinbefore prescribed, the sum of fifteen thousand dollars per annum is hereby appropriated to each state, to be specially provided for by congress in the appropriations from year to year, and to each territory entitled under the provisions of section eight of this act, out of any money in the treasury proceeding from the sales of public lands, to be paid in equal quarterly payments, on the first day of January, April, July and October in each year, to the treasurer or other officer duly appointed by the governing boards of said colleges to receive the same, the first payment to be made on the first day of October, eighteen hundred and eighty-seven; provided, however, that out of the first annual appropriation so received by any station an amount not exceeding one-fifth may be expended in the erection, enlargement, or repair of a building or buildings necessary for carrying on the work of such station; and thereafter an amount not exceeding five per centum of such annual appropriation may be so expended."

The Hatch act of 1887 was supplemented by the passage of the Adams act in 1906 the act being entitled: "An act to provide for an increased annual appro-

priation for agricultural experiment stations and regulating the expenditure thereof."

In section 1 of the Adams act, page 5 of bulletin 176 of the Ohio Agricultural Experiment Station, it is provided that the amount appropriated is:

> "to be applied only to pay the necessary expenses of conducting original researches or experiments bearing directly on the agricultural industry of the United States, having due regard to the varying conditions and needs of the respective states or territories."

Section 2 of the Adams act, in part, is as follows:

> "That the sums hereby appropriated to the states and territories for the further endowment and support of agricultural experiment stations shall be annually paid in equal quarterly payments on the first day of January, April, July and October of each year by the secretary of the treasury, upon the warrant of the secretary of agriculture, out of the treasury of the United States, to the treasurer or other officer duly appointed by the governing boards of said experiment stations to receive the same, and such officers shall be required to report to the secretary of agriculture on or before the first day of September of each year, a detailed statement of the amount so received and of its disbursement, on schedules prescribed by the secretary of agriculture. * * *"

It will be noted from a reading of section 2 of the act that the money therein appropriated is made payable to the treasurer or other officer appointed by the governing board of the experiment station to receive the same.

I find upon enquiry at the office of the auditor of state that the available appropriations under the two acts referred to are on deposit in the state treasury to the credit of the Adams-Hatch fund, and that an appropriation for the purposes designated has been made as shown on page 677, 106 Ohio Laws, as follows:

> "All monies appropriated by the United States government which are now in the Adams-Hatch fund, or which may be credited to such fund prior to July 1, 1917."

It will be noted that the only monies specifically appropriated are those which may be credited to the fund from appropriations made by the United States government, no reference being made to funds which may accrue from the sale of products arising from the use of such funds in the experiments conducted under the provisions of the Adams-Hatch laws, nor for funds received from the sale of any stock purchased with such funds.

Section 24 of the General Code, as amended 104 Ohio Laws 178, is as follows:

> 'On or before Monday of each week every state officer, state institution, department, board, commission, college, normal school or university receiving state aid shall pay to the treasurer of state all moneys, checks and drafts received from the state, or for the use of any such state officer, state institution, department, board, commission, college, normal school or university receiving state aid, during the preceding week, from taxes, assessments, licenses, premiums, fees, penalties, fines, costs, sales, rentals, or otherwise, and file with the auditor of state a detailed, verified statement of such receipts. Where fees and tuitions are paid to the officer or officers of any college, normal school or university receiving state aid, said

officer or officers shall retain a sufficient amount of said tuition fund and fees to enable said officer or officers to make refunds of tuition and fees incident to conducting of said tuition fund and fees. At the end of each term of any college, normal school or university receiving state aid, the officer or officers having in charge said tuition fund and fees shall make and file with the auditor of state an itemized statement of all tuitions and fees received and disposition of the same."

It will be observed that the terms of the statute are emphatic as to the payment into the state treasury of all moneys, checks and drafts "received for the state," or for the "use of any such state officer or state institution," no exception being made with reference to the particular funds in question.

Your precise question is:

"Is it proper for the state to require funds appropriated by the general government for a specific purpose and accepted by the state for that purpose to be converted into the general revenues of the state, subject to reappropriation by the state legislature?"

For a proper consideration of the matter the question should be considered from two angles: 1. Should the fund appropriated by the general government for a specific purpose be converted into the state treasury? and, 2. To what fund in the state treasury should the fund so appropriated by the general government be credited?

Section 270 of the General Code provides, in part, as follows:

"All moneys paid into the state treasury, the disposition of which is not otherwise provided by law, shall be credited by the auditor of state to the general revenue fund. * * *"

By the provisions of the federal legislation appropriating the Adams-Hatch fund for the use of state officers in carrying on the experiments for which it was designed, it may be said that the disposition of the money appropriated thereby was provided by law as comprehended by section 270 of the General Code, supra. The acceptance of the Adams-Hatch fund appropriation by the state imposed an obligation on the state to use the fund for the purpose designated, and accordingly the Adams-Hatch law funds paid into the treasury constitute in the treasury a separate and distinct fund, no part of which is subject to appropriation for general purposes as are the general revenues of the state.

This interpretation has been recognized by the general assembly in its appropriation to the agricultural commission of

"all moneys appropriated by the United States government which are now in the Adams-Hatch fund, or which may be credited to such fund prior to July 1, 1917."

Your statement is to the effect that unless the fund may be re-invested through the necessary changes in your cows it will be impossible to conduct the investigations for which the fund was originally created.

That it was the purpose of the general assembly to confine the fund to the specific purpose is manifest, and it is my opinion that the business necessities of its operation demand and justify its being kept intact as far as possible by crediting to the Adams-Hatch fund set up in the auditor's office all moneys received from the sale of cows or milk used in the experiments referred to on the ground that

such receipts are a part of the funds appropriated by the general government. This would make the necessary funds available for your purposes and would not hamper the experiments. I would suggest in the future, however, that to care for this and kindred matters a rotary fund be established.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1804.

CANAL LANDS—LEASE OF SAME TO CITY OF CINCINNATI—ACTS OF 1911, 1913 AND 1916 CONSIDERED—ACT OF 1913 WITHOUT EFFECT SINCE NO LEASE WAS EXECUTED UNDER IT—HOW NEW LEASE SHOULD BE EXECUTED.

The execution of the new lease provided for by amended senate bill No. 255, 106 O. L. 293, is governed by the first five sections of senate bill No. 259, 102 O. L. 168, and by said amended senate bill No. 255, and in the execution of said lease no reference is to be had to house bill No. 562, 103 O. L. 720.

COLUMBUS, OHIO, July 22, 1916.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I have your communication of May 29, 1916, relating to the leasing of a part of the Miami and Erie canal to the city of Cincinnati, which communication reads as follows:

> "We are about to prepare the lease required to be executed and delivered by the governor under the act of May 17, 1915 (106 O. L. 293), and certain doubts have arisen as to the provisions to be placed in such lease and the uses to which the grant is limited.
>
> "1. The original act covers the canal from a point 300 feet north of Mitchell avenue to the east side of Broadway in the city of Cincinnati.
>
> "The act of 1913 (103 O. L. 720) apparently covers an additional part of the canal extending to St. Bernard.
>
> "This act of 1913 required the execution of a new lease which has not apparently been executed.
>
> "The act of 1911 limited the use to certain purposes other than railways.
>
> "The act of 1913 extended the use to railways.
>
> "The question arises from the terms of these two acts of 1911 and 1913, whether the latter did not confine its purposes to the extended portion of the canal.
>
> "We find, for instance, that section 1 of the 1911 act is not repealed nor amended, but that the section 1 of the act of 1913 provides for the grant of additional parts of the canal, the words employed being 'In addition to the lease or parts of the Miami and Erie canal heretofore made to the city of Cincinnati,' etc.
>
> "Then, section 5 of the act of 1911 was not amended nor referred to, in its stead a similar provision, known as section 4 in the act of 1913, was made covering the same ground, and especially speaking of approval of valuation 'on said portion of such canal.'

"Also the method of ascertaining the rents for the new portion i. e. 'for said part of such canal' is determined by reference to the appropriate sections of the act of 1911.

"On the other hand we find that in section 4 of the 1913 act, in the provision for the construction of works for supplying water to lessees of the state, the provision is limited to 'that portion of the canal to be abandoned under the act of May 15, 1911,' tending to show an intent on the part of legislature to have the entire section 4 of that act apply to the whole portion to be abandoned except that particular provision. Also in section 4 of the 1913 act we find the gauge of the anticipated Lake-Ohio river canal changed from 9 to 5 feet for the entire distance.

"*Query:* In executing the new lease provided for in section 6 of the 1915 act, shall we be governed by the 1913 act as well as by the act of 1911 in the following respects:

"(A) In extending the uses to railways.

"In this connection we call attention to the fact that, if the act of 1913 is not applicable, then we have this peculiar situation:

"The act of 1911 limits the use to streets, etc. Railways are not specified as a use enjoyed from the grant.

"Section 5 as amended in 1915 (106 O. L. 293) says that 'Nothing herein shall be held or interpreted to prevent the construction or operation by said city of Cincinnati, or its grantees, of a subway X X X for the use of streets, electric, suburban or interurban railways or terminals,' and forbids the use for railways of a certain portion of the property within the city of Cincinnati.

"The question is, first, whether the provision of the amended section 5 to the extent that it refers to railways, is not confined to that part granted by the act of 1913. Second, if it does apply to the whole quantity granted, then, is the lease to provide in the granting clause that the uses shall be as defined in section 1 of the act of 1911, with the condition in the Habendum clause that 'nothing herein shall be held or interpreted to prevent the construction,' etc., following the language of section 5 above referred to.

"2. In the act of 1911 provision was made in section 5 for the contingency of the state constructing a Lake Erie-Ohio river canal. It provided for a nine foot gauge.

"This section was amended in the act of 1915, the possibility of such a new canal being constructed being overlooked entirely.

"In the 1913 act, section 4, we find a provision taking care of this contingency, in the same words as employed in the act of 1911, section 5 except that the gauge is changed to five feet. This section 4 of the act of 1913 is unrepealed.

"*Query:* Does section 4 of the act of 1913 apply to the entire property granted?

"For your better information we send herewith a 'parallel analysis' of the three acts in question."

Upon receipt of your request I forwarded a copy of the same to Hon. Charles A. Groom, city solicitor of Cincinnati, with the request that he submit his views upon the matters involved, and I am in receipt of the following communication from him bearing upon the questions submitted by you:

"I am in receipt of your favor of June 7th, enclosing copy of letter

from Hon. A. V. Donahey, auditor of state, requesting an opinion on certain matters connected with the lease by the state to the city of Cincinnati of a portion of the Miami and Erie canal.

"With regard to Mr. Donahey's first doubts, that is, what consideration should be given to the act of 1913 (103 Ohio Laws 720), there can at present be no dispute on account of the fact that the city of Cincinnati has not taken advantage of the act of 1913 in so far as the same applies to the acquisition of that portion of the Miami and Erie canal lying between a point 300 feet north of Mitchell avenue and a point 1,000 feet beyond the crossing of the canal by the tracks of the Baltimore and Ohio S-W. R. R. in the city of St. Bernard.

"Section 5 of the act of 1913 amended section 6 of the act of 1911, and section 6 of the act of 1913 gave the governor of state authority to amend the lease of the city of Cincinnati between Broadway and a point 300 feet north of Mitchell avenue, so as to conform with section 6 of the act of May 8, 1911, as amended in the 1913 act. Whatever results might have been occasioned by the act of 1913, through construction of section 5 and section 6 thereof, cannot now be material, since the act of May 17, 1915 (106 Ohio Laws 293) amends sections 5 and 6 of the act of April 18, 1913, and specifically repeals the said sections 5 and 6 of the act of 1913.

"If Mr. Donahey has in mind the fact that section 6 of the act of May 15, 1911, was not repealed by the act of April 18, 1913, he is in error, since section 7 of the act of April 18, 1913, expressly repeals all laws and parts of laws inconsistent therewith, furthermore, the act of May 17, 1915, repealing sections 5 and 6 of the act of April 18, 1913, eliminates all questions of conflict between the act of May 17, 1915, and possibly unrepealed sections of the act of 1911 by the final provisions of section 2 of the act of May 17, 1915, specifying that all laws and parts of laws inconsistent therewith are repealed.

"With regard to the matter of the gauge of the canal from Lake Erie to the Ohio river, being 9 feet in the act of 1911 from 5 feet in the act of 1913, there can at present be no controversy, since the city of Cincinnati has never requested the lease of the property north of a point 300 feet north of Mitchell avenue. Section 4 of the act of 1913 is specific in providing for a valuation and lease of property north of the point 300 feet north of Mitchell avenue, and further specifies that in case the state shall build such canal of no less than 5 feet gauge the city of Cincinnati shall reimburse the state for the amount of its expenditure in procuring a right of way either by purchase or condemnation, or both, for said canal from a point in the city of St. Bernard 1,000 feet beyond the crossing of the canal by the tracks of the Baltimore and Ohio S-W. R. R. to a point at said canal 300 feet north of Mitchell avenue. Section 5 of the act of 1911 refers to the 9-foot gauge canal, and obligates the city to provide for the expense of purchase or condemnation for such canal from a point 300 feet north of Mitchell avenue through Millcreek valley to the Ohio river. This section was not amended or repealed by the act of April 18, 1913, and as the act of April 18, 1913, made specific provision for the expense of purchase or condemnation by the state of a right of way for a 5-foot gauge canal between the point in St. Bernard and the point 300 feet north of Mitchell avenue, there can be no conflict between the two unless the city should ask for a lease of the canal property north of that now held and for which it now asks the amended lease.

"So far as material to the present lease, there should be considered

only sections 1, 2, 3, 4 and 5 of the act of May 15, 1911, and sections 5 and 6 of the act of May 17, 1915, which take the place of sections 5 and 6 of the act of April 18, 1913, which said last act was enacted to take the place of section 6 of the act of May 15, 1911. In extending the use to railways, therefore, the acts of 1911 and 1915 alone should be considered.

"I fail to see any basis for a claim that the amendment of section 5 and 6 of the act of April 18, 1913, by the act of May 7, 1915, limits the application of the provisions of the 1915 amendment to that portion of the canal authorized to be leased, in addition to that already leased, mentioned in the 1913 act, since the language of section 5 of the act of 1913 is quite specific to the end that it is an amendment merely of section 6 of the act of May 15, 1911. The point in Mr. Donahey's mind would lead to the opposite construction, that is, that section 5 of the act of 1913 applies only to that portion of the canal authorized to be leased by the act of 1911.

"I think the confusion has arisen from a misinterpretation of the boundaries of the canal property which the city desires. The property now described is exactly the same as that authorized to be leased in 1911. The provisions of the act of 1913 with regard to the leasing of additional property have not so far been exercised.

"At the bottom of page 3 of the copy sent me it is stated that in the act of 1911 provision was made in section 5 for the contingency of the state constructing a Lake Erie-Ohio river canal, and providing for a 9-foot gauge; and on page 4 of the copy sent me it is stated that this section was amended in the act of 1915, and the possibility of such new canal being constructed was entirely overlooked.

"This is error. The act of 1915 amends sections 5 and 6 of the act of 1913, and section 5 of the act of 1913 amended section 6 of the act of 1911, so that section 5 of the act of 1911 has never been either amended or repealed, and still provides for the possibility of a 9-foot gauge canal, and you will find in the draft form of lease submitted a reference to the 9-foot gauge canal possibly to be constructed.

"On page 4 of the copy of the letter sent me it is stated that in the act of 1913, section 4, is found a provision taking care of the contingency of the possible construction by the state of a Lake Erie to Ohio river canal, with the statement that the provision in the 1913 act is in the same words as employed in the 1911 act, section 5, except that the gauge is changed to 5 feet; and the further statement that section 4 of the act of 1913 is unrepealed. In this connection you will observe that section 4 of the act of 1913 relates to, and takes care only of the space north of the point 300 feet north of Mitchell avenue, and is not in the same words as employed in section 5 of the act of 1911. As stated before, there is undoubtedly a provision for the payment by the city of the expenses of a right of way for a 9-foot gauge canal from a point 300 feet north of Mitchell avenue south to the Ohio river in connection with the property authorized to be leased by the act of 1911, and a provision for the payment by the city of acquiring a right of way for a 5-foot gauge canal between the point 300 feet north of Mitchell avenue and the point 1,000 feet beyond the crossing of the railroad tracks in St. Bernard in connection with the additional property authorized to be leased by the act of 1913. The conflict anticipated by Mr. Donahey, however, cannot arise unless the city of Cincinnati at some future time would desire to lease the additional property authorized to be leased by the act of 1913. If the city should ever demand such lease the circumstance undoubtedly would arise, and the city would be ob-

ligated to provide for the expense of condemnation or other acquisition of property for a 5-foot gauge canal from St. Bernard to a point 100 feet north of Mitchell avenue, and for a 9-foot gauge canal from a point 100 feet north of Mitchell avenue to the Ohio river, since section 4 of the act of 1913 and section 5 of the act of 1911 are both in force.

"Section 4 of the act of 1913, as stated before, on its face discloses that it applies merely to the construction of a Lake Erie to Ohio river canal between the specifically described points set forth in the last sentence of the said section and, consequently, the same cannot apply to property authorized to be leased by an entirely separate and distinct act.

"If I have not made myself entirely clear in the foregoing I think the following table will eliminate all question of doubt:

"Act of 1911, 102 Laws 168—

"Subject—Lease of canal, Broadway to Mitchell avenue.

"Section 1—Not amended.

"Section 2—Not amended.

"Section 3—Not amended.

"Section 4—Not amended.

"Section 5—Not amended.

"Section 6—Repealed by section 7 of act of 1913 (103 Laws 720) and amended in section numbered 5 of act of 1913.

"Act of 1913, 103 Laws 720—

"Subject—Lease of canal Mitchell avenue to point in St. Bernard.

"Section 1—Not amended.

"Section 2—Not amended.

"Section 3—Not amended.

"Section 4—Not amended.

"Section 5—Subject—Amendment of section 6 of act of 1911 relating to lease of canal Broadway to Mitchell avenue.

"Section 6—Subject,—Provision for new or amended lease of property from Broadway to Mitchell avenue to conform with section 6 of act of 1911 *as herein amended,* and for outlet or spillway at St. Bernard.

"Section 7—Repeal of all laws and parts of laws inconsistent.

"Act of 1915, 106 Laws 293—

"Subject—Amendment of section 5 and 6 of act of 1913.

"Section 1—Amendment of sections 5 and 6 of act of 1913.

"Section 2—Repeal of sections 5 and 6 of act of 1913.

"IN FORCE—

"Sections 1, 2, 3, 4, and 5 of act of 1911, and sections 5 and 6 in act of 1915, the latter section 5 being an amendment of section 6 of the act of 1911, and sections 6 being new matter.

"Sections 1, 2, 3, and 4 of the act of 1913.

"Sections 1, 2, 3, 4 and 5 of the act of 1911 relate to the canal from Broadway to Mitchell avenue.

"Sections 1, 2, 3, and 4 of the act of 1913 relate to the canal from Mitchell avenue to St. Bernard.

"Section 5 and 6 in the act of 1915 relate to the use to be made of the canal and the execution of a new lease covering either the canal from Broadway to Mitchell avenue or from Broadway to St. Bernard *if* the additional part of the canal from Mitchell avenue to St. Bernard is acquired as authorized by sections 1, 2, 3, and 4 of the act of 1913.

"Whatever conflicts or inconsistencies there may be in sections 1, 2, 3, and 4 of the act of April 18, 1913, are not material, since the same do

not apply to the property described in the amended leases now requested.

"Using the old rule of construction that an amended section is placed in the body of the entire act and the whole interpreted in the light of the new conditions, we have the situation that permission is given to the city to lease, enter upon, improve and occupy as a public street or boulevard and for sewage conduit, and if desired for subway purposes, the Miami and Erie canal between the east side of Broadway and a point 300 feet north of Mitchell avenue; but nothing herein shall be held or interpreted to prevent the construction or operation by the city of Cincinnati, or its grantee, of a subway beneath the street or boulevard, etc., or the construction of ventilation openings or the operation of interurban railways on the surface or in open cut or ditch from Brighton bridge to the point 300 feet north of Mitchell avenue.

"I will be very glad to come to Columbus at any time convenient to you and take up the matter in detail.

"Thanking you for your attention to this matter in the past, and trusting that you will call on me if anything further is desired, * * *."

A brief reference to the history of the legislation relating to the leasing of a portion of the Miami and Erie canal to the city of Cincinnati is essential in a consideration of the questions submitted by you.

The original act found in 102 O. L. 168, was passed May 15, 1911, and consisted of eight sections. An act supplementing and amending the act of 1911 was passed April 18, 1913, and is found in 103 O. L. 720. The first four sections of this act related to the proposed leasing of a further part of the Miami and Erie canal to the city of Cincinnati. I am informed that no action has ever been taken under these four sections, and that no action under the same is at the present time desired or contemplated by the city of Cincinnati, and that the city now desires only an amended lease covering that part of the canal referred to in the origianl act of 1911. Section 5 of the act of 1913 amended section 6 of the act of 1911. Section 6 of the act of 1913 provided for an amended lease, and it is my understanding that the authority conferred by this section has never been exercised. Section 7 of the act of 1913 provided for the repeal of all laws and parts of laws inconsistent with that act. Inasmuch as the first four section of the act of 1913 related to the leasing of an additional portion of the canal, and inasmuch as the city of Cincinnati does not now desire to lease this additional portion of the canal these four sections need not be considered in connection with your present inquiry. Inasmuch as section 6 of the original act of 1911 was amended by the act of 1913, said section 6 of the original act is also removed from consideration. Sections 5 and 6 of the act of 1913 were amended by an act found in 106 O. L. 293, which act was passed May 17, 1915. Inasmuch as all that part of the act of 1913, which has not been amended, relates to the leasing of an additional portion of the canal, and inasmuch as no lease of any additional portion of the canal is now desired, your questions may be answered without any reference to the act of 1913, which act has no bearing upon the questions now submitted. These questions are to be determined by a reference to the first five sections of the act of 1911, and the act of 1915.

I, therefore, advise you that in executing the new lease provided for in the act of 1915, you are to be governed by the first five sections of the act of 1911 and by said act of 1915, and that no reference is to be had by you to the act of 1913.

I have no doubt that by the adoption of the act of 1915 the legislature intended that the city under its new lease should be entitled to construct railways or terminals on the surface or in an open cut or ditch rather than in a subway over a

part of the leased premises. It is unnecessary at this time, however, to place a construction upon the language used in the act of 1915 in amending section 5 of the act of 1913. In the preparation of the lease, in so far as the extension of the uses of the leased property so as to include railways is concerned, full expression may be given to the intention of the legislature, and the rights of all parties may be conserved by providing for the granting of permission to the city of Cincinnati to enter upon, improve and occupy forever, as a public street or boulevard and for sewerage, conduit, and if desired for subway purposes, all of that part of the Miami and Erie canal which extends from a point 300 feet north of Mitchell avenue to the east side of Broadway in said city, including the full width thereof, as owned or held by the state, such permission to be subject to the outstanding rights or claims, if any, existing at the time of the passage of the act of 1911 with which it might conflict, following substantially in this grant the language of section 1 of the act of 1911, and adding thereto language embodying the provisions of section 6 of the act of 1911, as last amended in 106 O. L. 293. This addition may be made substantially in the language in said section 6, as amended, and the lease will then have been executed in accordance with the terms of the statute, and if there be in the future any controversy as to the meaning of the language employed in the lease, which language is the language of the statute, the matter will have to be determined by a judicial construction of said section 6 of the act of 1911, as last amended by the act of 1915. Answering specifically your question as to the proper terms of the lease, in so far as extending the uses to railways is concerned, I advise you that the provisions of section 6 of the act of 1911, as last amended by the act of 1915, are not confined to the additional portion of the canal which might have been leased under the act of 1913, but that on the other hand these provisions are applicable in the preparation of an amended lease covering that portion of the canal originally leased under the act of 1911, and which amended lease you are now called upon to prepare. The granting clause of the lease should set forth the uses in the language of section 1 of the act of 1911, and immediately following this clause or incorporated therein there should be set forth substantially in the language of the statute the several provisions of section 6 of the act of 1911, as last amended by the act of 1915.

In stating your second question you correctly observe that in the act of 1911 provision was made in section 5 for the contingency of the state constructing a canal of not less than a 9-foot gauge from Lake Erie to the Ohio river at Cincinnati.

Your next observation that section 5 of the act of 1911 was amended by the act of 1915 is incorrect. Section 6 of the act of 1911 was amended by the act of 1913, and later amended by the act of 1915, but no other part of the act of 1911 has been amended. The section 5 amended by the act of 1915 was section 5 of the act of 1913. Section 5 of the act of 1911 is still in full force and effect, and applies to all that portion of the canal which the city of Cincinnati is now desirous of leasing, and section 4 of the act of 1913 has no application whatever to such portion of the canal.

In drawing the amended lease referred to by you, provision for reimbursement of the state by the city to the amount of the state's expenditure in providing a right of way for a canal should therefore be made in the lease in strict accordance with the provisions of section 5 of the original act of 1911.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1805.

CIVIL SERVICE—FIVE-THIRDS RULE—WHEN LIST OF COMPETITIVE ELIGIBLES IS REQUESTED FOR MORE THAN ONE POSITION ONE PERSON MAY BE CERTIFIED TO APPOINTING AUTHORITY FOR EACH POSITION TO BE FILLED AND TWO ADDITIONAL NAMES ADDED TO LIST.

When a list of competitive eligibles is requested for more than one position one person may be certified to the appointing authority for each position to be filled and two additional names added to the list. This is commonly known as the five-thirds rule. When this is done, however, beginning at the top of such list each person who is not appointed must be considered the number of times required by law in his case in a group of three composed of himself and two persons next highest on the list. If in addition to such competitive eligible list persons are certified under the provisions of section 486-31 *G. C. as amended* 106 *O. L.* 418, *and one or more of such persons so certified are appointed, such appointment or appointments will prevent any consideration of the lowest name on such competitive eligible list because of the requirements above stated.*

COLUMBUS, OHIO, July 24, 1916.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your letter of June 23, 1916, submitting the following statement and inquiry:

"The Industrial Commission of Ohio respectfully requests of you an opinion as to the legality of its action in appointing Wilbur C. Doerr, of Cincinnati, Ohio, regularly to the position of branch office deputy at Toledo, Ohio, on the following statement of facts:

"The names certified by the state civil service commission for the positions of branch office deputy on certification No. 1671, are as follows:

"Charles V. Lavan, Cleveland; Walter J. Boesel, Columbus; Ralph E. Maxwell, Columbus; Clyde H. Kearns, Columbus; Wilbur C. Doerr, Cincinnati; F. M. Secrest, Cleveland (non-com.); H. G. Wagner, Toledo (non-comp.); Arnold S. Althoff, Dayton (non-com.).

"The above certification of eligibles and non-competitives was made in response to a request made by the Industrial Commission for certification of names from which to make appointments to this position in Cleveland, Toledo and Dayton.

"F. M. Secrest, Cleveland, Ohio, was appointed to the position of branch office deputy, Cleveland office, on September 18, 1915, approved by Governor Willis on September 28, 1915.

"H. G. Wagner, Toledo, Ohio, was appointed to the position of branch office deputy, Toledo office, on September 18, 1915, disapproved by Governor Willis on September 20, 1915. Mr. Wagner was again appointed to this position on February 24, 1916, and was disapproved by the governor on February 25, 1916.

"Arnold S. Althoff, Dayton, Ohio, was appointed to the position of branch office deputy, Dayton office, on September 18, 1915, approved by Governor Willis on September 28, 1915.

"Charles V. Lavan, Cleveland, Ohio, was appointed to the position of branch office deputy, Toledo office, on September 25, 1915, disapproved by Governor Willis on September 28, 1915.

"Wilbur C. Doerr, Cincinnati, Ohio, was appointed to the position of branch office deputy, Toledo office, on May 5, 1916, approved by the governor on May 8, 1916.

"Reports of appointments showing approval and disapproval of the same have been furnished the state civil service commission. That commission refuses to approve the appointment of Wilbur C. Doerr as branch office deputy at Toledo, Ohio as made by this commission on May 5, 1916, on the ground that he was not entitled to consideration for appointment to such position."

It appears from your foregoing statement that a requisition was made for an eligible list from which appointments were to be made to three positions. In response to this request the state civil service commission certified five names from a competitive eligible list and also the names of three persons who were entitled to such certification under certain provisions of section 486-31 G. C. as amended 106 O. L. 418, which provisions are as follows:

"The name of each officer, employe and subordinate holding a position in the classified service of the state, the counties, cities and city school districts thereof at the time this act takes effect, who has not passed a regular competitive examination and who has not been in the service seven years as herein provided, shall, within ten days after this act becomes effective, be reported by the appointing authority to the commission, and shall be certified to the appointing authority in addition to the three candidates for appointment to such position. If any such person is reappointed, he shall be deemed to have been appointed under the provisions of this act. If no eligible list exists such person may be retained as a provisional employe until such time, consistent with reasonable diligence, as the commission can prepare eligible lists when such position shall be filled as prescribed in this act."

Attention is directed particularly to the requirement in the provisions above quoted that such certification shall be in addition to the three competitive candidates for each position. It is a rule of the state civil service commission, being subdivision b of rule VI, and also of the commissions of other states, notably New York, that when a list of eligibles is requested for more than one position, one person will be certified for each position to be filled and two additional names added to the list. This rule is known as the five-thirds rule and in its operation, when followed, it will always give three names from which to fill the last position in the list. In the case under consideration it appears that the civil service commission followed this rule, certifying on the eligible list five persons for the three positions to be filled and adding the names of three persons as hereinbefore stated. This method of certifying an eligible list when more than one appointment is to be made seems never to have been questioned, and I know of no reason why it does not meet the full requirements of the law when other regulations of the commission in reference thereto are observed. Such regulations will be referred to later in this opinion.

The plan upon which this rule is based, however, does not contemplate the certification of any additional names as provided in said sections 486-31 G. C. supra, and in the present case the certification of said three additional names and the appointment of two thereof completely disarranged the ordinary operation of the rule. It is provided in said subdivision b of rule VI of the State Civil Service Commission, that whenever certifications are made by groups the appointments

may be made by appointing those standing highest on the list, "but in case this is not done, then beginning at the top of the list everyone who is not appointed must be considered three times in a group of three, and every time a group of three is considered one of such group must be appointed." It was required, therefore, that when the appointment to the Cleveland position was made the industrial commission, under the foregoing regulations, could only consider in connection therewith the names of the first three persons on the eligible list and the name of the person certified under said section 486-31 G. C. supra, for appointment to such position. It appears that the person so certified under said section, and commonly known as a non-competitive, was appointed to fill the position, so that when the commission came to consider candidates for the second position it was again required to consider only the first three names on the eligible list in connection with the person certified under said section 486-31 G. C. supra, and again it occurred that said last named person was appointed to the position so that when the commission came to consider the last position to be filled, which is the position in controversy, it was again required, under the regulations aforesaid, to consider only the first three names on the eligible list and the name of the person certified under said section 486-31 G. C. supra. It appears, however, from your statement that the person whose name appears fifth on the eligible list was finally selected for this position. From what has been stated it is apparent that under the rules of the commission, which are in accordance with the requirements of the law, said person was not eligible for consideration for this position. Had there been no certification of persons under section 486-31 G. C. supra, and appointments thereof, then when the last position came to be filled the name of the person whose appointment is now challenged would have appeared on the list for that position but, as before stated, the appointments from certifications under said section 486-31 G. C. supra, disarranged the whole plan.

In view of the considerations above stated I am of the opinion that the commission is justified in refusing to approve Mr. Doerr's appointment.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1806.

BOARD OF DEPUTY STATE SUPERVISORS AND INSPECTORS OF ELECTIONS—SECTION 12911 G. C. IS VIOLATED WHEN MEMBER OF SUCH BOARD SELLS FIRE INSURANCE TO POLITICAL SUBDIVISION WITH WHICH HE IS NOT CONNECTED WHERE PREMIUM MORE THAN $50.00.

Section 12911 G. C. is violated when a member of the Board of Deputy State Supervisors and Inspectors of Elections sells fire insurance to a political subdivision with which he is not connected where the premium amounts to more than fifty dollars.

COLUMBUS, OHIO, July 25, 1916.

HON. JOHN C. D'ALTON, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—Your letter of July 12, 1916, submitting the following statement and inquiry is received:

> "A member of the Deputy Board of State Supervisors and Inspectors of Election of this county is also a member of a firm which has the agency for an insurance and bonding company, which agency desires to write

insurance on county and city property, and to furnish bonds for county, city and state officials.

"Is there any criminal liability on the part of such member of board of election in acting as a member of a firm which is the agent for such insurance or bonding company? In particular, can such bonding agency write bonds for depositaries of public moneys?

"Your opinion upon this subject would be appreciated."

Section 12911 G. C. provides as follows:

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

A member of the Board of Deputy State Supervisors and Inspectors of Elections holds an office by appointment of both trust and profit. He is, however, a state officer and is not therefore "connected with" any other political subdivision in the sense the same is used in sections 12910 and 12911 G. C.

A member of a firm is necessarily "interested in" any business transacted by the firm.

It follows, therefore, that if such firm makes any contract for furnishing fire insurance, the premium of which amounts to more than fifty dollars, the member of said firm who is also a member of the Board of Deputy State Supervisors and Inspectors of Elections would become liable to prosecution and conviction under said section 12911 G. C., unless such contract is let on bids duly advertised as provided by law. I might add that I know of no provision in law for advertising and receiving bids for fire insurance.

I know of no law forbidding a public officer from being interested in the furnishing of bonds to other public officers or for depositaries of public moneys. The furnishing of such bonds is the result of private contract between the individuals and with which the public subdivision has nothing to do except possibly in those few instances where the public subdivision pays the premium on the bond. As will be noted bonds are not included in the subjects prohibited in either section 12910 or 12911 G. C., those statutes being confined to the furnishing of property, supplies and fire insurance.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1807.

BOARD OF EDUCATION—INDOOR CHEMICAL CLOSETS MAY NOT BE INSTALLED IN SCHOOL HOUSES.

Indoor chemical closets may not be installed in school houses in view of the provisions of section 12600-65 *of the General Code.*

COLUMBUS, OHIO, July 25, 1916.

State Board of Health, Columbus, Ohio.

GENTLEMEN:—Your request for an opinion is as follows:

"At a recent meeting of the State Board of Health, there appeared before the board a representative of a sales company selling indoor chemical closets. I was instructed to refer the matter to you for your opinion and advice.

"Attached hereto, you will find a monograph, giving information in regard to the construction, installation and operation of the Kaustine chemical closet, which is typical of sanitary equipment of this type.

"Please inform me if this or any similar device can be legally installed inside a school building in this state."

In addition to your letter and the monograph, memoranda submitted by Mr. Emerson L. Taylor has been considered in connection with the matter.

It is contended in the memoranda that the Kaustine sanitary equipment has much merit, and that from a standpoint of economy it is highly desirable that it should be accepted by your board as being allowable under the provisions of the building code.

This matter has been dealt with by your board on several occasions in the past, and was made the subject of a special investigation by a committee consisting of W. H. Dittoe, chief engineer, and Wm. C. Groeniger, plumbing inspector, with the result that a number of recommendations were made concerning the use of chemical closets.

Conceding that the Kaustine system may have all the merit claimed for it from the standpoint of efficiency and economy it does not appear that those matters have any material bearing on the question of its availibility under the laws as they exist.

Your attention is invited to section 12600-65 G. C., a part of the state building code which contains a provision as follows:

"Where water supply and sewerage systems are not available no sanitary equipment shall be installed within the building, but pumps in lieu of drinking fountains, closets and urinals in the above proportions shall be placed upon the school building grounds, and no closets or urinals shall be placed nearer any occupied building than fifty (50) feet."

It is contended by counsel that the Kaustine system is a private sewage disposal system, and as such is not comprehended within the prohibitions contained in the section just quoted, and the further argument is offered that the system should not be brought within the terms of the statute for the reason that it was not originated until several years after the building code had been in force.

Whatever may be claimed for the Kaustine system it must certainly be regarded as a sanitary equipment for the uses and purposes for which it has been originated, and it is my opinion that the sweeping provisions of section 12600-65 G. C. supra, clearly prohibit the installation of this or any similar device inside a school building in this state.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1808.

ROADS AND HIGHWAYS—WHAT IS A "REPAIR" OF A HIGHWAY—OPINION REAFFIRMED IN WHICH IT WAS HELD STATE HIGHWAY COMMISSIONER IS NOT AUTHORIZED TO PAY CONTRACTOR AN ESTIMATE BASED UPON MATERIAL DELIVERED ON SITE.

In order to constitute a "repair" of a highway it is first essential that there must have been an improvement of the highway and that this improvement must have fallen into decay, either slight or extensive. Some substantial part of the original improvement must remain, and the proposed operation, to be a repair, must contemplate the use of that part of the old improvement still remaining, and must further contemplate a completed work that will be substantially like the original.

The state highway commissioner is not authorized to pay a contractor an estimate based upon material delivered on the site of an improvement and not yet incorporated in the work.

The conclusions expressed in opinion No. 485, rendered June 10, 1915, and opinion No. 1211, rendered January 28, 1916, are reaffirmed.

COLUMBUS, OHIO, July 25, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—This department is in receipt of a communication from The Ohio Paving Brick Manufacturers' Association, under date of May 3, 1916, in which communication there is requested a reconsideration of certain questions passed upon by me in opinion No. 485, rendered to you on June 10, 1915, and opinion No. 1211, rendered to you on January 28, 1916.

In opinion No. 485 I was called upon to define the meaning of the word "repair" as used in the sections of the General Code governing the activities of your department. The following is quoted from the opinion in question:

> "The verb 'repair' is defined in the Standard dictionary as follows: '(1) to mend, add to or make over;' '(2) to restore to a sound or good state.' The noun 'repair' is defined in the same work as follows: 'restoration after decay, waste, injury or partial destruction.' In order to constitute a repair it would seem in the light of the above definitions that there must first have been a work of some kind, and this work must have fallen into a state of decay. The extent of the decay does not seem to be material, so long as some substantial part of the original work remains. When the above situation exists, a repair would consist in restoring the work in question to its originally sound and good state, utilizing a substantial part of the original work and so conducting operations that when they are completed the new work will be substantially like the old. Applying these general principles to the word 'repair' as used in connection with a highway, it is first essential that there must have been an improvement and that this improvement must have fallen into decay, either slight or extensive. Some substantial part of the original improvement must remain, and in order to constitute a repair the proposed operation must contemplate the use of that part of the old improvement still remaining and must further contemplate a completed work that will be substantially like the original. It will not, however, rob a contemplated operation of its character as a repair merely because it is proposed to so conduct the operation that the highway when repaired will possess certain improvements as compared with the original work. In the specific instance referred to by you, it is my opinion that the facts that some slight alterations are to be made

in the grade of some parts of the road, that the margins are to be straightened up and that the roadway is to be widened in places will not change the character of the proposed operation as a repair. The present cuts and fills will be utilized, substantially the present grade will be followed and the old macadam not worn away will be used as a base. The road was originally constructed as a macadam road, a very substantial part of the old construction still remains and is to be utilized in the new work, and when the new work is completed the result will be a road of substantially the same general type as the original improvement; and I am of the opinion that you may properly regard this contemplated improvement as a repair and pay for it accordingly. I would have no hesitation in saying, however, that if it were planned to change the general type of the road, as, for instance, by paving with brick a road originally surfaced with macadam, then the proposed operation could not properly be regarded as a repair."

As I understand the communication of the Ohio Paving Brick Manufacturers' Association, that association objects particularly to the conclusion that the operation of paving with brick a road originally surfaced with macadam, could not properly be regarded as a repair. I have not been cited, however, to any authorities in support of an opposite conclusion and a careful re-examination of the authoities bearing on this question has only served to strengthen and confirm my conclusions as originally expressed.

A general definition of the word "repair" was attempted by the court in the case of Ardesco Oil Co. v. Richardson, 63 Penn. State, 162, 166, the court using the following language:

> "Repair means to restore to its former condition, not to change either the form or the material. If you are to repair a wooden building, you are not to make it brick, stone or iron, but you are to repair wood with wood."

In the case of Farraher v. City of Keokuk, 111 Iowa, 310, the court was called upon to consider the validity of an assessment for an alleged repair of a sidewalk. Under the Iowa statute cities were authorized to provide for the construction, reconstruction and repair of permanent sidewalks and to assess the cost thereof on abutting lots, and it was provided that such improvements should be made only on petition of a majority of the frontage. Cities were also authorized to repair sidewalks without notice to owners and assess the expense thereof against the property. The city engineer of Keokuk caused a brick walk, which had been out of repair, to be taken up, a new trench dug and an entirely new foundation of sand laid thereon, and a large number of new brick to be used along with some of the old brick in relaying the walk. This was held to constitute a reconstruction and not a repair of the walk such as the city was authorized to make without a petition, and the assessment was therefore held to be invalid. A careful reading of the opinion indicates that the decision of the court was based on the fact that no substantial part of the old work was utilized in the construction of the new.

In the case of Board of Commissioners v. Mankey, 29 Ind. App., 55, the court cited with approval Webster's definition of the word "repair," which is to "restore to a sound or good state after decay, injury, dilapidation or partial destruction," and held that authority to repair a graveled road did not carry with it authority to make substantial changes in the established grade.

The following is quoted from the opinion of the court in the case of Weaver v. Templin, Trustee, 113 Ind., 298, 303:

> "We are unable to resist the conclusion that the trustee, under color of making repairs and removing obstructions, has changed and improved

the ditch in several essential particulars. The ditch has been greatly widened and deepened, and, doubtless, much improved, since the amount expended is almost twice the cost of the original ditch. The inference from the facts stated is that the trustee has improved the ditch instead of repairing it. Under authority to repair there can be no enlargement and improvement, except in so far as the work of repairing necessarily enlarges and improves."

In the case of Ritterskamp v. Stifel, 59 Mo. App., 510, the court held that when in repaving an alley all the old paving stones were taken out and new ones used in their stead, the grade changed two or three inches, and the alley made new except the old sand which was mixed with the clay and soil, the work was a reconstruction and not a repair.

In the case of Paving Company v. Broderick, 113 Calif., 628, the court held that it would be in violation of a proper construction of the term "repair" to hold that it included the original improvement of the street, *or work of a different character from that previously done thereon.*

In the case of Blount v. City of Janesville, 31 Wisc., 648, it was held that if a street once graded and paved with stone is ordered to be regraded and completely repaved with a different material, such operation would not constitute a repair.

In the case of Field v. City of Chicago, 198 Ill., 224, the court emphasized the fact that some very substantial part of the old improvement must be incorporated in the new work in order to constitute it a repair. The road in question had been previously macadamized, and the plans for the new work called for the cleaning, scarifying and rolling of the old roadway and the construction thereon of a complete new broken limestone and crushed granite pavement six and one-half inches thick. The court held that the operation was an improvement and not a repair. The following is from the opinion of the court:

"If the roadway already contains a good foundation, or one that with some labor can be made a good foundation, we see no reason why the same should be excavated and destroyed instead of being used in putting down a new pavement on the street. Doubtless most of the streets in cities of any considerable size, which have been premanently improved by special assessment or special taxation, had been previously graded, curbed and macadamized by the city authorities, and used in that way by the public long before the permanent improvement was made, and we do not understand that the previous work done on such streets would impress all future improvements with the character of mere repairs, unless such previous improvements were destroyed. * * * The mere fact that the ordinance provides that the macadam foundation already in the street shall be made level and smooth, and used as a foundation for the improvement provided for by the ordinance, and that some of the curb stones shall be used in the new work, does not make the work one of repair only. If the ordinance had provided that on the roadway so cleaned, filled and compacted, as specified, there should be placed a layer of granite blocks or a layer of vitrified brick, instead of layers of broken limestone and crushed granite, it would hardly be contended that the work would be one of repair."

In the case of Robertson v. City of Omaha, 55 Nebr., 718, the court held in effect that a use of a part of the old work will not constitute an operation a repair if the result is a pavement of a substantially different type. In this case a street had been paved with wooden blocks laid on a concrete base, and the wooden blocks had become worn and were replaced with vitrified brick laid on the old base. It was held that this constituted a repavement of the street and not a repair.

In the case of In the Matter of Repaving Fulton Street, 29 How. Pr. (N. Y.), 429, the first branch of the syllabus is as follows:

> "The substitution of a new and different kind of pavement from that existing on a public street is not a repair of the street, and a local assessment may be made for the expense thereof, even where the whole width of the street is not so repaved."

In the case of Bush v. City of Peoria, 215 Ill., 515, the court held that laying a new asphalt pavement after removing the old asphalt pavement down to the concrete base, and partially renewing the base, is not a repair, notwithstanding a part of the old foundation is to be used. The court evidently did not consider that enough of the old work was to be preserved and utilized to constitute the operation a repair and held that the same was an improvement. To the same effect see People v. City of Buffalo, 65 N. Y. Supp., 163; Levi v. Coyne, 57 S. S. (Ky.), 790, and McCaffrey v. City of Omaha, 72 Nebr., 583. However, in the case of City of Covington v. Bullock, 126 Ky., 236, the court held that where a street has been constructed with a concrete base six and one-half inches thick, and an asphalt wearing surface three inches thick and the asphalt has become worn, the operation of entirely removing the asphalt and laying a new asphalt wearing surface on the old concrete base without disturbing the same constitutes a repair and not a reconstruction.

If it were attempted to construct a rule from these five cases decided by the courts of Illinois, New York, Kentucky and Nebraska, the rule would be that the laying of a new wearing surface of the same material constitutes a repair, but that the partial rebuilding of the base and the laying of a new wearing surface, even of the same material as the old, does not constitute a repair, and is to be classed as a reconstruction.

The question of whether any given operation is to be classed as a repair or a reconstruction is a mixed question of law and fact, and it is impossible to lay down a definite and absolute rule that will afford an answer in every case that may arise. I am satisfied, however, that the statement of the general principles that are to govern, as made in opinion No. 485 of this department, hereinbefore referred to, is a correct statement of the law, and that the same is supported by the authorities. The rule will not exclude the use of brick in repair work, and will, indeed, require the use of this material where a road was originally constructed of brick. The rule will also permit of some variations in the method of construction to meet the developments of the road builders' art. Where a brick pavement has been laid without the use of any filler, and it becomes necessary to dig up the brick and relay the same on the old base, substituting new brick for those that are found to be broken or badly worn, the operation will not be robbed of its character as a repair merely because after the pavement is relaid cement or tar is used as a filler.

The other opinion of this department, a reconsideration of which is requested by the Ohio Paving Brick Manufacturers' Association, is opinion 1211, rendered to you on January 28, 1916, in which opinion I held that under the provisions of section 1212, G. C., you were not authorized to pay a contractor estimates based upon material delivered on the site of the improvement and not yet incorporated in the work. That part of section 1212, G. C., quoted in the opinion in question, reads as follows:

> "No payment by the state, county or township, on account of a contract for any improvement under this chapter shall, before the completion of said contract, exceed eighty-five per cent. of the value of the work performed to the date of such payment. Fifteen per cent. of the value of the work performed shall be held until the final completion of the contract in accordance with the plans and specifications."

The only other provision found either in this section or elsewhere, and bearing in any way upon the question, is the preceding sentence, which sentence reads as follows:

> "The payment of the cost of the construction of such improvement shall be made as the work progresses, upon estimates made by the engineer in charge of such improvement, and upon approval of the state highway commissioner."

The matter is in my opinion, however, fully determined by the provision first above quoted, and I am unable to reach any conclusion other than that expressed in opinion 1211.

In the absence of a specific statutory provision to the contrary, the state certainly could not be called upon to pay for something that it had not yet received. Where the ownership of unspecified goods is to be transferred from one person to another, it is elementary that the title will not ordinarily pass until there has been an appropriation of specific goods assented to by both the seller and the buyer. In the building of houses or other permanent structures, the act which is ordinarily indicative of this selection of specific goods is the final affixture of the materials to the freehold, for the reason that this act is the one which puts the material finally out of the control of the builders and redounds purely to the benefit of the owner. Even the act of the owner in approving materials to be used by the builders is not usually sufficient to transfer title. This approval simply sets at rest the question of the land owner's assent. The seller may not, up to this point, have indicated positively his election and may not until afterward. In obtaining the approval of the owner, the builder merely secures the owner's assent to the subsequent appropriation of the goods by affixture to the realty, should he elect to so affix them.

Johnson v. Hunt, 11 Wend. (N. Y.) 135;
Manchester Mills v. Rundlett, 23 N. H., 271;
4 Meeson and Welsby's Rep., 687.

I have not been referred to any authorities supporting the contentions of the Ohio Brick Manufacturers' Association; the arguments submitted being directed in the main to the wisdom and advisability of the statute rather than to its proper construction. These are arguments to be properly made to the legislature rather than to administrative officials charged with the execution of the law, and in view of the clear and unambiguous language used in section 1212, G. C., and of the well established legal principles referred to above, I am of the opinion that the rule set forth in opinion 1211 of this department is the one that should govern your department in this particular.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1809.

APPROVAL, RESOLUTIONS FOR IMPROVEMENT OF CERTAIN ROADS IN TWENTY-TWO DIFFERENT COUNTIES.

COLUMBUS, OHIO, July 25, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communications of July 13th, July 15th, July 17th, July 20th, July 22nd and July 24th, 1916, transmitting to me for examination final resolutions relating to the following road improvements:

"Clermont county—Sec. 'H,' Cincinnati-West Union road, Pet. No. 2169, I. C. H. No. 30.

"Clermont county—Sec 'L,' Milford-Hillsboro road, Pet. No. 2168, I. C. H. No. 9.

"Delaware county—Sec. 'D,' Columbus-Wooster road, Pet. 2295, I. C. H. No. 24.

"Harrison county—Sec. 'M,' Cadiz-Carrollton road, Pet. No. 943, I. C. H. No. 371.

"Madison county—Sec. 'E,' Urbana-London road, Pet. No. 2635, I. C. H. No. 194.

"Medina county—Sec. 'A,' Akron-Medina road, Pet. No. 2664, I. C. H. No. 95.

"Pickaway county—Sec. 'K,' Lancaster-Circleville Northern road, Pet. No. 2811, I. C. H. No. 463 (Also alternate).

"Tuscarawas county—Sec. 'K,' West Lafayette-New Philadelphia road, Pet. No. 2997, I. C. H. No. 408, M. M. IX.

"Tuscarawas county—Sec. 'A,' Canton-Canal Dover road, Pet. No. 2995, I. C. H. No. 70, M. M. IX.

"Vinton county—Sec. 'G,' McArthur-Logan road Pet. No. 3040, I. C. H. No. 397.

"Vinton county—Sec. 'G,' McArthur-Athens road, Pet. No. 3039, I. C. H. No. 160.

"Medina county—Sec. 'M' of the Medina-Norwalk road, Pet. No. 2665, I. C. H. No. 291.

"Columbiana county—Sec. 'Q,' Cleveland-East Liverpool road, Pet. No. 2193, I. C. H. No. 12, M. M. No. III.

"Athens county—Sec. 'J,' Logan-Athens road, Pet. No. 2061, I. C. H. No. 155.

"Columbiana county—Sec. 'R,' Cleveland-East Liverpool road, Pet. No. 2193, I. C. H. 12.

"Fayette county—Sec. 'I,' Springfield-Washington road, Pet. No. 2332, I. C. H. 197.

"Franklin county—Sec. 'K,' Columbus-Marysville road, Pet. No. 934, I. C. H. No. 48.

"Geauga county—Sec. 'A,' Painesville-Warren road, Pet. No. 2381, I. C. H. No. 153.

"Geauga county—Sec. 'D,' Chardon-Madison road, Pet. No. 2379, I. C. H. No. 327.

"Geauga county—Sec. 'I,' Burton-Bloomfield road, Pet. No. 2383, I. C. H. No. 447.

"Hamilton county—Sec. ...., Carthage-Hamilton road, Pet. No. 2415, I. C. H. No. 43.

"Hocking county—Sec. 'F,' Logan-Lancaster road, Pet. No. 2496, I. C. H. No. 360.

"Logan county—Sec. 'B,' Bellefontaine-Kenton road, Pet. No. 1495, I. C. H. 226 (supplemental).

"Marion county—Sec. 'K,' Marion-Waldo road, Pet. No. 2648, I. C. H. No. 109 (also duplicate).

"Ottawa county—Sec. 'F,' Pt. Clinton-Marblehead road, Pet No. ......, I. C. H. No. 440 (supplemental).

"Ottawa county—Sec. 'C,' Bono-Pt. Clinton road, Pet. No. 2778, I. C. H. 438.

"Wayne county—Sec. 'A,' Cleveland-Wooster road, Pet. No. 3071, I. C. H. 25.

"Lorain county—Sec. 'M,' Cleveland-Sandusky road Pet. No. 2600, I. C. H. No. 3.

"Meigs county—Sec. 'C,' West Union-Sinking Springs road, Pet. No. 2009-T, I. C. H. No. 124, Meigs township (township).

"Franklin county—Sec. 'A' and 'L,' Columbus-Marysville road, I. C. H. No. 48, M. & R."

I find these resolutions to be in regular form and am therefore returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1810.

CORPORATION—MAY BY AMENDMENT TO ARTICLES OF INCORPORATION AUTHORIZED BY UNANIMOUS CONSENT OF STOCKHOLDERS, CHANGE ISSUED COMMON STOCK TO PREFERRED STOCK AND ISSUED PREFERRED STOCK TO COMMON STOCK.

A corporation may by amendment to its articles of incorporation authorized by the unanimous consent of its stockholders, change issued common stock to preferred stock, and issued preferred stock to common stock.

COLUMBUS, OHIO, July 26, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of July 21, 1916, requesting my opinion as follows:

"We are enclosing certificate of amendment to the articles of incorporation of 'THE NORCROSS COMPANY,' which was presented to this department by Cooke, McGowen and Foote, attorneys-at-law, Cleveland, Ohio, for filing. As the said certificate of amendment does not recite the fact that the proposed amended capital stock is unissued and in conformity with a late opinion rendered by your department, we have refused to file the same.

"At the request of counsel for The Norcross Company, we are submitting the proposed certificate to your department and kindly request an early opinion on the question, as to whether a corporation can by amendment change common stock into preferred, or preferred into common, although the proposed amended capital stock is issued and outstanding."

The certificate of amendment to the articles of incorporation of The Norcross Company enclosed in your letter discloses that said company has an authorized capital stock of $100,000.00 all of which is common stock. It seeks by amendment authorized by the unanimous consent of all its stockholders to change $50,000.00 of this common stock to preferred stock. The certificate of amendment does not recite that the common stock which it desires to change to preferred stock is unissued, and I am informed by counsel for the company that all of this stock is issued and outstanding.

In opinion No. 1306 rendered to you on March 1, 1916, I advised you as follows:

"For your future guidance in this connection, I may add that it is my opinion that you should file and record certificates of amendment to articles

of incorporation, adopted by the unanimous consent of all the corporation's stockholders, changing unissued common stock to preferred stock, or unissued preferred stock to common stock."

Although the corporation under consideration at the time the above mentioned opinion was given was seeking to change by unanimous consent of all its stockholders unissued preferred stock to common stock, yet I believe that the reasons for the conclusion therein expressed are equally applicable to the situation presented in your enquiry.

The controlling reason for the conclusion expressed and the advice given you in the former opinion referred to was that the change in the character of the stock was agreed to and authorized by all of the stockholders of the company, and that therefore no rights either of creditors or stockholders were impaired or jeopardized by permitting the change, and even though such action was not specifically authorized by the General Code, yet by reason of the long-established practice to that effect it should be permitted.

I therefore advise you that you should accept and record the certificate of amendment to the articles of incorporation of The Norcross Company enclosed in your letter and which I herewith return to you.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1811.

CHILDREN'S HOME—WHERE TRUSTEES REQUEST ADMISSION OF PUPILS TO COMMON SCHOOLS—BOARD OF EDUCATION OF DISTRICT OBLIGED TO ADMIT SUCH PUPILS—COUNTY COMMISSIONERS PAY TUITION—WHEN NEW BUILDING REQUIRED AND FUND NOT AVAILABLE—BOARD OF EDUCATION MUST BORROW MONEY FOR PUPOSE OF ERECTING SCHOOL BUILDING.

The written request of the trustees of a children's home in which a separate school has been maintained, for the admission of pupils resident in such home to the common schools of the appropriate school district, obliges the board of education of such district to admit such pupils subject to the payment of tuition for them by the county commissioners.

In case such request necessitates the construction of a new school building and funds therefor are not immediately available, the board of education must borrow money under its general power to issue bonds for school building purposes, there being no special provision for such a case.

If the tax duplicate of the district permits, money may be borrowed for such a purpose by the board of education without a vote of the people. Section 7629, *G. C., explained in the light of Rabe v. Board of Education,* 88 *O. S.,* 403, *the Smith one per cent. law, and particularly section* 5649-1 *thereof.*

COLUMBUS, OHIO, July 26, 1916.

HON. PERRY SMITH, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—In your letter of July 10th you requested my opinion as follows:

"Under section 7676 of the General Code of Ohio we have what is known as the Avondale children's home in Newton township. The trustees of said children's home have notified the board of education of Newton township

to provide a school sufficient for the inmates of said institution. The said board of education cannot build this school house because the same will cost about $5,000.00 to $5,500.00 and it will become necessary to issue bonds to build the same.

"Under what section of the law can the board of education of Newton township issue these bonds to build this school house without a vote of the people? There is in the treasury of the building fund of Newton township $1,483.68 and on August 1st they will draw $1,483.68 more. In the contingent fund they have $845.00 that they will not need this year so it will become necessary to borrow or issue bonds for the difference between $3,700.00 and $5,500.00 and the board of education of said township thinks they can pay these bonds off in three years.

"If there is any law or provision by which this money can be raised by the issuing of bonds, please give us the section of the statute and we will try and comply with it."

In reply to my request for additional information respecting the situation upon which my advice was desired, you wrote me on July 19th as follows:

"1st. The Avondale children's home was established by law by a vote of the people who issued bonds for buying the land and building the institution. It is a children's home for Muskingum county, Ohio, and it is not a private establishment or institution.

"2nd. The trustees of the children's home under section 7676 of the General Code have served a written notice upon the trustees of the township to build a school house to accomodate the children of the Avondale children's home.

"3rd. This is not a special school house for these children alone, but is for the children in the neighborhood and also to accomodate the children's home pupils.

"The institution, through its trustees, have been furnishing school room and rooms, furniture, fuel, apparatus and books for the children, but the institution has grown so large that it becomes necessary to build a school house conveniently near to said children's home so as to give them a common school education. It is not especially for the children's home, but for the children who live in the neighborhood.

"Our tax duplicate will not justify us at this time as far as the county is concerned in building this school house as you have the facts of the money that Newton township has on hand. Please let me know if there is any section of law by which the board of education can borrow the money to build this school house, or if the board of education is relieved from building the school house under the General Code, and is it incumbent upon the county commissioners to build the same? I understand from the law that the trustees or the board of education of the township must furnish school for the children of the home."

Section 7676, G. C., et seq., as amended in 103 O. L., 896, provide as follows;

"Sec. 7676. The board of education in any district in which a children's home or orphans asylum is established by law, when requested by the board of trustees of such children's home or orphans' asylum when no public school is situated reasonably near such home or asylum, shall establish a separate school in such home or asylum, so as to afford to the children therein,

as far as practicable, the advantages and privileges of a common school education. Such schools must be continued in operation for such period as is provided by law for public schools. If the distributive share of school funds to which the school at such home or asylum is entitled by the enumeration of children in the institution is not sufficient to continue the schools for that length of time, the deficiency shall be paid out of the funds of the institution or by the county commissioners.

"Sec. 7677. All schools so established in any such home or asylum shall be under the control and management of the respective boards of education of the school districts in which such homes and institutions are located, and courses of study, length of school term, and all other school matters shall be uniform in the respective school districts. Teachers employed in such homes or institutions must have a teacher's elementary school certificate as provided by section seven thousand eight hundred and twenty-nine of the General Code."

"Sec. 7678. In the establishment of such schools the commissioners of the county in which such children's home or orphans' asylum is established, shall provide the necessary school room or rooms, furniture, fuel, apparatus and books, the cost of which for such schools must be paid out of the funds provided for such institution. The board of education shall incur no expense in supporting such schools."

Your statement of facts makes it reasonably clear that these sections have in the past been complied with. The separate school of which section 7676, G. C., speaks has been in existence and rooms and facilities therefor have been furnished in the institiution by the trustees thereof or by the county commissioners at the expense of the institutional funds. It appears that now the trustees of the institution feel that they can no longer afford the space therein necessary for the accommodation of the separate institutional school, and have requested the board of education of the district in which the school is located to furnish other accommodations for the pupils resident in the home. In other words, what is desired is the discontinuance or disestablishment of the separate school referred to in section 7676, G. C., which, on your statement of facts, will require the building of a new school building in the district because of the fact, which seems reasonably to be inferred from your letter, that the buildings which now exist in the district are not of sufficient capacity to accommodate the pupils already attending school therein and the additional pupils which would under the proposed arrangement have to be accommodated therein.

The first question which is suggested by your letter is as to whether or not the written notice given by the trustees of the children's home to the board of education is sufficient to require the board of education to discontinue the separate school and provide additional regular facilities for the accommodation of the children's home pupils.

Sections 7676 to 7678, inclusive, deal solely with the establishment of a separate school. Prior to the amendment of section 7681, G. C., in 106 O. L., 489, no machinery was afforded for the discontinuance or disestablishment of such separate school, and the same could be effected, if at all, only by common consent of the public authorities whose action was requisite to the establishment thereof. However, said section 7681, G. C., at present provides as follows (106 O. L., 489):

"The schools of each district shall be free to all youth between six and twenty-one years of age, who are children, wards or apprentices of actual residents of the district, including children of proper age who are inmates of a county or district or of any public or private children's home or orphans' asylum located in such a school district, but the time in the school year at

which beginners may enter upon the first year's work of the elementary schools shall be subject to the rules and regulations of the local boards of education. The board of education in any district in which a public or private children's home or orphans' asylum is located, when requested by the governing body thereof, shall admit the children of school age of such home or asylum to the public schools of the school district. The county commissioners shall pay the tuition of such pupils to the school or schools maintained by the board of education at a per capita rate which shall be ascertained by dividing the total expenses of conducting the elementary schools of the district attended, exclusive of permanent improvement and repairs, by the total enrollment in the elementary schools of the district, such amount to be computed by the month. An attendance any part of the month shall create a liability for the whole month. The distributive share of school funds from the state for the children of such home or asylum shall then be paid to the county commissioners. But all youth of school age living apart from their parents or guardians and who work to support themselves by their own labor, shall be entitled to attend school free in the district in which they are employed."

Under this section it is clear that the request of the governing body of the public children's home is sufficient to discontinue the special school in said home, and to require the board of education to admit the children of school age of such home to the public schools of the appropriate school district, subject of course, to the obligation of the county commissioners to pay the tuition of such pupils in accordance with the rule laid down in the section.

The written notice referred to in your letter is, in my opinion, in compliance with section 7681, G. C. (instead of section 7676, G. C., referred to by you.)

The sections quoted make no special provision for the acquisition of additional facilities necessitated by the admission of such pupils to the schools of the district. The special school provided for by sections 7676 to 7678, inclusive, was to be conducted in school rooms furnished by the county commissioners; but the buildings or rooms, if any, necessary for the accommodation of the additional pupils admitted to the public schools of the district by virtue of section 7681, G. C., as amended, must be furnished by the board of education, and no part of the cost of such permanent improvement is to be included in fixing the rate of tuition to be paid by the county commissioners. In short, one effect of discontinuing a separate school and admitting the children's home pupils to the public school is to shift from the county to the school district the financial burden of providing school rooms for the pupils involved.

There being no special provision for paying the expense of additional school buildings necessitated by the admission of children's home pupils to the schools of the district, under section 7681, G. C., it follows that the board of education must secure the funds for such purpose by exercising its general powers.

Your statement of facts makes it clear that the expense of erecting a new building can not be defrayed out of current building fund levies; that money will have to be borrowed, and that it is desired to borrow the same without submitting the question to a vote of the people.

It appears from your statement of facts that the amount of money needed in addition to the moneys which are expected to be in the building and contingent funds and available for use for this purpose is not large. Accordingly it seems quite possible (although I am unable to determine such possibility without knowing the tax duplicate of the district) that section 7629, General Code, may be employed. It provides as follows:

"Section 7629. The board of education of any school district may issue bonds to obtain or improve public school property, and in anticipation

of income from taxes, for such purposes, levied or to be levied, from time to time, as occasion requires, may issue and sell bonds, under the restrictions and bearing a rate of interest specified in section seventy-six hundred and twenty-six and seventy-six hundred and twenty-seven. The board shall pay such bonds and the interest thereon when due, but provide that no greater amount of bonds be issued in any year than would equal the aggregate of a tax at the rate of two mills, for the year next preceding such issue. The order to issue bonds shall be made only at a regular meeting of the board and by a vote of two-thirds of its full membership, taken by yeas and nays and entered upon its journal."

It has always been held by this department and by the courts that despite the reference in this section to "the restrictions * * * specified in sections seventy six hundred and twenty-six and seventy-six hundred and twenty-seven," which makes the section somewhat ambiguous, said section 7629 authorizes the issuance of bonds without a vote of the electors.

An additional limitation is imposed upon the issuance of such bonds by section 7630, G. C., which, however, was declared by the supreme court in the case of Rabe v. Board of Education, 88 O. S., 403, to have been repealed by implication by the enactment of the Smith one per cent. law, section 5649-1, et seq., G. C.

The language of the opinion of Donahue, J., in this case raises some doubt as to whether section 7629, G. C., being necessarily related to section 7630, G. C., was not also repealed by implication in the same manner. He says at pages 414 and 415:

"The provisions of section 7629, General Code, were modified, aided and restricted by the provisions of section 7626, 7627, 7630, 7591 and 7592, General Code. These material parts of this code being no longer in force or effect, the whole plan and scheme is weakened and *possibly* destroyed.

"*If* section 7629, General Code, has survived the wreck of the plan provided by the school code of 1904, for the issuing of bonds by the board of education, it is not only bereft of its fellow sections of that code in reference to the same subject-matter, but it is deprived of the aid of their correlative provisions with reference not only to the issuing but to the retirement of bonds.

"Section 7629, General Code, provides for the issue of bonds only in anticipation of income from taxes levied for the purposes named in that section. * * * This section contains a further provision—that the bonds issued thereunder shall not exceed an amount equal to the aggregate of a tax at the rate of two mills on the tax valuation for the year next preceding such issue."

Thereafter, at considerable length Judge Donahue proceeds to discuss the application of section 7629, G. C., as modified by the Smith law to the facts of the case at hand. It is therefore to be strongly inferred from his final conclusion that he did not regard section 7629 as repealed. This was the opinion of my predecessor and I concur therein, and advise you that section 7629, G. C., is at present in force.

Much was said in Rabe v. Board of Education, supra, as to the modifying effect of the Smith one per cent. law upon the power of the board of education to issue bonds without a vote of the people under section 7629, G. C. The fourth branch of the syllabus epitomizes the holding of the court on this point:

"4. In determining the amount of income from taxes levied or to be levied that may be anticipated by an issue of bonds by any taxing authority, the calculation must be based on the same proportion of the total maximum

levy in any one taxing district as the proportion of the maximum levy it is authorized to certify to the budget commissioners is to the total maximum levies that all the taxing authorities within that taxing district are authorized to certify."

In connection with this statement of the syllabus the following remark in the opinion must be noted:

"It would seem to be not only proper but necessary to take into account the future demands upon the school funds for school purposes in connection with the probable increase of the tax duplicate in determining just what income may be anticipated by the issue of bonds for the purchase of school property without detriment to the future imperative needs of the schools of that school district."

In other words, as the law was when the controversy which gave rise to Rabe v Board of Education originated, the levies which could be anticipated under section 7629, G. C., were levies that would have to be made subject to the prior claims, so to speak, of the current expense and tuition levies of the district. Since then, however, article XII, section 11 of the constitution has been adopted, and is now in force, and as to bonds issued since its adoption the following paragraph of the opinion in Rabe v. Board of Education applies:

"At this time, under the amendment to the constitution (section 11, article XII), which provides that no bonded indebtedness of the state or any political subdivision thereof shall be incurred or renewed, unless in the legislation under which such indebtedness is incurred or renewed provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds and provided for a sinking fund for their final redemption at maturity, it is of the utmost importance that at the time of the incurring of such indebtedness the other needs of the political subdivision proposing to issue the bonds should be taken into account, for this levy must continue during the term of the bonds in an amount sufficient to pay the interest and provide a sinking fund for their final redemption, even though the amount should exhaust the entire income available from taxation and without regard to the current expenses. In other words, under this provision of the constitution, the payment of interest and the retirement of bonds are to be provided for first, and the current expenses become a secondary consideration."

Though as Judge Donahue pointed out "this amendment * * * has no application to this case" (Rabe v. Board of Education), it does have application at the present time and its force and effect is emphasized and made clear by the provisions of section 5649-1, G. C., as amended 104 O. L., 12, as follows:

"In any taxing district, the taxing authority shall, within the limitations now prescribed by law, levy a tax sufficient to provide for sinking fund and interest purposes for all bonds issued by any political subdvision, which tax shall be placed before and in preference to all other items, and for the full amount thereof."

So that it is now clear that a board of education acting under section 7629, G. C. has the power (which to be sure ought as a matter of policy not to be abused) to issue bonds within the limitation of that section without a vote of the people, and to order

in the proceedings to issue such bonds the making of sufficient interest and sinking fund levies to provide for the final retirement of the bonds, which such levies so provided for must be made during the life of the bonds, regardless of the effect of the making of such levies upon the returns from taxation for the current needs of the district.

It was the opinion of my predecessor, who first considered this question, and it is my own opinion, that there are at the present time but two absolute limitations upon the power of a board of education to issue bonds for the purpose of building a school building without a vote of the electors. They are:

> "(1) The amount of the bonds so issued must not exceed in any one year the amount which would have been produced by a tax at the rate of two mills for the year next preceding the issue.
>
> "(2) The amount of the annual levy required to retire such bonds, and accordingly 'anticipate' under section 7629, G. C., as determined by the aggregate amount of the bonds and the number of years which they are to run, must not exceed, together with interest and sinking fund levies already provided for and applicable within the district, any of the limitations of the Smith one per cent law applicable to such interest and sinking fund levies."

If, in determining the length of time the bonds would have to run, the board of education of a district should propose to act in reckless disregard of the needs of the district for tuition purposes for any future year or years, it seems that a taxpayer prior to the issuance of the bonds might intervene, and by injunction restrain such action as an *abuse of discretion;* but if no such action were taken, the bonds, if within the limitations above referred to, would undoubtedly be valid, and the money produced by their sale could undoubtedly be expended for the purpose for which it was raised. Regardless of the question of power, however, I can not too strongly advise that the board of education should not fail to take into account the needs of the school district for current expense levies during the time which the projected sinking fund levies are to be made, in determining the amount of bonds that it ought to issue for such purposes.

Answering, then, the question submitted in your letter of July 10th, I beg to advise that the board of education of Newton township may issue the bonds required to build the school house needed without a vote of the people under section 7629, General Code, subject to the limitations above referred to; that is to say, while I am not able to state positively that the board of education can issue the bonds, yet if the tax duplicate of the district is of sufficient size as that the amount of money needed for the purpose, together with the amount, if any, previously borrowed under the section during the year, will not exceed the proceeds of a two-mill levy on last year's duplicate, and if the necessary interest and sinking fund levies will not impair the needs of the district for current purposes, the power of the board of education to act under the section above referred to is adequate.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1812.

BOARD OF TRUSTEES OF BOWLING GREEN STATE NORMAL COLLEGE—APPROVAL OF CONTRACT FOR CONSTRUCTION OF TRAINING SCHOOL BUILDING.

COLUMBUS, OHIO, July 26, 1916.

HON. J. E. SCHATZEL, *Secretary, Bowling Green State Normal College, Bowling Green, Ohio.*

DEAR SIR:—You have submitted to me through your architects the contract entered into by your board of trustees and The Steinle Construction Company, under date of July 21, 1916, for the construction of the training school building, including general construction, heating and ventilating, plumbing, gas fitting, sewage, and lighting fixtures, the said contract calling for the sum of $94,545.45, to be paid for out of the appropriations made in sections 2 and 3 of house bill 701, 106 O. L. 666, together with the bond covering said contract and the advertisements calling for bids.

I have ascertained from the auditor of state's office that there are sufficient funds on hand not contracted against for the purposes of this contract. I have examined the contract and bond and find the same to be in compliance with law and have therefore this day approved the same and have filed the original contract and bond with the auditor of state and have returned the rest of the papers to your architects.

Respectfully,
EDWARD C. TURNER,
Attorney-Gen al.

1813.

APPROVAL, SALE OF CERTAIN CANAL LANDS IN UNION TOWNSHIP, ROSS COUNTY, TO COUNTY COMMISSIONERS.

COLUMBUS, OHIO, July 26, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of July 19, 1916, transmitting to me duplicate copies of your record of proceedings relating to the sale of certain canal lands in Union township, Ross county, Ohio, to the board of county commissioners of that county, and also duplicate copies of a resolution providing for such sale.

I find upon an examination of your record of proceedings that the sale is authorized by the statute, and I also find that the resolution providing for the sale is properly drawn. I am therefore returning the duplicate copies of the resolution with my signature attached thereto.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1814.

BUILDINGS—CITY AND TOWNSHIP HAVE NO AUTHORITY TO UNITE FOR ERECTION OF CITY HALL AND TOWNSHIP HOUSE.

COLUMBUS, OHIO, July 27, 1916.

HON. F. C. GOODRICH, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—Your letter of July 15, 1916, is as follows:

> "The question has been asked of me whether or not a city and a township have a right to join in the erection of a city hall and township house.
>
> "Section No. 3399 of the General Code provides that a village and township may join in the building of a township house, but I can find no section of the statute giving direct authority for a city and a township to join in the erection of a city building.
>
> "Will you please advise whether or not section No. 3399 and the following sections will permit the city and township joining in the erection of this building, or if there is any other section of the statute that gives such authority?"

Section 3399, G. C., provides:

> "The electors of a township in which a village is situated, and the electors of such village may if both so determine, as hereinafter provided, unite in the enlargement, improvement or erection of a public building."

Section 3400, G. C., provides that application for such purpose shall be made to the mayor of the village and the trustees of the township, and prescribes the minimum number of freeholders that must sign the respective applications. Section 3401, G. C., provides for the submission of the question of levying a tax for said purpose to the electors of the village and township respectively, and section 3402, G. C., provides:

> "If at such election two-thirds of the electors of the township and of the village voting, vote in favor of such improvement, the trustees of such township and the council of the village shall jointly take such action as is necessary to carry out such improvement."

It will be observed that the authority conferred by the foregoing provisions of the statutes is limited to the electors of a township in which a village is situated and the electors of such village. It is evident that said provisions of the statutes do not authorize the electors of a city to unite with the electors of a township for the aforesaid purpose.

A city as well as a township has only limited power and each must act within the limits of its powers as prescribed by statute. I find no provision of the statute authorizing a city and township to join in the erection of a city hall and township house and I am of the opinion therefore that your question must be answered in the negative.

Respectfully,

EDWARD C. TURNER.

Attorney-General.

1815.

APPROVAL, SYNOPSIS FOR INITIATIVE PETITION PROHIBITING LIABILITY INSURANCE COMPANIES COMPETING WITH WORKMEN'S COMPENSATION.

COLUMBUS, OHIO, July 29, 1916.

HON. TIMOTHY S. HOGAN, *Attorney-at-law, Columbus, Ohio.*

DEAR SIR:—You have submitted to me for my certificate an initiative petition, the syllabus of which reads as follows:

"PROPOSED LAW

"To amend section 1465-101 of the General Code of Ohio, making void contracts indemnifying employers against loss or liability for the payment of workmen's compensation, and agreements to pay such compensation, and making void contracts which indemnify the employer against damages when injury, disease or death arises from failure of employer to comply with lawful requirements for the protection of the lives, health and safety of employes, or when the same is occasioned by the wilful act of the employer or any of his officers or agents; prohibiting the issuance of licenses to enter into such contracts; and to repeal original section 1465-101 of the General Code of Ohio."

I hereby certify that the foregoing synopsis is a truthful statement regarding the above entitled proposed law.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1816.

PROSECUTING ATTORNEY—SON OF SUCH OFFICER NOT LEGALLY DISQUALIFIED FOR EMPLOYMENT UNDER SECTION 2412, G. C., TO ASSIST PROSECUTOR.

An attorney at law who is the son of a prosecuting attorney is not thereby legally disqualified for employment under the provisions of section 2412, G. C., to assist said prosecuting attorney in the prosecution or defense of any action brought by or against the officers specified in said section aforesaid, but cannot be appointed merely as a collector of delinquent taxes.

COLUMBUS, OHIO, July 29, 1916.

HON. TOM S. MADDOX, *Prosecuting Attorney, Washington C. H., Ohio.*

DEAR SIR:—I have your letter of July 19, 1916, as follows:

"A prosecuting attorney acting under authority of section 2412, G. C., requests the county commissioners to appoint him an assistant for the purposes of bringing suit, prosecuting, defending and collecting the delinquent street assessments due the city of Washington, Fayette county, Ohio, as appears on the tax duplicate in the office of the county treasurer of said

county; also to collect all other delinquent taxes appearing on the duplicate.

"R. R. Maddox, son of said prosecutor, by appointment under section 2914, 2915, G. C., is clerk and stenographer to said prosecutor; the said R. R. Maddox is an attorney at-law since July 1, 1916; no partnership of any kind exists between the said R. R. Maddox and said prosecutor.

"May said parties enter into a legal contract for the same?"

Section 2412, G. C., to which you refer, provides as follows:

> "If it deems it for the best interests of the county, upon the written request of the prosecuting attorney, the board of county commissioners may employ legal counsel to assist the prosecuting attorney in the prosecution or defense of any suit or action brought by or against the county commissioners or other county officers and boards, in their official capacity."

This statute provides for the employment of legal counsel to assist in the prosecution or defence of any suit or action brought by or against the county commissioners or other county officers and boards. The employment of such legal counsel as contemplated by this statute must be to assist the prosecuting attorney in some suit or action instituted by the officials named in said section or brought against them. There is nothing in this section to prevent the county commissioners from employing the son of a prosecuting attorney to assist the latter in the prosecution of such suits or in defending said officers and boards in any suit instituted against them; provided, of course, that said son is an attorney at law. The further fact mentioned in your inquiry that the son is in the employ of his father as a clerk and stenographer, appointed under authority of section 2915, G. C., and who, I learn in a subsequent letter, is engaged only a part of the time at a salary of $35.00 per month, offers no legal obstacle to the employment of the son under said section 2412, G. C., supra.

I therefore hold, under the facts stated, that the son of said prosecuting attorney may be legally employed under the provisions of section 2412, G. C., supra, but I express no opinion on the policy of making such employment.

In a subsequent letter you call attention to the provisions of section 3892, G. C., and refer to an opinion rendered by the bureau of inspection and supervision of public offices and of this department to the effect that only the county treasurer may enforce the collection of assessments under said section. I am unable to see what connection said last named section has with said section 2412, G. C., supra. As before observed, under said section 2412, G. C., supra, the commissioners may only employ an attorney to assist the prosecuting attorney in prosecuting suits and actions brought by the board of county commissioners or other county officials, or in defending such officials in suits and actions brought against them. There is nothing in the provisions of section 3892, G. C., supra, that would prevent a county treasurer from being represented in actions to enforce the collection of assessments under said section by the prosecuting attorney or the person so employed to assist him.

If, however, it is intended that the person employed to assist the prosecuting attorney is expected to act as a collector merely for the county treasurer in the matter of street assessments and other collections named in your inquiry, such employment may not be made for such purposes. A person employed under section 2412, G. C. must be employed to assist in actual litigation and cannot be employed as a mere collector for the county treasurer. I trust that this interpretation of section 2412, G. C., is made perfectly plain.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1817.

CHILDREN'S HOME—TRUSTEES OF SUCH HOME WITHOUT AUTHORITY TO TRANSFER TO OTHER INSTITUTIONS, CHILDREN COMMITTED TO THEIR CARE BY JUVENILE COURT EXCEPT UPON ORDER OF SUCH COURT.

Trustees of children's home are without authority to transfer to other institutions any children committed to the children's home by the juvenile court, except upon the order of such court, which has continuing jurisdiction over its wards until they arrive at the age of twenty-one years

COLUMBUS, OHIO, July 29, 1916.

Board of State Charities, Columbus, Ohio.

GENTLEMEN:—Your request for an opinion relative to the adoption of dependent children is as follows:

> "An interesting question in connection with the matter of adoption of dependent children has been submitted to us by a children's home of this state which has placed a large number of children in foster homes, many of whom are later adopted. This institution has also acted as an agent for other institutions. The following situation is submitted for your opinion as to the proper procedure:
>
> "A child is committed by the juvenile court in the manner set forth in section 1653, to a county children's home. Later the trustees of said county home transfer and surrender guardianship by means of a signed document to a legally recognized institution in another county. It is assumed that this child, when committed to the county children's home is placed therein with the right to adopt, as provided in section 1672. Has the county children's home the legal right to transfer guardianship of children to another institution without securing formal consent of the judge who committed the child to the county children's home? And has the second institution full legal authority to be a consenting party to the adoption of this child by foster parents in whose home the child has been placed through the instrumentality of the second institution? (See sections 8024 and 8025.)
>
> "The same institution has for years been receiving by the use of the formal surrender blank, children from other institutions in the same community. There is attached hereto a copy of the formal surrender blank used by institutions when transferring the guardianship of the child, which is the same as is used by parents when voluntary surrender of guardianship of children to the institution is made."

With your letter you enclose the copy of the blank form referred to in your letter which is as follows:

"THE CHILDREN'S HOME.

"The undersigned_____
of_____county of_____state
of_____of_____
a minor child, born_____do hereby surrender and intrust to THE CHILDREN'S HOME of Cincinnati, Ohio, and to such person or persons as it may select as to its assignee, the charge, management and control of the said child until_____shall become___ _____years

of age, and_____do hereby invest the said CHILDREN'S HOME and its assigns with the same powers and control over the said child as those of which_____possessed.

"This surrender of the child is made with the understanding that after the said child is accepted by the society,_____to have no further control or intercourse with_____except through the medium of said society, and that_____to have no knowledge of the family with whom said child is placed until_____becomes of legal age.

"Witness_____hand____and seal____this_____day of_____19____

"Witness:

"_____ "_____seal.

"_____ "_____seal."

Section 1653 of the General Code (103 O. L., 872), in part is as follows:

> "When a minor under the age of eighteen years, or any ward of the court under this chapter, is found to be dependent or neglected, the judge may make an order committing such child to the care of the children's home if there be one in the county where such court is held * * *"

The provisions of law relative to the manner in which children may be admitted to children's homes are embraced in section 3090 of the General Code (103 O. L., 890), which is as follows:

> "They shall be admitted by the superintendent on the order of the juvenile court or of a majority of such trustees, accompanied by a statement of facts signed by the court or trustees, setting forth name, age, birthplace, and present condition of the child named in such order, which statement of facts contained in the order, together with any additional facts connected with the history and condition of such children shall be, by the superintendent, recorded in a record provided for that purpose, which shall be confidential and only open for inspection at the discretion of the trustees."

As to the guardianship and control of inmates, section 3093 of the General Code in part, provides as follows: (103 O. L., 891.)

> "All inmates of such home who by reason of abandonment, neglect or dependence have been admitted, or who have been by the parent or guardian voluntarily surrendered to the trustees, shall be under the sole and exclusive guardianship and control of the trustees during their stay in such home, until they are eighteen years of age, and if such child is placed out or adopted such control shall continue until such child becomes of lawful age. * * *"

Under the provisions of the section just quoted it will be noted that exclusive guardianship and control of children while in children's homes is vested in the trustees of the said home.

Under the provisions of section 3090 of the General Code, supra, it will be observed that there are two methods of admitting children to children's homes—one through the agency of the juvenile court, and the other by a majority of the trustees of the children's home.

Section 1643 of the General Code, as amended (103 O. L., 869), is as follows:

> "When a child under the age of eighteen years comes into the custody of the court under the provisions of this chapter, such child shall continue

> for all necessary purposes of discipline and protection, a ward of the court, until he or she attain the age of twenty-one years. The power of the court over such child shall continue until the child attains such age."

From a reading of section 1643 quoted above it will be observed that there is a specific provision therein to the effect that "the power of the court over such child shall continue until the child attains such age."

The question involved in your inquiry is as to whether or not the jurisdiction of the juvenile court over the wards of the court continues after a child has been committed to a children's home insofar as the approval of the court may be required for the removal of the child from such children's home.

The provisions of section 3093 of the General Code, supra, to the effect that all inmates of such homes "shall be under the sole and exclusive guardianship of the trustees during their stay in such homes" appears to be general and controlling with respect to the matter, but upon examination of section 3093, supra, and section 1643, supra, it will be found that section 3093 is an old statute which has governed trustees of children's homes for a number of years, whereas section 1643, supra, is one of comparatively recent origin, and is a part of a general scheme of the law for the care and conduct of dependent and neglected children which originated with senate bill 40, which was an act "to regulate the treatment and control of dependent, neglected and delinquent children," which act was passed April 25, 1904, to be found in 97 Ohio Laws, at page 561. By virtue of the act in question the juvenile court system was established, which was an advance movement in the care of Ohio's unfortunate wards.

There have been a number of changes in the law since its original enactment but section 1643 of the General Code, supra, which vests the juvenile court with continuing jurisdiction of its wards until they arrive at the age of twenty-one years, and section 1653 of the General Code, supra, under which the children referred to in your communication were committed to the children's home, are parts of the juvenile court law as it at present exists.

The clear and manifest purpose of the juvenile court system is to vest in the juvenile court the absolute control of all dependent children which become wards of that court.

Section 3093 of the General Code, supra, provides that:

> "All inmates of such homes who by reason of abandonment, neglect or dependence have been admitted, or who have been by their parents or guardians voluntarily surrendered to the trustees shall be under the sole and exclusive guardianship and control of the trustees during their stay in such home."

and insofar as such guardianship and control applies to the children committed by the juvenile court is concerned, it is absolute while such child remains in the home.

The provisions of section 1643 of the General Code, supra, to the effect that the jurisdiction of the juvenile court shall continue for *"all necessary purposes of discipline and protection"* until the child attains the age of twenty-one years is controlling with reference to children committed by the court to the children's homes and may be exercised whenever, in the judgment of the court, the best interests of the child demands any change or modification in the orders of commitment.

There can be no question but that the ward's discipline and protection reflects on the place wherein the child may be kept or the person in whose custody it is placed.

As reflecting upon the intention of the general assembly with reference to the continuing jurisdiction of the juvenile court over its wards reference may be had to section 1352-3 of the General Code (103 O. L., 866), wherein it is provided, in part, as follows:

"The board of state charities shall when able to do so, receive as its wards such dependent or neglected minors as may be committed to it by the juvenile court. County, district, or semi-public children's homes or any institution entitled to receive children from the juvenile court may, with the consent of the board, transfer to it the guardianship of minor wards of such institutions. If such children have been committed to such institutions by the juvenile court that court must first consent to the transfer. * * *"

In section 1352-5 of the General Code (103 O. L., 867), it is provided, among other things, that:

"The board of state charities may when willing to do so, receive as its wards with all the powers given it by section 1352-3 of the General Code, delinquent children committed to it by a juvenile court or from any institution to which such children may be committed by the juvenile court or assigned by the board of administration. Such children shall be placed by it in homes in accordance with the provisions of section 1352-3 of the General Code. * * * * If originally committed to such institution by the juvenile court, that court must first consent to the transfer of such child to the board of state charities. * * *"

And, again, section 1672 of the General Code (103 O. L., 876), is to be considered as laying particular stress upon the continuance of the jurisdiction of the juvenile court under the provisions of section 1643 of the General Code, section 1672 being as follows:

"If the court awards a child to the care of an association, corporation or individual, in accordance with these provisions, unless otherwise ordered, the child shall become a ward, and be subject to the guardianship of such association, corporation or individual. Such association, corporation or individual may place such child in a family home and shall be made party to any proceedings for the legal adoption of the child, and if the court when making such award so orders, may appear in any court where such proceedings are pending, and assent to such adoption. Such assent shall be sufficient to authorize the judge to enter the proper order or decree of adoption, and upon such order being made, all jurisdiction of the juvenile court over such child under section 1643 of the General Code, shall cease and determine. Such guardianship shall not include the guardianship of any estate of the child."

The ultimate purpose of the state is to dispose of its juvenile court ward by finding suitable homes in families rather than to continue such wards in institutions and ample provision is made in the various statutes for the placing of all such wards in homes by the various institutions or state agencies, but nowhere in the law is there to be found any provision which admits of the transferring of the wards of the juvenile court from one institution to another, except that in the exercise of its powers under the juvenile research act to be found in 103 O. L., 175, the board of administration may transfer any minor committed to one of the institutions under its care to any other institution with the limitation that no person shall be transferred from a benevolent to a penal institution.

In view of the foregoing it is my opinion that the trustees of a children's home are without authority of law to transfer the guardianship, control or custody of children committed to it by the juvenile court to another institution, except upon the order of the juvenile judge who originally committed the child to the children's home.

A similar question was considered by my predecessor in opinion No. 767, addressed to Hon. Hugh R. Gilmore, prosecuting attorney, Eaton, Ohio, under date of September 9, 1912, to be found in Vol. II, of the Report of the Attorney-General for 1912, at page 1529, in which opinion I concur.

This disposition of the first question will of course obviate the necessity of a discussion of the second question in your inquiry.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1818.

APPROVAL, CERTAIN OIL AND GAS LEASES TO GRIFFIN PRODUCING COMPANY AND T. R. COWELL.

COLUMBUS, OHIO, July 29, 1916.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of July 6, 1916, addressed to Hon. Frank B. Willis, Governor of Ohio, and myself, requesting our approval of oil and gas leases as follows:

(1) Lease to Griffiin Producing Company, dated June 28, 1916, and covering property located in section 29, township 13, range 16, Hocking county, Ohio, being the first half of the north half of the northwest quarter, and the south half of the northwest quarter.

(2) Lease to T. R. Cowell, dated June 28, 1916, and covering property located in Hocking county, Ohio, section 29, township 13, range 16, being the east half of the north half of the northwest quarter of said section, and the north half of the northeast quarter of said section.

(3) Lease to T. R. Cowell, dated June 28, 1916, and covering property located in Hocking county, Ohio, section 29, township 13, range 16, being the north half of the southwest quarter of said section.

I have carefully examined said leases, and the same meet with my approval.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1819.

BOARD OF EDUCATION—WEAK SCHOOL DISTRICT—SALARY OF PART-TIME SUPERINTENDENT.

That the proportionate part of the salary of a part-time superintendent employed by a school district under section 4740, G. C., attributable to teaching service, exceeds $70 00 per month, does not disqualify the district to receive state aid as a "weak" one, unless the average compensation paid to all high school teachers, including such portion of the salary of such superintendent, exceeds such rate.

That a board of education may be able to apply income from the district levy for contingent fund upon the payment of teachers' salaries, or may actually contemplate such application, does not affect the amount which the district is entitled to receive under the weak school district aid law, which is in all cases measured by the deficiency in the estimated income of the tuition fund as compared with the amount required to pay the minimum salaries of elementary teachers mentioned in section 7595-1, G. C., the actual salaries of high school teachers, and the other charges made by law against the fund.

COLUMBUS, OHIO, July 29, 1916.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of July 12th, requesting my opinion upon the following question:

"A part-time superintendent is employed by a special supervision district under favor of section 4740, G. C., at an aggregate salary for all services of $175.00 per month. He devotes one-half of his time to teaching, and, in accordance with my opinion No. 1769, addressed to you under date of July 10, 1916, the district, if it requires state aid under the weak school district aid law, may include as a part of its deficiency such portion of his total salary as is referable to his services as teacher, the apportionment being made on a time basis. In the opinion referred to you have also been advised that for the purpose of applying section 7595-1, General Code, such a part-time superintendent should, as a teacher, be regarded as a high school teacher, because of the nature of the qualifications he is required to possess. Inasmuch as half of the monthly salary of the superintendent-teacher in question exceeds $70.00 per month, which is the amount fixed for high school teachers in section 7595-1, G. C., you submit the following questions which have arisen in your administration of the weak school district aid law:

"1. Must we refuse state aid under the weak school district aid law on that ground?

"2. Does the question of what fund bears this expense of $87.50 have any relation to this question?

"In other words, * * *: In determining whether a district is entitled to state aid, should we disregard all expenditures out of contingent funds? Or, stated otherwise, if the maximum levy is made, and if the proper proportion of that levy is placed in the tuition fund, then, should we only contemplate expenditures for salaries made out of that fund, and disregard expenditures for salaries paid out of other funds by transfer, always, however, having in mind the mandate that salaries paid should be those fixed by the weak school district law?

"3. If your opinion holds that we should only regard the salaries paid out of the tuition fund, then, if the salary of the superintendent is wholly

paid out of funds other than tuition fund, by transfer either in whole or in part, should any part of that salary be included in our calculation in determining the sum of state aid to be given?"

Section 7595-1, G. C., as now in force, provides as follows (106 O. L., 430):

"Only such school districts which pay salaries as follows shall be eligible to receive state aid: Elementary teachers without previous teaching experience in the state, forty dollars a month; elementary teachers having at least one year's professional training, forty-five dollars a month; elementary teachers who have completed the full two years' course in any normal school, teachers' college, or university, approved by the superintendent of public instruction, fifty-five dollars per month; high school teachers not to exceed *an average of seventy dollars per month* in each high school."

The words "not to exceed an average of" were inserted in the section by its last amendment. Since this amendment became effective I have had occasion to consider the application of the amended section in the following opinions:

In opinion No. 799—1915 (Opinions of the attorney-general for that year, page 1672), I held that,

"With the exception of salaries paid to high school teachers, the provisions of section 7595-1, G. C., as amended, determine the minimum salaries which the board of education of a school district, which complies with the other provisions of the statute governing state aid to weak school districts, must pay in order to be entitled to receive such aid."

In opinion No. 803, the same year, Id. 1683, I held with respect to the provision of section 7595-1, G. C., relating to salaries of high school teachers that

"It is not necessary for a board of education, in making application for state aid, to show the exact amount which each high school teacher employed by said board is entitled to receive according to the terms of his contract of employment. If said application shows the number of high school teachers employed, the number of months for which they are employed and the total amount of the salaries which said high school teachers will be entitled to receive under the terms of their contract of employment, the state auditor will be able to determine whether said board of education has complied with the above provisions of section 7595-1, G. C., as amended, governing salaries paid to high school teachers."

In other words, the mere fact that one teacher who ranks as a high school teacher is entitled to receive a salary attributable to teaching service in excess of $70.00 per month does not disqualify the district from receiving state aid. It must appear that the average compensation paid to high school teachers in the district exceeds $70.00 per month before the district is disqualified.

Your first question, therefore, must be answered in the negative, with the qualification that if it should appear that the average salary paid to all high school teachers in the district in question exceeds $70.00 per month, then the district is disqualified from receiving any state aid under the weak school district law.

I take it that your second and third questions do not relate to the question of the qualification of a district to receive any state aid, but rather to the amount that the district is entitled to receive, assuming that it is not disqualified.

As to the salaries of teachers other than high school teachers, the answer to a

question of this sort is under the statutes clear. The opinions of this department both during my administration and that of my predecessor, have uniformly held that a school district is not disqualified from receiving state aid because it has contracted to pay more than the minimum salary provided by law to some of its trachers; but that the amount of state aid to which it is entitled is limited to the deficiency in its tuition fund measured by the difference between the amount therein and the amount which would be necessary to pay the minimum salaries.

Of course, if a district has contracted to pay salaries in excess of those mentioned in sections 7595-1, G. C., it must in some manner or other provide funds therefo as the contracts, because of the provisions of section 5661, General Code, are valid obligations of the district. If this were accomplished by transfer from the contingent fund, the amount of such transfer could not be applied to reduce the deficiency because if this were done it might in many cases wipe out the deficiency entirely and deprive the district of state aid.

Accordingly, I held in opinion 799, above referred to, that

> "The certified statement to the state auditor must show, among other things:
>
> " '1. That the board of education of the school district in question made the maximum school levy allowed by law, two-thirds of which was for the tuition fund.
>
> " '2. The estimated amount of the tuition fund that will be realized from two-thirds of said levy.
>
> " '3. The estimated amount that must be paid from said fund other than for the salaries of teachers.
>
> " '4. The estimated amount that will be available for the payment of said salaries.
>
> " '5. The number of teachers employed by the board of education of said school district, properly classified according to qualifications prescribed by section 7595-1, G. C., as amended.
>
> " '6. The estimated amount of money which will be required *in the tuition fund* to pay said teachers the salaries provided by said section 7595-1, G. C., as amended, for eight months of the year.'
>
> "The difference between the estimated amount which will be required in said tuition fund as above set forth in item 6, and the estimated amount available for said teachers' salaries as set forth in item 3, will be the amount of the deficit for which the state auditor shall issue a voucher. * * *
>
> If, therefore, the certified statement of facts from the county auditor shows that the board of education of a school district has complied with all the requirements of the statute governing state aid to weak school districts, I d not think the state auditor is required, before issuing the aforesaid voucher, to determine whether said board of education has contracted to pay its teachers salaries, which in the aggregate will amount to more than the amount required under item 6, as above set forth.
>
> "Under the provisions of section 7603, G. C., the contingent fund of said district will be entitled to receive, in addition to the one-third of the amount realized from the maximum legal school levy, all moneys coming from sources not enumerated in said section. If said board of education finds that the amount realized from two-thirds of the maximum legal school levy, together with the amount received from the state as state aid, under authority of section 7595, G. C., as amended, is less than the aggregate amount which said board has contracted to pay its teachers, this difference may be made up by transferring any surplus money in the contingent fund to said tuition fund, under authority of section 2296, G. C., as amended in 103 Ohio Laws, page

522, and in the manner provided by sections 2297, et seq., of the General Code, or said board may, under authority of section 5656, G. C., and within the limitations therein provided, borrow money for this purpose."

In accordance then with this previous opinion, I advise that if the district is not disqualified entirely from receiving state aid and has made the maximum levy, and if the proper proportion of that levy is placed in the tuition fund, then the deficiency for which the district is entitled to state aid is the difference between the anticipated income from such fund and such amount as is necessary to pay the minimum salaries provided in section 7595-1, G. C., as to the salaries of teachers other than high school teachers, plus the amount necessary to pay the actual aggregate compensation of high school teachers under their contracts of employment. That the board of education may contemplate transferring enough money from the contingent fund to the tuition fund to pay the entire salary of one of its teachers makes no difference; it is, nevertheless, entitled to state aid on the basis above referred to.

I therefore answer your second question by advising that in determining whether a district is entitled to state aid you are to disregard the fact that the board of education may contemplate transferring moneys from its contingent fund to its tuition fund; and that you are to apportion the state aid to the district in such manner as will make the tuition fund large enough to pay the minimum salaries provided in section 7595-1, G. C., and the actual salaries of high school teachers, even though you may be advised that the board of education may have available for transfer money in its contingent fund which, if transferred to the latter fund would make such tuition fund larger in amount than would be necessary to provide for the payment of such salaries and other fixed charges.

To illustrate my holding by a simple example, let it be supposed that a weak school district has contracted to pay its teachers just the minimum salaries provided by section 7595-1, G. C., and that the average salary of its high school teachers is $70.00 per month; it would be entitled to state aid for the difference between the income from its levies for the tuition fund, less fixed charges payable from such fund other than for teachers' salaries, and the amount required to pay the salaries contracted for, even though the board of education at the time of making the application for state aid might foresee its ability to transfer a considerable amount from the contingent fund of the district to the tuition fund, and even though the board might be willing to do so and actually intend to make such transfer.

To put it in another way: The auditor of state is, in my opinion, without authority to compel the board of education of a weak school district to agree to enhance the amount of the tuition fund by transfer from the contingent fund as a condition of receiving state aid or as determining the amount of state aid which it will receive.

This answer to your second question determines the answer to your third question. It makes no difference that the salary of the superintendent in question may as a matter of intention and anticipation be payable out of funds other than the tuition fund. (Of course, the application for state aid is prospective and the deficiency which it contemplates is estimated, under the present law, so that it cannot be said to a certainty that any given salary is paid out of any particular fund, unless indeed the contract of employment so stipulates. All salaries of teachers, superintendents, etc. are primarily a charge upon the tuition fund and must be regarded as such in the office of the auditor of state).

Accordingly, if in the case you submit the fact that that part of the salary of the part-time superintendent which is attributable to teaching service amounts to $87.50 does not cause the average amount paid to high school teachers to exceed $70.00 per month, and does not accordingly disqualify the district entirely from receiving state aid, the district in question would be entitled to state aid for the entire amount of its anticipated deficiency, one item going to make up which would be the entire esti-

mated expenditure for the salaries of high school teachers, even though the board of education might contemplate the use of contingent fund moneys to pay all or part of the salary of a particular teacher or superintendent.

Throughout this opinion I have differentiated between the salaries of high school teachers and those of elementary teachers as items in the deficiency application. This is because, as I have pointed out, the amounts fixed in section 7595-1, G. C., for salaries of elementary teachers are minimum amounts, whereas the average amount stipulated therein with respect to the salaries of high school teachers is a maximum amount. Accordingly, if the district is not disqualified entirely by exceeding the maximum as to high school teachers, it is entitled to state aid on that behalf to such an extent as will enable it to pay the entire salaries of its high school teachers, and no more. Thus, if the aggregate amount paid to high school teachers in a weak school district were such as that the average was $65.00 per month, only such amount should be included in the statement of deficiency on account of the salaries of high school teachers as would represent an average of $65.00 per month; whereas, as to elementary teachers the full amount specified in section 7595-1, G. C., being a minimum, must necessarily represent the measure of the deficiency.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1820.

ROADS AND HIGHWAYS—RESOLUTIONS OF TOWNSHIP TRUSTEES OF RUSH CREEK TOWNSHIP, LOGAN COUNTY AND BOKES CREEK TOWNSHIP, LOGAN COUNTY, FOR CERTAIN ROAD IMPROVEMENTS IMPROPERLY DRAWN.

Resolutions of the township trustees of Rush Creek township, Logan county, and Bokes Creek township, Logan county, relating to the improvement of inter-county highway No. 236, as submitted by the state highway commissioner, are improperly drawn and are therefore returned without approval.

COLUMBUS, OHIO, July 29, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—You have submitted to me for examination under date of July 13, 1916, a final resolution by the township trustees of Rush Creek township, Logan county, Ohio, providing for the improvement of a section of I. C. H. No. 236 in that township; and also under date of July 22, a final resolution of the township trustees of Bokes Creek township, Logan county, Ohio, providing for the improvement of a section of I. C. H. No. 236, located in that township.

A careful examination of these resolutions discloses that they have been prepared upon the theory that it is permissible for the township trustees of two townships to in some measure at least proceed jointly in reference to the improvement of a section of inter-county highway lying partly in one township and partly in the other.

In so far as the resolution of the township trustees of Rush Creek township is concerned it appears that the trustees have applied for state aid on 786 feet of highway, but that you have approved their application as to 6979 feet of highway, and have caused plans to be made for the improvement of said 6979 feet of highway. In other words your approval and your plans cover a much longer section of highway than that covered by the application. Bokes Creek township lies immediately east of Rush Creek township, and by a comparison of the description of the section of high-

way on which state aid is asked with the section of highway which you plan to improve it appears that all but 786 feet of the highway lies in Bokes Creek township instead of Rush Creek township. Discrepancies also appear in the resolution of the trustees of Bokes Creek township between the description of the section of highway on which state aid is asked and the description of the section of highway, the improvement of which you have approved, and for the improvement of which plans have been prepared by you.

A reference to the resolution of the township trustees of Rush Creek township shows that they are to contribute three hundred dollars ($300.00), which is $10,800.00 less than the total estimated cost, which total estimated cost amounts to $11,100.00. A reference to the resolution of the township trustees of Bokes Creek township shows that they are to contribute three thousand one hundred and thirteen dollars and ninety-eight cents ($3,113.98), which is $9,386.02 less than the total estimated cost and expense, which total estimated cost and expense amounts to $12,500.00. A reference to the certificate of the chief clerk of your department, endorsed on the resolution of the trustees of Rush Creek township, shows that the state is proposing to expend nine hundred dollars ($900.00) in connection with that improvement, while a reference to the certificate of the chief clerk, endorsed on the resolution of the trustees of Bokes Creek township, shows that the state is proposing to expend eight thousand and twenty-seven dollars and eighty-one cents ($8,027.81) on the improvement within that township. In other words, the state is to expend $900.00 in one township and $8,027.81 in the other township, while one township is to expend $300.00 and the other is to expend $3,113.98, making a total expenditure of $12,341.79. It will thus be seen that the total amount certified for expenditure is not the same as the estimated cost, whether said estimated cost be taken to be $11,100.00 or $12,500.00.

I understand that both final resolutions relate to the same proposed improvement and that a small portion of the improvement lies in Rush Creek township and the remainder in Bokes Creek township. I also understand that the total cost was first estimated at $11,100.00 but was later raised to $12,500.00, and that of this estimated cost of $12,500.00 the sum of $1,200.00 is referable to the work in Rush Creek township. I also understand that there are no drainage structures on that part of the improvement situated in Rush Creek township, but that there are some drainage structures on that part of the road located in Bokes Creek township.

There is no statutory authority for any form of joint action by two or more boards of township trustees in the improvement of a section of intercounty highway lying in two or more townships but not on the township line. Section 1220, G. C., authorizes two or more townships to make application where a road is on a township line, but has no application to the facts of the present case. Where it is desired to improve such a section of highway partly in one township and partly in another, and not on the line between the two, the portion in each township should be regarded as a separate section, and separate proceedings should be carried forward as to the improvement of the portion of highway located in each township.

Under section 1214, G. C., fifteen per cent. of the cost and expense of an intercounty highway improvement, excepting therefrom the cost and expense of bridges and culverts, is to be apportioned to the township or townships in which such road is located, and ten per cent., excepting therefrom the cost and expense of bridges and culverts, is made a charge upon the property abutting on the improvement. Under section 1217, G. C., where the application for an intercounty highway improvement is made by the township trustees, the state may assume all or any part of the county's proportion of the cost of the improvement. The effect of these provisions is that where an improvement is made on the application of township trustees the township must assume and agree to pay, in the first instance, at least twenty-five per cent. of the cost of the work, exclusive of bridges and culverts.

The estimate for this work should be divided in accordance with the facts to show that the estimated cost of the work in Rush Creek township is $1,200.00, and that the estimated cost of the work in Bokes Creek township is $11,300.00. The $1,200.00 may be divided between the state and Rush Creek township in any manner that may be agreed upon, and a similar division may be made between the state and Bokes Creek township as to the $11,300.00, representing the estimated cost of the work in that township, with the qualification in each instance that the township must assume and agree to pay at least twenty-five per cent. of the cost of the work on the section of roadway within its territorial bounds, excluding therefrom bridges and culverts. The descriptions of the sections of roadway on which state aid is desired, and the descriptions of the sections of roadway, the improvement of which is approved by you, should also be corrected to correspond with the facts.

For the reasons above stated I am returning these final resolutions without my approval.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1821.

TAXES AND TAXATION—INSURANCE COMPANIES—AGENTS' BALANCES —HOW TAXABLE.

Balances belonging to insurance companies, which are in the hands of agents in this state, on the day preceding the second Monday of April in any year, are taxable.

An agent's balance consists of: (1) *Moneys collected by him during any current month from policy holders, and, under the prevailing practice, transmitted by said agent to the insurance company which he represents, on or about the first day of the month following their collection, less any amounts applied by said agent in taking up surrendered policies,* (2) *amounts at any time due the company from the policy holders, but uncollected by the agent, said amounts being charged against said agent on the books of the company, and considered as a part of said balance. That part of the agent's balance referred to in item one constitutes "moneys" as defined by section* 5326, *G. C., while that part of said balance referred to in item two constitutes "credits" of the company within the meaning of that term as defined by section* 5327, *G. C.*

"Credits" in the hands of an agent, representing an insurance company in this state on the tax listing day of any year, which, under the provisions of the statutes must be returned for taxation, should be determined by deducting from the amount due said company, on account of business transacted by said agent, and not collected by him on said tax listing date, the bona fide debts of said company arising "from the same source," i. e., from the business so transacted.

COLUMBUS, OHIO, July 31, 1916.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—In your letter of recent date you request my opinion on the following questions which you state have arisen in the administration of the Parrett-Whittemore law:

"1. Are balances belonging to insurance companies, which are in the hands of agents within this state, and are commonly known as agents' balances, taxable?

"2. Should the same be treated as money or as credits?

"3. If a part or all of said balances are credits, and are subject to taxation, what liabilities of the companies may be deducted from them?"

Permit me to say by way of explanation, that the answer to the above request has been delayed owing to the fact that at the time the same was made, Mr. O. B. Ryon, general counsel for the national board of fire underwriters, asked permission to file a brief on the foregoing questions and with the consent of your commission this request was granted. Said brief has just been filed with the department and reference will hereafter be made to the same.

The provisions of the statutes governing the return of the property of all incorporated companies, except banking or other corporations whose taxation is specifically provided for, are found in sections 5404, 5405 and 5406 of the General Code read in connection with sections 13, 14 and 15 of the so-called Parrett-Whittemore law (sections 5406-1, 5406-2 and 5406-3 of the General Code, 106 O. L., 249), and section 6 of said law (section 5372-1, G. C., 106 O. L., 247). Said provisions are as follows:

"*Sec.* 5404. The president, secretary, and principal accounting officer of every incorporated company, except banking or other corporations whose taxation is specifically provided for, for whatever purpose they may have been created, whether incorporated by a law of this state or not, shall list for taxation, verified by the oath of the person so listing, all the personal property thereof, and all real estate necessary to the daily operations of the company, moneys and credits of such company or corporation within the state, at the true value in money.

"*Sec.* 5405. Return shall be made to the several auditors of the respective counties where such property is situated, together with a statement of the amount thereof which is situated in each township, village, city, or taxing district therein. Upon receiving such returns, the auditor shall ascertain and determine the value of the property of such companies, and deduct from the aggregate sum so found of each, the value as assessed for taxation of any real estate included in the return. The value of the property of each of such companies, after so deducting the value of all the real estate included in the return, shall be apportioned by the auditor to such cities, villages, townships, or taxing districts, pro rata, in proportion to the value of the real estate and fixed property included in the return, in each of such cities, villages, townships, or taxing districts. The auditor shall place such apportioned valuation on the tax duplicate and taxes shall be levied and collected thereon at the same rate and in the same manner that taxes are levied and collected on other personal property in such township, village, city or taxing district.

"*Sec.* 5406. The auditor of each county, on or before the first Monday of May, annually, shall furnish the president, secretary, principal accounting officer, or agent as provided in the next two preceding sections, the necessary blanks for the purpose of making such returns, but neglect or failure on the part of the county auditor to furnish such blanks shall not excuse such president, secretary, accountant, or agent, from making the returns within the time specified herein. If the county auditor to whom returns are made is of the opinion that false or incorrect valuations have been made, that the property of the corporation or association has not been listed at its full value, or that it has not been listed in the location where it properly belongs, or if no return has been made to the county auditor, he must have the property valued and assessed. This section and the next preceding section shall not tax any stock or interest held by the state in a joint stock company.

"*Sec.* 5406-1 (106 O. L., 249). If the property of an incorporated com-

pany is situated in more than one county, return shall be made to the county auditor of the county wherein the principal place of business of the company is located, or if the company has no principal place of business in this state, to the county auditor of any county wherein it transacts business or its property is situated. The county auditor to whom return is made shall certify the fact, together with the return and all information in his possession relating thereto, to the tax commission of Ohio, which shall ascertain and determine the aggregate value of the entire property of the company required to be listed in this state, and, from the aggregate sum so found, make the deductions provided in section fifty-four hundred and five of the General Code. The commission shall apportion the value of the property of such company, after making such deductions, among such counties in proportion to the value of the property located in each, and certify its findings to the county auditors, who shall severally apportion the amount certified to their respective counties, to the cities, villages, townships and other taxing districts therein, in the manner prescribed in section 5405 of the General Code.

"*Sec.* 5406-2 (106 O. L., 249). The county auditor shall enter the apportioned valuation provided for in the preceding section on the tax list and duplicate, separately entering the real estate belonging to the company at the assessed value thereof.

"*Sec.* 5406-3 (106 O. L. 249). In determining the location of property for the purpose of the two preceding sections, all moneys and credits used in or appertaining especially to a separate business transacted by an incorporated company at a particular place shall be deemed to be located at such place where the business is transacted, and moneys and credits not used in or appertaining especially to such separate business transacted at any particular place shall be deemed to be located at the principal place of business of such company.

"*Sec.* 5372-1, G. C. (106 O. L. 247). Personal property, *moneys, credits,* * * * in the *possession or control* of a person as * * * agent * * * on the day preceding the second Monday of April in any year, on account of any person or persons * * * or corporation, shall be listed by the person having the *possession or control* thereof and be entered upon the tax lists and duplicate in the name of such * * * agent, * * * adding to such name words briefly indicating the capacity in which such person *has possession of or otherwise controls* said property, and the name of the person * * * or corporation to whom it belongs * * *."

Your first question is answered by determining the answer to the question whether any of the foregoing provisions of the statutes make it the duty of an insurance company doing business in this state, or the agent of said company, to return for taxation moneys or credits in the hands of said agent on the day preceding the second Monday of April in any year and belonging to said company.

As I understand it, an agent's balance, so-called, in the state of Ohio, consists of:

(1) Moneys collected by him during any current month from policy holders and, under the prevailing practice, transmitted by said agent to the insurance company which he represents on or about the first day of the month following their collection, less any amounts applied by said agent in taking up surrendered policies, as hereinafter set forth;

(2) Amounts at any time due the company from the policy holders but uncollected by the agent, said amounts being charged against said agent on the books of the company and considered as a part of said balance.

While Mr. Ryon states that said balance cannot be used by the agent in any way; that the same belongs to the company and is so treated by both the company

and the agent; that said balance is not in any instance used by the company in this state, and that the agent, in remitting collections, retains only such portion of the same as is due him for commissions under his contract with the company which he represents, I find upon investigation that the agent is usually authorized to take up cancelled policies at short time rates and pay for the same, and said cancelled policies are then returned to the company and the agent is credited with the amount paid by him for the same. In this way said agent, as the representative of his company, uses a part of all the money, collected by him, in the transaction of the business of said company.

The foregoing observations are justified by the further statement of Mr. Ryon in his brief, which statement is as follows:

> "In the early days of fire insurance, all contracts of this kind were for cash—indeed, credit was unknown; but as the business developed and became of greater complexity and commercial importance, it was found impracticable to collect cash for the policies issued at all times, and the system was inaugurated of permitting local agents to make periodical returns to the companies, presented usually at the end of each month, the agent being expected to collect premiums and to remit, less his commissions, with his account.
>
> "As the business developed, however, and its importance increased and further credit was extended, and while the agent is still required by all the companies, so far as I am advised, to render an account at the end of the month of all business transacted, showing a balance due and appearing upon his books at the time the account is made, as a practical proposition, he does not now remit, under ordinary circumstances, but has additional time, of from thirty to forty-five days, in which to make his collections, if possible and send the money to the companies he represents.
>
> "The account current, or monthly statement, is handled upon the books of the companies as a debit against the agency and may be liquidated *either in cash or by the surrender of cancelled policies*, or from payments which the agent has made in behalf of the company.
>
> "It frequently happens that policies are accounted for by the agent to the company, which as a matter of fact are never paid, and in that event the agent squares his account with the company by returning the cancelled policy."

It will be observed that that part of the agent's balance referred to in item one, above set forth, constitutes "moneys" as defined by section 5326, G. C., while that part of said balance referred to in item two, constitutes "credits" of the company within the meaning of that term as defined by section 5327, G. C.

Mr. Ryon contends that these funds are transitory in the hands of the agents are not subject to their control and, being collected in the course of the ordinary business and for practically immediate transmission to their superiors, are not subject to a property tax under any condition.

Mr. Ryon argues that the supreme court of Ohio has never passed upon this question; that there is no specific provision of the Ohio statutes on the subject and in support of his proposition as above stated he cites the following adjudicated cases by the courts of other states:

> Metropolitan Life Insurance Co. v. Newark, 62 N. J. L. R. 74;
> Village of Howell v. Gordon, 127 Mich. 317;
> New York Life Insurance Co. v. Board of Assessors, 158 L. A. 462.

In support of the proposition that the "credits" referred to in item two, above set forth, are not returnable for taxation in Ohio, Mr. Ryon calls attention to the definition of that term by chief justice McGruder, speaking for the supreme court of Illinois, in Reat v. People, 201 Ill., 469, as follows:

> "Where a foreigner has an agent within the state, by whom investments are made, who collects the income and transmits it to his principal, it is usually held that 'credits' have a situs in the hands of the agent within the state and may be taxed there * * *
>
> "If, however, the credit is left in the hands of an agent in the state not for investment, but merely to be collected and the proceeds transmitted to the owner abroad, the better view is that it is not property within the state.
>
> "Where the owner of such credits or securities is a non-resident of Illinois, and is absent from the state, his securities, remaining in this state in the hands of an agent, are only subject to taxation in this state when they are so left in the hands of the agent for the purpose of having them renewed or collected, in order that the money realized from such renewal or collection may be re-loaned by the agent as a permanent business. The credits of the non-resident owner, so remaining in Illinois, must constitute the subject matter or stock in trade of the business of the owner as conducted by the agent."

I have examined the foregoing, as well as other citations of Mr. Ryon, in support of his conclusion that the funds in question are not subject to taxation in this state, and have carefully considered the case note in 55 L. R. A. (n. s.) at pages 903 et seq. on the subject of situs, as between different states or countries, of personal property for taxation. If Mr. Ryon were correct in his assumption that no specific provision of the Ohio statutes requires the return of the funds under consideration for taxation, and the further assumption that said funds are in no way subject to the control of the agent, the authorities cited by him would clearly support the conclusion reached by him and I would be compelled to concur with him in said conclusion. That said assumptions are incorrect, in view of the plain provisions of section 6 of the Parrett-Whittemore law (section 5372-1, G. C.) and in view of what has already been said relative to the practice of insurance companies in authorizing their agents in this state to take up surrendered policies and pay for the same, seems clear.

Section 2 of article XII of the constitution provides:

> "Laws shall be passed, taxing by uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property according to its true value in money. * * *"

I find no provision of the statute attempting to exempt the funds under consideration from taxation. There can be no question therefore that in so far as domestic insurance companies are concerned said funds must be returned either by the proper officers of the company under provision of section 5404, et seq., of the General Code, or by the agent himself under provision of section 5372-1, G. C., supra. It remains to be determined in answering your first question whether said balances in the hands of agents representing foreign insurance companies doing business in this state, must be returned under any of the foregoing provisions of the statutes.

In this connection it must be noted that the tax provided for in section 5433 G. C. (106 O. L. 502) is in the nature of a tax upon the right to do business and is not a tax upon property.

See:

Insurance Co. v. Bowland, 196 U. S. 611;
Assurance Co. v. Halliday, 110 Fed. 259;

Insurance Co. v. Halliday, 126 Fed. 257;
Assurance Co. v. Halliday, 127 Fed. 830.

As I view it, the fact that the agent of the foreign insurance company doing business in this state is authorized to apply a part or all of the money collected by him in any month to the taking up of surrendered policies and as stated by Mr. Ryon, "other payments which the agent has made in behalf of the company," distinguishes the question under consideration from the question passed upon by the courts in the cases above cited. But apart from this consideration, I am clearly of the opinion that it was the intention of the legislature, in enacting the provisions of section 5372-1 G. C., supra, to require the return for taxation of just such funds as those referred to in your first question.

It will be observed that under the plain terms of the provisions of this section moneys or credits in the possession *or* control of a person as agent of a corporation, on the day preceding the second Monday of April in any year, on account of such corporation, must be listed by such agent having the possession or control thereof and be entered upon the tax list and duplicate in the name of said agent, said section further providing that there shall be added to such name words briefly indicating the capacity in which such agent has possession of or otherwise controls said property and the name of the corporation to whom it belongs.

While it may be true, as stated by Mr. Ryon, that if the tax commission insists upon this assessment and requires insurance companies to pay taxes upon said balances, said companies will so arrange their business in the state of Ohio that the balances in the future will not exist, this does not alter the conclusion above expressed as to the duty of the agent to return said balances in his hands on the tax listing day in any year.

I am of the opinion therefore, in answer to your first question, that moneys, and credits as hereinafter defined, belonging to insurance companies, which are in the hands of agents within this state on the day preceding the second Monday of April in any year, must be returned for taxation.

Your second question has been answered in determining the answer to your first question.

Coming now to a consideration of your third question, it will be observed that under provision of section 5406-3, G. C., supra, "all moneys and credits used in or appertaining especially to a separate business transacted by an incorporated company at a particular place shall be deemed to be located at such place where the business is transacted." This provision of section 5406-3, G. C., read in connection with the provisions of section 5372-1, G. C., supra, makes it clear that the duty rests primarily on the agent of an insurance company, doing business in this state, to return for taxation moneys and credits in his hands on the tax listing day in any year and realized from the particular business transacted by him as the representative of said company. It is equally clear that the effect of the enactment of said provisions of said sections, in so far as the return of credits is concerned, is to carry into the statutes, governing the return of such credits for taxation, the limitation declared by the courts in the case of Hubbard v. Brush, 61 O. S., 252. The second and third branches of the syllabus in that case are as follows:

"2. Choses in action, whether book accounts, promissory notes, or the like, of foreign corporations that are kept in this state and arise out of the corporate business transacted here, are subject to taxation under the provisions of section 2744, Revised Statutes.

"3. Such corporation, in listing for taxation its 'credits' liable to taxation in this state, may, under the provisions of section 2730, Revised Stat-

utes (section 5327, G. C.), deduct from its claims and demands that arise out of the business it transacts in this state, such of its bona fide debts *as arise from the same source.*"

In view of the foregoing, I am of the opinion in answer to your third question that the "credits" in the hands of an agent, representing an insurance company in this state, on the tax listing day of any year, which, under the provisions of the statute must be returned for taxation, should be determined by deducting from the amount due said company, on account of business transacted by said agent, and not collected by him on said tax listing date, the bona fide debts of said company arising "from the same source," i. e., from the business so transacted.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1822.

SECRETARY OF AGRICULTURE OF UNITED STATES—RURAL POST ROADS—CERTAIN REQUIRED INFORMATION BEFORE STATE ENTITLED TO FEDERAL AID FOR RURAL POST ROADS.

Information requested by secretary of agriculture as to the constitution and laws of Ohio, which is required in connection with the administration of the act of congress approved July 11, 1916, *public No.* 156, *entitled "An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes."*

COLUMBUS, OHIO, July 31, 1916.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—I acknowledge the receipt of your communication of July 20, 1916, enclosing communication from the secretary of agriculture touching the act of congress approved July 11, 1916, and entitled "An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes." I note your request that I prepare replies to the inquiries submitted by the secretary of agriculture, whose communication to you reads as follows:

"Enclosed herewith there is sent you a copy of the act of congress approved July 11, 1916 (public No. 156), entitled 'An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes.'

"It is desired to proceed with the administration of the statute as promptly as practicable. It will be appreciated if you will forward, or cause to be forwarded, to this department, information with respect to your state as follows:

"1. Date of meeting, and the date of final adjournment if fixed by law, of the first regular session of the legislature held after the passage of the act, within the meaning of section 1 of the act, together with references to the provisions of the constitution and statutes of your state on the subject.

"2. References to the provisions, if any, of the constitution and statutes of your state dealing with tolls of any kind on roads, within the meaning of section 1 of the act.

"3. References to the provisions, if any, of the constitution and statutes of your state relating to the state highway department or to any department of another name, or commission, or official or officials, empowered, under the laws of your state, to exercise the functions ordinarily exercised by a state highway department, within the meaning of section 2 of the act.

"4. If the question be at all open to doubt, an opinion of the attorney-general, or other appropriate law officer of your state, as to whether your state has a highway department within the meaning of section 2 of the act.

"5. The names and addresses of the officials constituting the state highway department, if any, of your state.

"6. Two copies of the rules and regulations, if any, adopted by your state highway department.

"7. References to the provisions, if any, of the constitution and statutes of your state prohibiting the state from engaging in any work of internal improvements, within the meaning of section 3 of the act.

"8. References to the provisions of the constitution and statutes of your state dealing with construction work and labor in the state, within the meaning of section 6 of the act.

"9. References to the provisions of the constitution and statutes of your state dealing with the official, or officials, or depository, authorized under the laws of the state to receive public funds of the state or any county of the state, within the meaning of section 6 of the act.

"10. References to the provisions of the constitution and statutes of your state dealing with the duties of the state or its civil subdivisions with respect to the maintenance of roads, within the meaning of section 7 of the act.

"11. References to the provisions of the constitution and statutes of your state prescribing the authority and duty of the counties with respect to public roads, including all special legislation affecting particular counties."

I will answer the inquiries submitted by the secretary of agriculture in the order in which he has stated them.

1. The date of meeting of the first regular session of the legislature of Ohio to be held after the passage of the act referred to is the first Monday of January, 1917. The date of final adjournment of such session of the legislature is not fixed by law. Section 25 of article II of the constitution of Ohio reads as follows:

"All regular sessions of the general assembly shall commence on the first Monday of January, biennially. The first session, under this constitution, shall commence on the first Monday of January, one thousand eight hundred and fifty-two."

The section above quoted was a part of the original constitution of 1851.

On November 7, 1905, article XVII of the constitution of Ohio was adopted, and section I of this article reads as follows:

"Elections for state and county officers shall be held on the first Tuesday after the first Monday in November in the even numbered years; and all elections for all other elective officers shall be held on the first Tuesday after the first Monday in November in the odd numbered years."

In the case of State ex rel. v. Creamer, treasurer, 83 O. S., 412, decided March 28, 1911, the second branch of the syllabus reads as follows:

> "The express provisions of the constitution of the state establish such relation between the election of state officers and the convening of the general assembly that since the seventeenth article, adopted in 1905, has expressly changed the date of the election from November of the odd numbered years to the same month of the even numbered years, the provision for the convening of the regular session of the general assembly then elected must be regarded as changed by implication from the first Monday of January in the even numbered years to the first Monday of the same month in the odd numbered years."

The two constitutional provisions referred to above and the case of State ex rel. v. Creamer, treasurer, supra, are authority for the statement that the date of meeting of the first regular session of the legislature of Ohio to be held after the date of the passage of the act referred to, which date is July 11, 1916, is the first Monday of January, 1917. As before observed, the date of final adjournment of the legislature is not fixed by the constitution or laws, but is left to be fixed by the general assembly. The only pertinent constitutional provisions are section 14 of article II and section 9 of article III.

Section 14 of article II reads as follows:

> "Neither house shall, without the consent of the other, adjourn for more than two days, Sundays excluded; nor to any other place than that, in which the two houses shall be in session."

Section 9 of article III reads as follows:

> "In case of disagreement between the two houses, in respect to the time of adjournment, he (the governor) shall have power to adjourn the general assembly to such time as he may think proper, but not beyond the regular meetings thereof."

From the above it will be seen that the date of final adjournment of the next regular session of the general assembly of Ohio remains to be fixed by a joint resolution to be adopted by the two houses of such general assembly.

2. There is not in Ohio any constitutional or statutory authority for the expenditure of funds of the state or of any political subdivision thereof in the construction or repair of roads that are not free from tolls. Section 19 of article I of the constitution of Ohio reads as follows:

> "Private property shall ever be held inviolate but subservient to the public welfare. When taken in time of war, or other public exigency, imperatively requiring its immediate seizure of for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money, and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner."

In order that the unusual powers conferred by this section of the constitution may be exercised with respects to roads, it is necessary that such roads shall be open

to the public without charge. Toll roads formerly existed in Ohio but their abolition was brought about by the enactment of senate bill No. 172, 101 O. L., 397, which bill was passed on May 10, 1910, and is entitled "An act supplemental to section 7405 of the General Code and to authorize and empower county commissioners to acquire toll roads." This act contains four sections, numbered from 7405-1 to 7405-4, inclusive, of the General Code of Ohio, and the purpose and scope of the act is sufficiently indicated by the first two sentences of the first section thereof, which sentences read as follows:

> "In any county in which is located any portion of toll road or toll turnpike in existence at the time of the passage of this act, the county commissioners thereof shall proceed to condemn or appropriate such road or turnpike for the purpose of converting it into a free public thoroughfare. Within six months after the passage of this act the county commissioners shall pass a resolution declaring such intent, defining the purposes of the appropriation, setting forth a pertinent description of the road and the estate or interest therein desired to be appropriated."

There are not now in Ohio any toll roads, controlled either by the state or its political subdivisions or by private corporations.

3. Section 2 of the act of congress provides that the term "state highway department" shall be construed to include any department of another name, or commission, or official or officials, of a state empowered, under its laws, to exercise the functions ordinarily exercised by a state highway department. The constitution of Ohio contains no provision relating to the state highway department. The statutory provisions relating to this department are found in amended senate bill No. 125, 106 O. L. 574, and more particularly in chapter VIII of that bill, which chapter relates to the construction, improvement, maintenance and repair of roads and bridges by the state highway department. The sections of this chapter are numbered from 1178 to 1231-3, inclusive, of the General Code of Ohio. This chapter contains the major portion of the statutory provisions relating to the state highway department, although certain provisions relating to that department are also to be found in other chapters of amended senate bill No. 125, and especially in chapters VII, X and XI thereof.

4. There can be no doubt of the fact that the state of Ohio has a highway department within the meaning of section 2 of the act of congress, referred to by the secretary of agriculture.

Section 171 of amended senate bill No. 125, 106 O. L. 574, 623, being section 1178 G. C., contains the following provision:

> "There shall be a state highway department for the purpose of affording instruction, assistance, and co-operation in the construction, improvement, maintenance and repair of the public roads and bridges of the state, under the provisions of this chapter."

5. Section 1178 G. C., referred to above, also contains the following provision:

> "The governor, with the advice and consent of the senate, shall appoint a state highway commissioner, who shall serve for the term of four years, unless sooner removed by the governor."

The state highway commissioner, Hon. Clinton Cowen, Columbus, Ohio, therefore constitutes the state highway department of Ohio within the meaning of the fifth question submitted by the secretary of agriculture.

6. I understand by inquiry at the office of the state highway commissioner that no rules and regulations have been adopted by the state highway department within the meaning of the sixth question as I understand the same.

The procedure of the state highway department is regulated by the provisions of amended senate bill No. 125, referred to above, and there is, therefore, no necessity for the adoption of rules and regulations. The state highway commissioner, acting under the authority of section 249 of amended senate bill No. 125, being section 7246 G. C., has prepared and published a set of traffic rules and regulations governing the use of and traffic on all state roads, but, as I understand the question of the secretary of agriculture, the same does not relate to rules and regulations of this class. It might be wise, however, to procure from the state highway commissioner two copies of such traffic rules and regulations and forward the same to the secretary of agriculture.

7. There is no constitutional or statutory provision in Ohio prohibiting the state from engaging in the work of internal improvements. Section 6 of article XII of the constitution of Ohio only goes so far as to provide that except as otherwise provided in the constitution the state shall never contract any debt for purposes of internal improvement. This only goes so far as to prohibit the contracting of debts, and does not prohibit the state from engaging in the work of internal improvement.

8. Section 6 of the act of congress, now under consideration, provides that the construction work and labor in each state shall be done in accordance with its laws. In so far as construction work of the state highway department is concerned the matter is regulated by statute, and the pertinent provisions are to be found in chapter VIII of amended senate bill No. 125, referred to above, the sections of the chapter being numbered from 1178 to 1231-3, inclusive, of the General Code of Ohio.

Under section 1196 G. C. plans, specifications, profiles and estimates must be made by the state highway commissioner. Under section 1200 G. C. the surveys maps, plans, profiles, specifications and estimates for a proposed improvement must be adopted by the local authorities co-operating in the making of the improvement. Under section 1206 G. C. the state highway commissioner must advertise for bids and is required to award the contract to the lowest and best bidder. Under section 1208 G. C. a bond must be furnished by the contractor before the contract is entered into, the conditions of the bond being set forth in this section. Section 1212 G. C. relates to the method of payment, and sections 1213 and 1214 G. C. relate to the division of the cost and expense of an improvement. It is provided by section 1212 G. C. that no payment on account of a contract for any improvement shall, before the completion of said contract, exceed eighty-five per cent. of the value of the work performed to the date of such payment.

I have referred to some of the more important provisions of the statutes of Ohio relating to construction work carried forward by the state highway department, but the question of the secretary of agriculture might be fully answered by the observation that the constitution of Ohio contains no provision relating especially to construction work carried forward by that department, and that the statutory provisions governing the same are found in sections 1178 to 1231-3, inclusive, of the General Code of Ohio.

In so far as labor is concerned reference should be had to section 37 of article II of the constitution of Ohio, which section reads as follows:

> "Except in cases of extraordinary emergencies, not to exceed eight hours shall constitute a day's work, and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state, or any political subdivision thereof, whether done by contract, or otherwise."

Reference should also be had to house bill No. 100, 103 O. L. 854, the sections of which are numbered 17-1 and 17-2 of the General Code of Ohio, which act makes

it unlawful for any person, corporation or association, whose duty it shall be to employ or to direct and control the services of workmen engaged on any public work carried on or aided by the state or any political subdivision thereof, whether done by contract or otherwise, to require or permit any of such workmen to labor more than eight hours in any calendar day, or more than forty-eight hours in any week, except in cases of extraordinary emergencies. Any person violating the provisions of this act is guilty of a misdemeanor, and upon conviction is liable to fine or imprisonment, or both.

9. Speaking in a general way the state treasurer is under the laws of Ohio authorized to receive public funds of the state, and the county treasurer of each county is authorized to receive public funds belonging to his county. The office of treasurer of state is created by section 1 of article III of the constitution of Ohio, and the office of county treasurer is recognized by section 3 of article X of the constitution of Ohio. While there are other scattered provisions in the General Code of Ohio relating to the duties of the treasurer of state, the principal statutory provisions governing his powers and duties are to be found in the first subdivision of chapter 4, division I title III, part first, of the General Code of Ohio, being sections 296 to 320-1, inclusive, of said General Code.

The election of a county treasurer is provided for by section 2632 G. C., and the powers and duties of the county treasurer are prescribed by the first subdivision of chapter 4, division II, title X, part first, of the General Code of Ohio, being sections 2632 to 2698, inclusive, of said General Code. There are many other scattered provisions of the General Code of Ohio relating to the duties of treasurer of state and county treasurer with which provisions the secretary of agriculture is probably not concerned, but his attention should be directed to section 24 G. C., as amended in 104 O. L. 178, which section provides for the disposition of taxes, assessments, licenses, premiums, fees, penalties, fines, costs, sales, rentals and other moneys received for the state; to the provision of section 1224 G. C., 106 O. L. 641, to the effect that nothing in the chapter in which this section is found shall be construed so as to prohibit a county, township or municipality or the federal government, or any individual or corporation from contributing a portion of the cost of the construction, maintenance and repair of state highways; and to section 1228 G. C., 106 O. L. 643, which section reads as follows:

> "If funds from the federal government for improvements or maintenance of highways shall become available, such funds shall be apportioned by the state highway commissioner, to the counties, in proportion to the mileage of improved public highways therein, unless a different method of apportionment shall be designated by the federal government. The state highway commissioner is authorized to enter into any agreement with the federal government that he deems proper, in order to secure any funds available for road purposes."

I express no opinion at the present time as to the effect of all of the above provisions, taken together; but, as above suggested, the attention of the secretary of agriculture should be called to the same.

10. The constitution of Ohio contains no provision relating to the maintenance of roads by the state or its political subdivisions. This matter is regulated by a number of sections of amended senate bill No. 125, 106 O. L. 574, and more particularly by section 241 of said act, being section 7464 G. C., which section divides the public highways of the state into three classes, viz.: State roads, county roads and township roads, and provides that state roads shall be maintained by the state highway department, county roads by the county commissioners, and township roads by the township trustees.

Section 238 of said act, being section 6956-1 G. C., provides for a mandatory

tax levy by county commissioners for the repair and maintenance of bridges and county highways, and section 239 of the act, being section 3298-18 G. C., provides for a mandatory tax levy for the construction, improvement, maintenance and repair of township roads. Under section 217 of the act, being section 1224 G. C., the state highway commissioner is required to maintain and repair all inter-county highways, main market roads, bridges and culverts constructed by the state by the aid of state money or taken over by the state after being constructed. Under this section, counties, townships, municipalities, the federal government, individuals or corporations may contribute a portion of the cost of constructing, maintaining and repairing state highways.

11. There is no provision in the constitution of Ohio relating to the authority and duty of counties with respect to public roads. This matter is controlled by the provisions of amended senate bill No. 125, 106 O. L., 574, and more particularly by the provisions of chapters I, II, VI, VII, IX, X and XI of that act. There is no special road legislation in Ohio affecting particular counties.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1823.

RURAL POST ROADS—FORM OF ASSENT BY GOVERNOR TO ENTITLE STATE TO FEDERAL AID.

Form of assent by the Governor to the provisions of the act of congress approved July 11, 1916 (public No. 156), entitled "An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes."

COLUMBUS, OHIO, July 31, 1916.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—I acknowledge the receipt of your communication of July 19, 1916, which communication reads as follows:

> "I am enclosing herewith a communication from the secretary of agriculture, together with copy of the act of congress of July 11, 1916, relative to state aid in the construction of rural post roads. You will note in paragraph 1 that provision is made for assent of the states to the terms of the statute. I thought it proper to refer this communication to you with the request that you will prepare the form of the assent provided for in section 1 of the act. It might be desirable in this connection for you to call in the state highway commissioner for consultation concerning this matter."

The communication addressed to you by the secretary of agriculture reads as follows:

> "Inclosed herewith there is sent you a copy of the act of congress approved July 11, 1916 (public No. 156), entitled 'An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes.'
>
> "Your attention is invited to the provisions of section 1 with respect to

the assent of the states to the terms of the statutes. If your state decides to assent, it will be appreciated if the instrument evidencing that fact is executed in duplicate and forwarded to this department."

Section 1 of the act in question contains the following provision:

"Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that the secretary of agriculture is authorized to co-operate with the states, through their respective state highway departments, in the construction of rural post roads; but no money apportioned under this act to any state shall be expended therein until its legislature shall have assented to the provisions of this act, except that, until the final adjournment of the first regular session of the legislature held after the passage of this act, the assent of the governor of the state shall be sufficient."

The secretary of agriculture evidently refers to the assent which may be given by the governor of a state, and which assent under the terms of section 1 of the act is effective until the date of the final adjournment of the first regular session of the legislature of such state held after the passage of the act. The secretary of agriculture makes no suggestions as to the form of such assent other than that the same should be executed in duplicate.

In the absence of any suggestion from the federal authorities as to the form of assent desired by them, I suggest that your assent to the provisions of the act may be given in the following form:

"Office of the Governor of Ohio, Columbus, Ohio----------1916.

"I, Frank B. Willis, Governor of Ohio, hereby assent to the provisions of the act of congress approved July 11, 1916 (Public No. 156), entitled "An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes.

"IN WITNESS WHEREOF I have hereunto set my hand on the day and year first above written.

"----------

"Governor of Ohio.

"Attest

"----------

"Secretary of State.

"(Seal)

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1824.

APPROVAL, CONTRACT FOR CONSTRUCTION OF FISH HATCHERIES AT LAKE ST. MARYS, OHIO.

COLUMBUS, OHIO, August 2, 1916.

Board of Agriculture, Columbus, Ohio.

GENTLEMEN:—A few days ago you submitted to me the specifications for the construction of fish hatcheries at Lake St. Marys, the contract for the building of which hatcheries you advise me has been let to the M. E. Murphy Company, and you request me to prepare contract therefor.

Upon an examination of the specifications I noted that a blank form of contract had already been inserted therein, which on examination I deem to fully cover the requirements and have therefore caused the proper words to be inserted in the blank space and herewith return the same to you.

The contract calls for the construction of a hatchery. Such a construction is not within the provisions of section 2314 et seq., G. C., not being for the erection, alteration or improvement of a state institution or buildings or additions thereto. Consequently, the restrictions of section 2314 et seq., G. C., relative to entering into a state contract do not apply to the contract in question.

The money that is to be used for the payment of the contract is part of the amount appropriated in section 1460 G. C., 106 O. L. 174, as follows:

> "All fines, penalties and forfeitures arising from prosecutions, convictions, confiscation or otherwise under this act, unless otherwise directed by the board of agriculture shall be paid by the officer by whom the fine is collected to the board of agriculture and by it paid into the state treasury to the credit of a fund which is hereby appropriated for the use of the board of agriculture."

The bill in which said section is found was passed on April 21, 1915, approved April 21, 1915, and the appropriation therein is at present available.

Since under the resolution passed by the board of agriculture the secretary of the board of agriculture, together with the fish and game committee, is authorized to award the contract, I am of the opinion that it will be sufficient if the secretary of the board of agriculture and the fish and game committee sign the contract.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1825.

CORPORATION—PURCHASE OF ITS OWN STOCK—PREVIOUSLY SUBSCRIBED, ISSUED AND OUTSTANDING—NOT RESTORED TO STATUS OF UNISSUED STOCK—CONTINUES TO RETAIN ITS CHARACTER—TAX COMPUTED UPON *ALL* ITS SUBSCRIBED OR ISSUED AND OUTSTANDING STOCK REGARDLESS OF FACT CORPORATION HAS PURCHASED PORTION OF ITS STOCK.

The purchase by a corporation of its own stock, which has been previously subscribed, issued and outstanding, does not restore such stock to the status of unissued stock. It continues to retain its character as subscribed, issued and outstanding stock.

The fee or tax required of a corporation under section 5498 G. C. should be computed upon all its subscribed, or issued and outstanding stock, regardless of the fact that a portion of such stock has been subsequently acquired and is owned by the corporation.

COLUMBUS, OHIO, August 2, 1916.

The Tax Commission of Ohio, Columbus, Ohio.

DEAR SIRS:—I have your letter of July 11, 1916, requesting my opinion, as follows:

> "The France Slag Company, a domestic corporation for profit, in 1915, reported $250,000.00 as the amount of its subscribed or issued and outstanding capital stock. In 1916, under the same item, it reported $125,000.00. In response to an inquiry by the commission as to the difference in these amounts, we received the following explanation:
>
> " 'The France Slag Company has an authorized capital stock of $250,000.00, all common. At the time it made its Willis tax report for the year 1915 its entire authorized capital stock was issued and outstanding. In January, 1916, upon a sale of a portion of its assets, $125,000.00 par value of the capital stock was surrendered to the company. This was done on the theory that the stock so surrendered became unissued stock and was not done for the purpose of reducing the capital stock of the company. The stock is in this situation: That the company, if it cares to do so, may again sell this stock to third persons. We are treating it as though it were unissued and not treasury stock, and as though the same had never been subscribed for, inasmuch as the company has parted with assets which represented that amount of stock.'
>
> "In view of the facts as stated above, what amount should be determined by this commission to represent the subscribed or issued and outstanding capital stock of the France Slag Company for the year 1916? As the same question is involved in reports of other corporations, an early reply to this question would be greatly appreciated."

I am also in receipt of a letter from counsel for the France Slag Company, from which I quote only so much as sets forth the facts from which arises the question to be considered:

> "A corporation filed its report in 1915, showing an authorized capital stock of two hundred and fifty thousand dollars, all common, all of which stock was subscribed for and was issued and outstanding at the time. Sometime prior to May, 1916, the corporation sold a portion of its assets to some of its stockholders, in consideration of which the purchasing stockholders surrendered their stock aggregating one hundred and twenty-five thousand dollars,

par value, to the corporation, the certificates evidencing which stock were canceled, and the stock was treated thereafter as unissued stock, as distinguished from treasury stock. The corporation in May, 1916, filed its Willis tax report with the state tax commission, and set out in this report that the amount of capital stock subscribed for, issued and outstanding, was one hundred and twenty-five thousand dollars, being the balance of the authorized capital stock remaining outstanding after the surrender to the company of the above mentioned one hundred and twenty-five thousand dollars of stock. No certificate of reduction covering the one hundred and twenty-five thousand dollars of stock has as yet been filed.

"QUERY: Must the corporation pay its Willis tax for 1916 based upon its original issued and outstanding stock?"

Sections 5495, 5497 and 5498 of the General Code, requiring corporations organized under the laws of Ohio to file an annual report with the Tax commission of Ohio, specifying in detail the contents of such report, and prescribing the basis for computing the annual fee or tax to be paid by such corporations, are as follows:

"Section 5495. Between the first day of May and the first day of July, 1911, and annually thereafter during the month of May, each corporation, organized under the laws of this state for profit, shall make a report, in writing, to the commission, in such form as the commission may prescribe.

"Section 5497. Such report shall contain:

"1. The name of the corporation.

"2. The location of its principal office.

"3. The names of the president, secretary, treasurer and members of the board of directors, with the postoffice address of each.

"4. The date of the annual election of officers.

"5. The amount of authorized capital stock and the par value of each share.

"6. The amount of capital stock subscribed, the amount of capital stock issued and outstanding, and the amount of capital stock paid up.

"7. The nature and kind of business in which the corporation is engaged and its place or places of business.

"8. The change or changes, if any, in the above particulars, made since the last annual report."

"Section 5498. Upon the filing of the report, provided for in the last three preceding sections, the commission, after finding such report to be correct, shall, on the first Monday of July, determine the amount of the subscribed or issued and outstanding capital stock of each such corporation. On the first Monday in August the commission shall certify the amount so determined by it to the auditor of state, who shall charge for collection, on or before August fifteenth, as herein provided, from such corporation, a fee of three-twentieths of one per cent. upon its subscribed or issued and outstanding capital stock. which fee shall not be less than ten dollars in any case. Such fee shall be payable to the treasurer of state on or before the first day of the following October."

The last quoted section (5498) requires the annual fee or tax to be computed upon the subscribed or issued and outstanding capital stock of the corporation, and under opinion No. 1274, rendered February 15, 1916, I advised your commission that the effect of this language was to require the fee to be computed upon all subscribed stock, regardless of whether or not the same was issued and outstanding.

The facts presented disclose that all the authorized capital stock of The France

Slag Company, amounting to $250,000.00, was, prior to January, 1916, subscribed, issued and outstanding, but that thereafter the corporation purchased, and from its assets paid for $125,000.00 of its stock, which stock has since been considered and treated by the corporation as authorized but unissued stock.

An Ohio corporation is not authorized, except under special circumstances which are not shown to have existed in connection with the affairs of The Franch Slag Company, to purchase or deal in its own capital stock. Therefore, the legality of the transaction, whereby this corporation purchased one-half of its own capital stock, is open to question. Passing this question, however, the fact remains that The France Slag Company purchased and is now the owner of $125,000.00 of its capital stock, which was heretofore subscribed, issued and outstanding. Assuming the legality of the transaction, the stock so purchased became and now is treasury stock.

In opinion No. 1274, above referred to, the following language is used:

> "As I understand the term, 'treasury stock' of a corporation is subscribed and issued stock which has later become the property of the corporation. The mere fact that this stock is an asset of and owned by the corporation itself does not take away its character as subscribed stock."

Section 8700, General Code, prescribes the only method whereby an Ohio corporation may secure a reduction in the amount of its authorized capital stock, and is as follows:

> "Section 8700. With the written consent of the persons in whose names a majority of the shares of the capital stock thereof stands on its books, the board of directors of such a corporation may reduce the amount of its capital stock and the nominal value of all the shares thereof, and issue certificates therefor. The rights of creditors shall not be affected thereby, and a certificate of such action shall be filed with the secretary of state."

As a corporation is purely a creature of law, it must, in order to exercise a power or privilege conferred by law, comply with all the essential requirements and conditions prescribed by such law. From the statement of facts presented in the letter of its counsel, The France Slag Company has failed to exercise the power conferred by said section 8700 of the General Code, and has admittedly filed no certificate of reduction covering the $125,000.00 of its capital stock purchased by it.

The mere fact that the corporation owns and has elected to treat such stock as unissued does not change its legal character or take away its status as subscribed stock, upon which the fee or tax authorized by section 5498 General Code, should be computed and collected.

I therefore advise you that the fee required by said section 5498 General Code, to be collected from The France Slag Company, should be computed upon the corporation's entire authorized capital stock of $250,000.00.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1826.

WHEN A PERSON BORN OF ALIEN PARENTS IS A NATURAL BORN CITIZEN OF UNITED STATES—WHEN AN ELECTOR—CHINAMEN AND JAPANESE.

A person born in the United States of alien parents then lawfully and permanently domiciled within the United States, and not employed in any diplomatic or official capacity under any foreign government, is a natural born citizen of the United States, and if possessed of the qualifications enumerated and referred to in section 1 of article V of the constitution of Ohio, is an elector, and entitled to vote at all elections, without regard to race or color.

COLUMBUS, OHIO, August 3, 1916.

HON. JOHN C. D'ALTON, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—Yours under date of July 27, 1916, is as follows:

> "We enclose you herewith a copy of letter this day sent to our deputy board of state supervisors, which is self-explanatory. Will you kindly give us your opinion with respect thereto at as early a date as convenient."

Your letter addressed to the board of deputy state supervisors and inspectors of elections of your county, to which you refer, a copy of which is enclosed, is as follows:

> "We have your letter of date July 26th, as follows:
>
> " 'Will you please advise this board if a Chinaman or Japanese, born in this country, under the laws of the United States, has the rights to a franchise and have we the rights to register and allow him to vote at the coming elections.
>
> " 'Immediate reply will be greatly appreciated by this board.'
>
> "Section 1 of article V of the constitution of Ohio provides as follows:
>
> " 'Every white male citizen of the United States of the age of 21 years, who shall have been a resident of the state one year next preceding the election, and of the county, township or ward in which he resides until such time as may be provided by law, shall have the qualifications of an elector, and be entitled to vote at all elections.'
>
> "The restriction, namely, 'white, male citizen,' in the elective franchise was abrogated by the 15th amendment to the constitution of the United States, which provides as follows:
>
> " 'The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any state, on account of race, color, or previous condition of servitude.'
>
> "The supreme court of the United States has held in 169 U. S., at page 649, as follows:
>
> " 'A child born in the United States, of parents of Chinese descent who, at the time of his birth, are subjects of the Emperor of China, but having permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes, at the time of his birth, a citizen of the United States by virtue of the first clause in the 14th amendment of the constitution:
>
> " 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.'

"From the quotations above noted, we are of the opinion that a Chinaman born in this country, whose parents have a permanent domicile in the United States, and whose parents are not employed in any diplomatic or official capacity under the Emperor of China, is, under the constitution of Ohio and United States, an elector, entitled to exercise the right of franchise in Ohio; but, as we are advised in a conversation over the telephone with your clerk that the registration laws of Ohio do not provide the necessary means of ascertaining the facts as to the residence of the parents of a Chinaman asking for this right, and, as we feel that if this privilege is asked for indiscriminately by such a number of Chinamen, namely, about 50, as you say, that will apply to your board for registration, and as this apparently might open the door to wholesale frauds of the election laws, we have for these reasons submitted to the attorney-general your letter for his official opinion.

"You will therefore kindly hold our opinion in abeyance until we have heard from the attorney-general."

In view of the provisions of section I of article V of the constitution of Ohio, the question of citizenship suggests itself as of first concern in the consideration of your inquiry. Section I of the 14th amendment of the constitution of the United States provides in part as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."

Under this constitutional provision, the case of the United States v. Wong Kim, Ark., 169 U. S., 649, 42 L. Ed., 890, to which you refer in your letter to the board of deputy state supervisors and inspectors of elections, the first branch of the syllabus of which is quoted therein, was decided. The rule laid down in that case is clearly determinative of the citizenship of persons born within the United States of alien parentage, subjects of the Emperor of China, who have a lawful permanent domicile within the United States and are there carrying on business and are not employed in any diplomatic or official capacity under any foreign government, and from the rule there laid down it clearly follows that a person, of whatever race, who is born within the United States of parents not employed in any diplomatic capacity under any foreign government, who are lawfully and permanently domiciled therein, is by reason thereof a natural born citizen of the United States. So that if the persons to which reference is made by the board of deputy state supervisors of elections, in their inquiry addressed to you, come within the rule laid down in that case, they are beyond question citizens of the United States and subject to the provisions of section 1 of article V of the constitution of the state of Ohio, that:

"Every white male citizen of the United States, of the age of twenty-one years, who shall have been a resident of the state one year next preceding the election, and of the county, township or ward in which he resides such time as may be provided by law, shall have the qualifications of an elector and be entitled to vote at all elections."

This constitutional provision is, however, subject to the provision of the fifteenth amendment to the constitution of the United States, that:

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."

So that by operation of the provision of this amendment to the federal constitution, the word "white" is, in effect, eliminated from section 1 of article V of the constitution of Ohio, above quoted, and the effect of this latter provision is, therefore, that every male citizen of the United States, having the qualifications therein enumerated, shall be entitled to vote at all elections and such right may not be in any way restricted by reason of the race or color of any citizen of the United States.

From the foregoing it conclusively follows that a person who was born in the United States, and who has all the qualifications enumerated in and referred to by said section 1 of article V of the constitution of Ohio, may not be barred from the exercise of the elective franchise solely by reason of alien parentage or on account of his race. I am, therefore, of opinion, that a person who was born in the United States of Chinese parents, who were then lawfully and permanently domiciled within the United States, there carrying on business and not employed in any diplomatic or official capacity under any foreign government, is a natural born citizen of the United States, and if possessed of the qualifications enumerated and referred to in section 1 of article V of the constitution of Ohio, is an elector, and entitled to vote at all elections.

Whether an individual is a native born citizen of the United States within the rule laid down in the above mentioned case is a question of fact to be determined in every case, whether such person be of Chinese or other foreign parentage. If doubt exists as to the nativity of any person who assumes the right to exercise the elective franchise, such question may be determined upon challenge in any case.

There is further reference in your communication to the absence of provision for the registration of the class of persons therein mentioned. It may be observed that electors are of two general classes only, viz., natural born and naturalized citizens. Attention is called to the provision of section 4905, G. C., which requires that the registrars shall place upon the register the answers of the applicant to their questions pertinent to the heading of each column thereon in their order. By section 4906, G. C., it is provided, among other things, that "in the column as to 'nativity' the name of the state or foreign country must be given."

"Nativity," as here used, clearly refers to the place of birth of the applicant for registration, and it is only necessary, therefore, in case of electors who were born within the United States to name the state in which they were born, regardless of the fact that their parents were aliens. Of course, as above stated, the answer to this question is subject to challenge the same as that with reference to any other necessary qualification of an elector, and subject to the same rules of determination upon challenge.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1827.

BOARD OF ADMINISTRATION—COTTAGE AT MASSILLON STATE HOSPITAL—SUPPLEMENTAL BID RECEIVED SUBSEQUENT TO OPENING OF ORIGINAL BID RECEIVED CANNOT BE CONSIDERED IN AWARDING CONTRACT.

A supplemental bid received subsequent to the opening of the original bid received under section 2318, G. C., cannot be considered in awarding a contract.

COLUMBUS, OHIO, August 3, 1916.

Ohio Board of Administration, Columbus, Ohio.

DEAR SIRS:—Under date of July 17th you wrote to me as follows:

"We are enclosing herewith tabulation of bids received on cottage No. 4 at the Massillon state hospital. Please note that the two low bids on this cottage are submitted by the Cullen-Vaughn Co., of Columbus, Ohio ($67,234), and Keller E. Huff, Canton, Ohio ($66,136).

"For your information we wish to state that the excavating for this cottage has been practically completed by the state, and, as you will note, the Cullen-Vaughn Co. have allowed $1,477 in their bid for excavating, and Keller E. Huff has allowed $410 for the same item. Deducting this item would make their bids read, the Cullen-Vaughn Co., $65,757, and Keller E. Huff $65,726, a difference of $31.00.

"The board also desires to accept alternate No. 7, for which the Cullen-Vaughn Co. have allowed a deduction of $50.00, and Keller E. Huff nothing. This would bring the Cullen-Vaughn Co's. bid down to $65,707, which would be $19.00 lower than Keller E. Huff's bid.

"We are also submitting herewith a letter from the Cullen-Vaughn Co., for substituting a fireproof ceiling on the second floor of the dormitory instead of metal lath coiling, as specified, for $1,550. However, this communication was received after the bids were opened, and the board is desirous of being advised whether or not it can be accepted. Please note that Keller E. Huff's bid on the same item was $2,500, and that the building cannot be constructed with the fireproof ceiling if Huff's bid is accepted without exceeding the appropriation, but if the Cullen-Vaughn Co's. bid is accepted the building can be constructed with the fireproof ceiling within the appropriation, $70,000, as you will note from the following figures:

	"Keller E. Huff.
"Original bid	$66,136.00
"Deduct for excavation	410.00
	$65,726.00
"Deduct for alternate No. 7	0.00
	"$65,726.00
"Add for fireproof ceiling	2,500.00
"Add for architect's fees (approximate)	2,365.00
"Add for advertising (approximate)	60.00
	"$70,651.00

	"The Cullen-Vaughn Co.
"Original bid	$67,234.00
"Deduct for excavation	1,477.00
	"$65,757.00
"Deduct for alternate No. 7	50.00
	"$65,707.00
"Add for fireproof ceiling	1,550.00
"Add for architect's fees (approximate)	2,365.00
"Add for advertising (approximate)	60.00
	"$69,682.00

"The board has decided to accept the bid of the Cullen-Vaughn Co., and your opinion is requested as to whether or not their bid for the addition of fireproof ceiling shall be accepted in the main contract or as an addition after the regular contract is entered into."

The letter referred to by you in your communication is as follows:

"July 14, 1916.

"*The Ohio Board of Administration, Columbus, Ohio.*

"GENTLEMEN:—Since filing our proposal for the construction of cottage No. 4 at Massillon, we have discovered we failed to put our estimated price if the second floor ceiling should be made fireproof. This price is requested in the specifications but no space is left for it on the bidding blank.

"Our figure for doing this work, namely making the ceiling of the second floor fireproof would be fifteen hundred and fifty dollars ($1,550.00) extra.

"Trusting that this explanation you will permit us to file this statement with our regular proposal, we beg to remain,

"Yours very truly,

"THE CULLEN-VAUGHN COMPANY,

"(Signed) E. C. Fenimore, *Manager.*"

After the receipt of your letter I communicated with the architects who advised me as follows:

"Referring to the letter from the Ohio board of administration regarding the bids on the cottage for the Massillon state hospital would say the estimated cost of this cottage exclusive of architects' fees and advertising is $67,575.00. This includes the building complete, using the metal lath ceiling. The estimate on the excavation is $1,100.00. Therefore, the estimated cost of the building, not including the excavation is $66,475.00.

"Both of the bids submitted to you in the letter herewith enclosed are below the estimate. Alternate No. 7 mentioned in the letter of the board of administration, reads as follows: 'If Tennessee marble is used in place of Vermont, from the marble, tile and slate bid, deduct $.....' The Cullen-Vaughn Company deducted $50.00 for this alternate and Keller E. Huff made no deduction whatever. It is desired to take advantage of this alternate. Keller E. Huff in his bids allow $410.00 for excavation and The Cullen-Vaughn Company allow $1,477.00. It is desired to take the excavation out of the contract as this is already done at no cost to the state. Therefore, deducting from the bid of the Cullen-Vaughn Co. the allowance

they make for excavation and the allowance they make for alternate No. 7 leaves their bid $65,707.00; making the same deductions from the bid of Keller E. Huff leaves his bid $65,726.00; making the bid of the Cullen-Vaughn Company $19.00 below the bid of Keller E. Huff, in accordance with the plans and specifications, not considering the alternate for a fireproof ceiling.

"It would seem to us that the decision of the board of administration to accept the bid of the Cullen-Vaughn Company on the original plans and specifications and award the contract to them as above outlined is the proper thing to do, and if the board desires to substitute the concrete ceiling for the metal lath ceiling, this should be done by securing the consent of the proper state officials. The proposal of the Cullen-Vaughn Company to put this ceiling in for $1,550.00 could then be accepted, making the total for the building complete on the Cullen-Vaughn bid after adding the ceiling $67,257.00. This would still leave the cost of the building including the concrete ceiling below the estimate first above stated."

As I understand the matter the Cullen-Vaughn Company submitted its bid without including therein a bid upon the alternate relative to fireproof ceiling on the second floor of the dormitory, but that it submitted the same in a letter, which letter was received after the opening of the bids. It further appears, however, that upon opening the bids the board had decided to exercise alternate No. 7 and also to deduct from each and every bid the amount bid upon the excavation, the board having itself caused the excavation to be made, so that with the deduction for excavation and the deduction for alternate No. 7 the Cullen-Vaughn Company is the low bidder.

Said company not having in its original bid included the item of addition for fireproof ceiling, I do not believe that it is within the power of your board to consider the supplementary bid made but that the proper thing to do is to accept the bid as it was originally submitted, and that after a contract has been duly entered into to change the specification by way of a change in the contract providing for the fireproof ceiling under the provisions of section 2320, G. C., which provides as follows:

"After they are so approved and filed with the auditor of state, no change of plans, descriptions, bills of material or specifications, which increases or decreases the cost to exceed one thousand dollars, shall be made or allowed unless approved by the governor, auditor and secretary of state, when so approved, the plans of the proposed change, with descriptions thereof, shall be filed with the auditor of state as required with original plans."

Section 2321, G. C., provides as follows:

"No allowance shall be made for work performed or materials furnished under the changed plans, descriptions, specifications or bills of material unless a contract therefor is made in writing before the labor is performed or materials furnished, showing distinctly the change. Such contract shall be subject to the conditions and provisions imposed upon original contracts, and approved by the attorney-general."

Therefore, after the original contract is entered into, a new contract embodying the change will have to be made under the provisions of section 2321, G. C.

Respectfully,

EDWARD C. TURNER,

Attorney-General

1828.

CLERK OF COURTS—WHERE FINES COLLECTED WERE PAID INTO GENERAL COUNTY FUND—SHOULD HAVE BEEN PAID TO LAW LIBRARY ASSOCIATION—COUNTY COMMISSIONERS MAY ALLOW CLAIM.

When the clerk of the courts pays into the general county fund certain fines which, under the provisions of section 3056, G. C., should have been paid to the trustees of a law library association and said money has thereafter been expended or appropriated by the county, said trustees may present a claim for the same to the county commissioners which when allowed by said commissioners may be paid from said county fund.

COLUMBUS, OHIO, August 3, 1916.

HON. WILLIAM C. HUDSON, *Prosecuting Attorney, McArthur, Ohio.*

DEAR SIR:—I have your letter of July 28, 1916, submitting the following statement and inquiry:

> "On February 10th of 1916, a law library association was organized in this county under authority and according to the provisions of the statutes relating thereto. Since that time the county clerk has received certain fines which according to section 3056, G. C., belonged to this association. The county clerk however instead of retaining these fines paid them into the county treasury. Now the law library association through their trustees demand of the clerk the amount which should have been paid to them. What is the duty of the clerk under such circumstances?
>
> "My view is that as the money was paid over by mistake the clerk should certify that fact to the county auditor who then should issue a warrant on the treasurer for the amount due the library association, but as I find no statute applicable I do not like to advise the clerk to that effect, and he is doubtful what course to pursue.
>
> "I would like to have your opinion on this question whether in accordance with, or contrary to, the view I take of the matter."

While it is true that the money was turned into the county treasury by a mistake of the clerk, as stated in your letter, yet, as you further state, there is no statutory law authorizing the county auditor, upon certificate of the clerk to that effect, to issue a warrant on the treasurer for the same, and as no money may be paid from the county treasury except in compliance with statutory law, I am of the opinion that the plan suggested by you may not be followed.

I advise that the library association, through its officers, present to the county commissioners for their allowance, a claim for the amount of money so paid into the county treasury by the county clerk aforesaid, and when said claim is allowed by the county commissioners a warrant may legally be drawn upon the county treasurer in favor of said library association for said amount.

In advising this procedure I am not overlooking the case of State ex rel. Pugh, et al. v. Sayre, auditor, et al., 90 O. S., 215, in which a writ of mandamus was awarded against the defendant Sayre, as county auditor, requiring him to issue his warrant on the county treasury for certain funds claimed to be due a law library association. This case was predicated upon wholly different facts from those involved here. In said case against Sayre the police court clerk, being doubtful of the validity of section 3056, G. C., paid into the county treasury the sum of $7,133.06, which, under the provisions of said section, should have been paid to the trustees of the law library

association. The defendant Sayre, as county auditor, under the provisions of section 2567, G. C., certified said money into the county treasury as "Law library funds." The petition specifically alleged that the county treasurer, at the time said suit was instituted, still held said money as the law library fund, and that it had not been expended nor appropriated for any purpose whatever. Under those facts then, the money was intact, and had been and was kept wholly separate from any other fund. In the case submitted by you, while your letter does not so state, I assume that the fines specified were paid into the treasury by your clerk to the credit of the general county fund, as provided by section 12378, G. C., and have since been expended or appropriated for county purposes. This being so, I am of the opinion that such appropriation will make the county liable to account to the trustees of the library association for the money so used and that the same now constitutes a claim against the county, to be paid only upon the allowance of the county commissioners as provided by section 2460, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1829.

APPROVAL, ORDER OF STATE BOARD OF HEALTH, PUBLIC WATER SUPPLY, STRUTHERS, OHIO.

COLUMBUS, OHIO, August 3, 1916.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Enclosed herewith you will find an order of the state board of health to The Mahoning Valley Water Company, of Youngstown, Ohio, in regard to the public water supply of Struthers, Ohio.

I have examined said order which is issued under section 1252 of the General Code, and find the same to be regular.

It is my opinion that it should be approved and I have therefore approved the same and am transmitting the order to you for your approval.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1830.

MUNICIPAL CORPORATION—CONTRACT FOR IMPROVEMENT OF STREET—PROVISION FOR EXCAVATION AND HAUL DISCUSSED —CONTRACTOR MAY RECEIVE ADDITIONAL COMPENSATION WHEN MATERIALS HAULED BEYOND LIMITATION FIXED BY ENGINEER AND CONTRACT.

When a contract for the improvement of a street provides that all material excavated therefrom shall be carefully and neatly piled by the contractor at such points on intersecting streets and abutting lots as the engineer directs and the engineer under said provision of said contract directs that such material when placed on intersecting streets shall be piled within 200 feet of the improved street and thereafter the contractor is employed by the municipality to haul some of said material to points on said intersecting streets beyond the limitation so fixed by said engineer and also to haul some material excavated to streets not intersecting said improved street, such hauling is not within the requirements aforesaid of said contract and the contractor may receive additional compensation therefor.

COLUMBUS, OHIO, August 4, 1916.

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

GENTLEMEN:—I have your letter of July 14, 1916, requesting my written opinion upon the following matter:

"In connection with the improvement of Springfield street within the village of St. Paris, Champaign county, Ohio, under a contract by and between the said village, and Brewer, Tomlinson & Brewer, contractors (original copy of contract and accompanying specifications attached) payment was made by the village to the contractors of a certain invoice, amounting to the sum of $174.00 for 'hauling 1160 loads of material off of Springfield street to various other streets' at 15 cents per load—said material being crushed stone or earth from the excavation of Springfield street—in addition to the consideration provided for by contract and in the absence of any supplemental contract whatsoever. In like manner certain other items, as extra or force accounts, have been paid by the village to the contractor for labor and materials in changing fire cisterns in such manner as to conform to the street improvement, and similar charges.

"It may be noted that the said sum of $174.00 for hauling excavated material to various other streets and certain other small items of so-called 'extra or force account' were not considered a portion of the cost of the Springfield street improvement, but have been paid from moneys in the service fund appropriated for street repairs.

"Reverting to the aforesaid item of $174.00, attention is invited to the accompanying extract from page 9 of a report on the village of St. Paris, filed by State Examiner C. E. Lippincott, Jan. 1, 1916, under the title of 'Contingent Findings,' wherein findings for recovery are returned against the contractors for that portion, if any, of said payment covering services of contractors in placing material upon intersecting streets or abutting lots.

"Affidavit of Clerk Myers indicates that the understanding prevailed that *not all* of said material was placed on parallel streets, but *part of same on intersecting streets.*

"Affidavit of Street Commissioner Richeson shows that but a small proportion of the excavated material was conveyed to parallel streets or alleys.

"See affidavits attached.

"*Question* 1. In view of provisions of contract (see specifications, page 3), and in the absence of any supplemental contract, should findings for recovery be returned, if at all, for that portion of said item of $174.00, representing payment for conveyance of materials to intersecting streets as is held in Examiner Lippincott's report under title of 'Contingent Findings?'

"*Question* 2. Or, should findings be returned against contractors for the entire sum of $174.00, and other invoices for extra labor performed and materials furnished, as held by Attorney L. D. Johnson, acting in behalf of the mayor of St. Paris?

"Opinion attached."

Before attempting to answer your foregoing inquiries attention must be directed to the extract from the report of the state examiner referred to therein, which is as follows:

"Under the contract it was the duty of the contractor to haul the gravel excavated from the street to other intersecting streets or abutting lots as directed by the engineer, and for which he was only entitled to the 40 cents per cubic yard for excavation as per bid. There is nothing in the contract whereby the contractor was to receive anything extra for hauling same, and also no limit as to length of the haul on intersecting streets."

The provisions of the contract to which reference is here made have been quoted in a former opinion upon the same matter, and are as follows:

"The council reserves the right to all cross walk stones, or paving block, curb stones, gravel, crushed stone, sewer pipe, earth or other valuable material after it has been taken up by the contractor, who is to use care in handling the same so as not to break or waste them, and shall carefully and neatly pile them at such points on intersecting streets or abutting lots as the engineer may direct."

As has been heretofore stated in reference to the aforesaid provisions of said contract the contractors are required to place the material so excavated at such points on intersecting streets as the engineer may direct, which is ordinarily, under such contracts, at such points only on said streets as to enable the material so excavated to be temporarily disposed of until a place may be found in which it may permanently be placed, and which second removal is outside of the terms of the contract entirely and must be at an additional expense to the municipality.

I am informed that under the foregoing provisions of said contract the engineer directed that all material not placed upon abutting lots should be placed at points on the intersecting streets within two hundred feet of the street under improvement. The examiner in question further states in his findings:

"In placing the gravel on other intersecting streets the contractor was merely complying with his contract, and, therefore, he would not be entitled to receive any extra price for such hauling, but, if placed on streets not intersecting Springfield street, there should have been a supplemental contract in writing, clearly fixing the extra price to be paid, which should have been made by council and signed by the mayor, notwithstanding the cost was less than $500.00 (section 4221 and 4223, G. C.). The original contract does not provide for placing any excavated material except upon 'intersecting

streets and abutting lots,' and when it was found necessary to place some of it elsewhere the law should have been followed by making of supplemental contract."

It is apparent that the foregoing observations of said examiner are not supported by the contract if it is true that the engineer directed the contractor to pile the excavated material within two hundred feet of the improved street. Under such circumstances it would not be the duty of the contractor under his contract to haul said material upon intersecting streets to any point beyond the two hundred feet limit, and as before observed the cost of removing said material beyond the two hundred feet limit would necessarily be an additional cost to the municipality. This appears to have been the construction placed upon the contract by the municipality, and it is claimed that because of the impossibility of securing teams to remove said material beyond the two hundred feet limit the contractors were employed by said municipality under an entirely separate and distinct contract to haul said material, not only to other points beyond the two hundred feet limit on intersecting streets, but also to points on parallel streets, and they were paid therefor at the rate of fifteen cents per load of one and one-half yards, said payments being made from the street repair fund and not from the fund provided for the construction of said improvement.

It would seem in view of these considerations to be purely a question of fact as to what action should be taken by your department in reference to the payment of this bill of $174.00. If it is true that the contractor was directed by the engineer to haul the material excavated from said improved street to points on intersecting streets within two hundred feet of said improved street, and said contractor was thereafter employed and paid by the municipality for hauling said material to points beyond said limit of two hundred feet on intersecting streets, and on other streets not covered by the contract, I am unable to see upon what ground a finding for said amount so paid may be sustained. On the other hand, if the municipality made payments to said contractors for the hauling of material that was covered by the terms of the contract, or, in other words, if the hauling of the material for which the $174.00 was paid was required of said contractors under the terms of their contract, a finding should be made against said contractors for said amount.

It is claimed in the opinion to which you refer in your second question that the payment of the money aforesaid was made in the entire absence of any contract liability, but is an additional sum paid out over what the express terms of the contract provided, and that if the hauling of this material was not covered by the terms of the original contract a supplemental contract should have been made, and that, therefore, the payment of said money was unlawful and may be recovered.

In a letter from the solicitor of the village in question it is stated that:

"The contract contained the provision mentioned in your letter that the gravel, etc., was to be placed on intersecting streets at points indicated by the engineer, who ordered it placed within two hundred feet of the improved street and it became incumbent upon the village to remove it to points where it was wanted upon other streets. The village endeavored to hire individuals to take their teams and haul the gravel, but were unable to obtain them. The council then entered into a new and independent contract with the contractors, whereby the contractors were to do the hauling for the village at a nominal price of 15 cents per load of one and one-half yards. This was done under street repair for the other streets, and when done, was paid for out of street repair fund and not out of the fund for the improvement of said street.

"No supplemental contract was entered into because there was no supplemental agreement. There was no change in plans or specifications, no

alteration or modification of original contract, therefore section 4223, G. C., did not apply to the case."

As I regard this controversy, the question of whether a supplemental contract was required or whether the "new and independent" contract specified in the solicitor's letter aforesaid was sufficient, is immaterial in view of the fact that no fraud is claimed and the price paid is admitted to have been a reasonable one. While I incline to the view that the contract made, as stated in the solicitor's letter aforesaid, was sufficient and that no supplemental contract was necessary, yet if the facts should eventually show that a supplemental contract was required the equitable principles approved by the court in the case of State v. Frontier, 77 O. S., 7, will control. While a strict construction of the rule as approved by the court in that case might suggest that it may be applied only to contracts involving a change of possession of property, and may not apply to personal services, yet, until such a distinction is made by the court, it will be the safer plan to follow the reasoning rather than a strict interpretation of the decision aforesaid, and in the present case therefore to hold that if the contractors were paid only a reasonable and fair compensation for services not included in the original contract, and which by the terms of said contract they were not required to perform, justice and fair dealing demand that they be permitted to retain the money so paid.

The aforesaid observations furnish as specific an answer to your inquiries as can be given.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1831.

MUNICIPAL CORPORATION—CHIEF OF POLICE MAY NOT CERTIFY TO ANY BILL FOR FOOD FURNISHED PRISONERS IN EXCESS OF CONTRACT PRICE—CHIEF RECEIVES REGULAR SALARY FOR DUTIES OF HIS OFFICE—MAY NOT BE ALLOWED ANY ADDITIONAL COMPENSATION.

Under the provisions of an ordinance enacted by virtue of sections 4125 *and* 4126, *G. C., and embodying substantially the provisions of said sections, a chief of police may not certify to any bill for food furnished prisoners in excess of the contract price of said food if provided and furnished under a contract with a third party or in excess of its actual cost if provided and furnished by said chief himself, and may not be allowed or receive any compensation other than his regular salary for the performance of the duties imposed upon him by the provisions of said ordinance.*

COLUMBUS, OHIO, August 4, 1916.

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

GENTLEMEN:—I have your letter of July 14, 1916, as follows:

"We would respectfully request your written opinion upon the following question:

"May a chief of police be allowed any sum additional to the actual cost or sustenance of prisoners under sections 4125 and 4126, General Code. See letters and copy of ordinance enclosed."

The copy of the ordinance, enclosed with your inquiry under which the same arises, is as follows:

> "Section 1. The chief of police of the city of_____shall provide all persons confined in prisons or station houses with necessary food during such confinement and see that such places of confinement are kept clean and made comfortable for the inmates thereof.
>
> "Section 2. It shall be the duty of the chief of police, monthly, to present to the director of public safety all bills for food, sustenance and necessary supplies, duly certified, whereupon such director shall audit the same and draw his order on the treasurer of the corporation in favor of the officer presenting such bill, but the amount shall not exceed 40 cents per day for any person so confined."

The foregoing ordinance was enacted under the authority of sections 4125 and 4126, G. C., and is substantially a copy of the provisions of said sections of the General Code. Both the language of the ordinance and of section 4125, G. C., is that the chief of police shall provide all prisoners with necessary food. There is no specific provision in either section 1 of the ordinance or section 4125, G. C., aforesaid, that the chief shall receive any compensation for the performance of the duty thus imposed upon him. If any compensation may be paid to him for the performance of this duty, authority therefor must be found in some other provision of the ordinance or statutory law, but no such specific provision may be found in either the ordinance or the statutory law. Upon the contrary, it is provided in section 2 of the ordinance, which, as before observed, is in sunstantial compliance with every requirement of section 4126, G. C., that it shall be the duty of the chief of police, monthly, to present to the director of public service all bills for food *duly certified.* It certainly will not be insisted that this requirement of the ordinance contemplates that the chief of police shall in any manner charge to his own advantage the original cost of furnishing said food to prisoners as charged in said bills. Further, it will not be claimed I apprehend that the chief, who has contracted with a third party to furnish, prepare and serve meals at a certain price, may certify a bill charging a higher price than that fixed by the contract. It is clear that it is the purpose of both the statutory law and the ordinance aforesaid to receive the certification of the chief of police to the end that the amount in said bills shall represent the actual cost of furnishing said food to the prisoners and that neither the statutory law nor the ordinance intends or contemplates that the chief of police through the discharge of his official duty shall be permitted to profit thereby at the expense of the city. The one requirement of certification, as before observed, precludes any contention that he may certify to a bill for any greater amount than that actually due either himself or a third party for food furnished to prisoners. The limitation of the ordinance fixing the maximum amount to be paid at forty cents per day does not mean that such amount is to be paid in each and every instance. This sum is a limitation beyond which no allowance may be made and if food may be provided for a less amount the city is entitled to the benefit of the difference.

I am of the opinion, therefore, in answer to your inquiry, that the sections of the General Code to which you refer, and the ordinance hereinbefore noted do not permit a chief of police to certify to a bill for food for a greater amount than the contract price if said food is furnished under a contract by a third party or to the actual cost thereof if said food is directly furnished by the chief.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1832.

MUNICIPAL CORPORATION—PRIMARY ELECTION IS NEITHER A REGULAR OR GENERAL ELECTION—INITIATIVE AND REFERENDUM—FAILURE OF BOARD OF DEPUTY STATE SUPERVISORS OF ELECTION TO SUBMIT ORDINANCE OR MEASURE TO ELECTORS AT TIME SPECIAL ELECTION SHOULD HAVE BEEN HELD—SHOULD BE SUBMITTED AT NEXT REGULAR OR GENERAL ELECTION—CERTAIN LIMITATION—CITY OF STEUBENVILLE.

The primary election required to be held by section 4963, *G. C.*, 104 *O. L.*, 9, *is neither a regular or general election within the terms of section* 4227-5, *G. C.*, 104 *O. L.*, 239.

When a petition is filed with the auditor of a city or clerk of a village, requesting the submission of an ordinance or a measure to the electors of a municipality, at a special election, pursuant to the provisions of section 4227-5, *G. C.*, 104 *O. L.*, 239, *and the board of deputy state supervisors of elections fail or refuse to submit the ordinance or measure to the electors of the municipality on the fifth Tuesday after the filing of the petition, there is no authority in the board of deputy state supervisors of elections to fix another date on which such ordinance or measure may be submitted to the electors at a special election.*

When a petition is filed, pursuant to said section 4227-5, *G. C., requesting the submission of a measure or ordinance at a special election, and the board of deputy state supervisors of elections fail or refuse to submit the same at a special election, as required by said section, such measure or ordinance should be submitted to the electors of the municipality at the next regular or general election occurring more than forty days subsequent to the filing of the petition, as provided by section* 4227-1,*G. C.*, 104 *O. L.*, 238.

COLUMBUS, OHIO, August 4, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Yours under date of July 28, 1916, is as follows:

> "We are herewith submitting to you for an opinion, a communication from W. C. Brown, prosecuting attorney for Jefferson county, and an agreed statement of facts in the matter of the proposed initiative petitions for the city of Steubenville, Ohio, filed with the auditor of the city of Steubenville, and certified to the board of deputy state supervisors of election.
>
> "Will you please give us your opinion on the matters therein contained as soon as possible."

You enclose, as stated, letter of Hon. W. C. Brown, prosecuting attorney, as follows:

> "Enclosed you will find agreed statement of facts of the board of deputy state supervisors of elections upon the question of submitting to the voters of the city of Steubenville, Ohio, two certain proposed initiative ordinances on the 8th day of August, 1916.
>
> "The members of the board of deputy state supervisors of elections being equally divided, are certifying the question to you, upon the agreed statement of facts, for your opinion."

The statement of facts referred to in the communication of Mr. Brown, above set forth, is as follows:

"IN THE MATTER OF THE TWO PROPOSED INITIATIVE PETITIONS FOR THE CITY OF STEUBENVILLE, OHIO, FILED WITH THE AUDITOR OF THE CITY OF STEUBENVILLE, AND CERTIFIED TO THE BOARD OF DEPUTY STATE SUPERVISORS OF ELECTIONS. } *Agreed statement of facts.*

"It is agreed that two several initiative petitions, signed by twenty per cent. of the electors of the city of Steubenville, Ohio, the basis of said percentage being determined by the total number of votes cast for the office of mayor of said city at the last preceding election therefor; said petitions being regular in form, and having the required number of signatures under section 4227-5 of the General Code, were, on the 26th day of June, 1916, filed with the city auditor of said city of Steubenville, proposing two certain ordinances, true and correct copies of which said ordinances were set forth in full in said two petitions, and requesting in said two petitions that the ordinances in said petitions set forth be submitted to the electors of said city of Steubenville at a special election.

"It is further agreed, that there had been filed on the 28th day of June, 1916, with said city auditor, explanations upon said proposed ordinances as required by section 5018-9, G. C.; that after ten days after the filing of said two petitions with said auditor, said two petitions were certified to the deputy state supervisors of elections of Jefferson county, Ohio; that on the 18th day of July, 1916, said city auditor having had said explanations printed, the same were mailed to every voter in said city of Steubenville; that on the 18th day of July, 1916, W. C. Brown, prosecuting attorney of said Jefferson county, in a written opinion, advised said board of deputy state supervisors of elections, that owing to the fact that the mailing of said explanations had not been fully completed by ten days previous to Tuesday, July 25th, 1916, which said date he ruled should be the date on which said special election on said two initiative petitions should be called by said board, and that in consequence said board was without jurisdiction and authority to proceed further in any matter pertaining to the holding of said election, and he further advised them not to proceed to have printed the ballots necessary for said election, nor to do anything else towards the holding of same; that said board, following said opinion, did nothing further in the matter until the 26th day of July, 1916, when at a regular meeting of said board the matter of the two several initiative petitions, filed with the city auditor on June 26, 1916, and certified to the board of deputy state supervisors of elections of Jefferson county, on July 10th, 1916, was taken up by said board, and on motion duly made and properly seconded, it was moved that said board shall submit the two several ordinances, proposed by initiative petition, and heretofore filed with the city auditor of said city of Steubenville, on June 26th, 1916, and which were certified to said board of deputy state supervisors of elections on July 10th, 1916, at an election to be held on the 8th day of August, 1916. The vote on said motion was: Nos, Messrs. McLane and Bernier—2: Ayes, Messers. McLister and Robinson—2. Said board being divided this matter is certified to the state supervisor of elections.

"It is further agreed that the board of deputy state supervisors of elections of Jefferson county has refused, and will continue to refuse, to call any election on said two several initiative petitions, or to proceed to submit said proposed ordinances at the election in said petitions prayed for, either on the 8th day of August, 1916, or on any other day.

"It is agreed that the proposed election asked for is under the provisions of section 4227-5, G. C.: that the said two several petitions are regular in form in all respects, and that a duly verified copy of said proposed initiative ordinances were filed with the auditor prior to the circulation of said two petitions, in all respects as prescribed by section 4227-6, G. C.

"It is further agreed that Tuesday, August 8, 1916, is the date of the primary election day, provided for by law for the holding of primaries for state, districts, and county candidates under section 4963, G. C.

"It is agreed that the question submitted is the legal authority of the board to submit the petition to a vote on any other date than the fifth Tuesday after the petitions were filed with the city auditor

"(Signed):
"A. E. McLane,
"President, Board Deputy State Supervisors of Elections.

"Attest:
"W. C. Brown,
"Prosecuting Attorney, Jefferson County, Ohio.

"Jos. W. Hutton,
"Clerk, Board Deputy State Supervisors of Elections."

It is provided by section 5007, G. C., 103 O. L., 845, that:

"The votes of at least three deputy state supervisors for the county or a majority of the chief deputies and clerks of the district or subdivision of the district shall be necessary to a decision. In all cases under this title, in the event of a disagreement, or, if no decision can be arrived at, the matter in controversy shall be submitted to the state supervisor of elections, who shall summarily decide the question so submitted to him, and his decision shall be final."

It is under authority of the above quoted section that the matter submitted for consideration is before the secretary of state, as state supervisor of elections, for decision. It may be observed, however, that the authority here conferred upon the state supervisor of elections is limited to the decision of matters which boards of deputy state supervisors of elections, referred to in section 5007, G. C., may lawfully determine and the state supervisor of elections would therefore be without jurisdiction to determine any question which was not within the power or authority of the other election officers referred to in said section 5007 to pass upon.

Section 4227-5, G. C., 104 O. L., 239, under authority of which the petitions above referred to were filed, provides as follows:

"Whenever twenty per cent. of the electors of any municipality file a petition with the city auditor, if it be a city, or village clerk, if it be a village, proposing or against an ordinance or other measure, requesting in the petition that the ordinance or measure be submitted to the electors of the municipality at a special election, the auditor or village clerk, after ten days, shall certify the same to the board of deputy state supervisors of elections, who shall submit the same at a special election to be held on the fifth Tuesday after the petition is filed. The petition shall not be submitted at a special election if a regular or general election will occur not later than ninety days after the petition is filed, but shall be submitted at the regular or general election."

The duty of submitting the question of the approval of an ordinance or other measure to the electors of a municipality is here conditioned solely upon the filing of a petition by twenty per cent. of the electors thereof, and a certification of the same after ten days by the city auditor, or village clerk, to the board of deputy state supervisors of elections. There is not here found, nor is there elsewhere, statutory provision imposing the duty or conferring the power upon the board of deputy state supervisors of elections to exercise any judicial function in respect to the regularity of the election or the legality and validity of an ordinance or measure which may be approved at the election here required to be held. If there appears from the certification of the auditor or clerk, as the case may be, a petition such as is required by section 4227-5, G. C., supra, the sole duty and authority of the deputy state supervisors of elections in respect thereto is to submit the question of the approval of the ordinance or measure set forth in such certification on the fifth Tuesday after the filing of the petition or at the next regular general election occurring not later than ninety days after the filing of the petition.

True, it is required, among other things, by section 5018-8, G. C., 103 O. L., 833, in reference to the distribution of pamphlets of explanation that:

> "Distribution of such pamphlets shall be made to every voter in the municipality or county, so far as possible, by the clerk of such municipality or county commissioner, as the case may be, either by mail or carrier, not less than ten days before the election at which the measures are to be voted upon."

There is, however, no provision of law under authority of which official knowledge of the distribution of such pamphlets, or the time thereof, may be brought to the board of deputy state supervisors of elections, and though it be a fact, as stated, that the distribution of such pamphlets was not completed within the time prescribed by section 5018-8 G. C., supra, the officers charged with the duty of conducting the election could have had no official knowledge of such fact. The question of whether the above provision of section 5018-8 is mandatory or directory only, and the effect of the failure of a strict compliance therewith upon the validity of the ordinance or measure submitted at an election held pursuant to section 4227-5, G. C., supra, is not within the functions of the deputy state supervisors of election to determine, nor does the fact of a failure to comply with such provision in any way affect the authority or duty of such officers to conduct the election in question, as required by said section 4227-5, G. C.

The effect of irregularities in respect to the distribution of pamphlets of explanation of ordinances or measures upon the validity of same, is a matter for judicial determination, with which the board of deputy state supervisors of elections have no concern. It is a well established principle of law that public officers may exercise only such powers as are expressly conferred by law or are necessary to the performance of duties or the exercise of powers so expressly imposed or conferred.

If, therefore, the certification of the city auditor were regular, as set forth in the statement of facts submitted, it was the plain duty of the board of deputy state supervisors of elections to have submitted the ordinances therein set forth at a special election on July 25, 1916, that being the fifth Tuesday after the filing of the petition on June 26, 1916, and there not being either a regular or general election to be held within ninety days subsequent to that date.

It is observed that since the special election was not held on the fifth Tuesday after the filing of the petition, as prescribed by section 4227-5, G. C., supra, it is now sought to hold the same on August 8, 1916, that being the day on which the primary election for the nomination of candidates for state and county officers is required by law to be held. This position is based, doubtless, on one of two theories, viz.,

that it is within the power of the deputy state supervisors of elections to fix a day other than that prescribed for holding such special election or that the primary election required to be held on August 8th next is a regular or general election within the terms of section 4227-5, G. C., supra.

It must be first observed that there is nowhere found any statutory provision, conferring in any way, power or authority to exercise any discretion as to the time of holding the election authorized by section 4227, G. C., upon the board of deputy state supervisors of elections. On the contrary, the time is definitely and specifically determined by express and unequivocal statutory provision, and the only express authority conferred upon the election officers in question is the submitting of the question or petition at a special election to be held at the time so fixed by statute.

It was held by the common pleas court of Montgomery county, in the case of in re Petition for Election Precincts, 2 N. P., n. s., 245, that the provision of section 1 of the Brannock law, 97 O. L., 87, that:

> "The common pleas judge shall order a special election to be held not less than twenty and not more than thirty days from the filing of such petition,"

was directory only as to the time within which such election might be held. The only reason stated for this holding is that "the objects of the petition might clearly be defeated by lengthy hearings which could be continued at great length as an excuse for defeating the objects of the act." No authority for the decision of the court on this point is cited or discussed. This case is followed by the common pleas court of Lucas county in 2 N. P., n. s., 469,by mere reference thereto. The same question was before the court of common pleas of Franklin county in the case of Cole v. Columbus, 2 N. P., n. s., 563, in which the decisions of the foregoing cases were referred to in a well considered opinion, in which the authorities were reviewed and wherein it was held that the provision of the Brannock law, above quoted, was mandatory. With this latter decision I am constrained to concur.

If, however, it were to be held that the provision of the Brannock law, above referred to, is directory only, there is a marked distinction between that statutory provision and that of section 4227-5, G. C., under consideration. There was by the Brannock law specifically conferred upon the mayor or common pleas judge, with whom the petitions were authorized to be filed, power and authority to determine the exact date on which the election should be held, subject only to limitations therein prescribed, while, as before pointed out, there is to be found no semblance of authority in the deputy state supervisor of elections to exercise any discretion or take any action whatever in respect to the date on which the election required by section 4227-5, G. C., may be held.

I am therefore led to conclude that there is no power or authority in the board of deputy state supervisors of elections to submit the petitions in question at an election on a day other than that prescribed by said last mentioned section.

Since the election was not held on the fifth Tuesday after the filing of the petitions, the only remaining date on which such election is authorized by section 4227-5, G. C., to be held, is that of a regular or general election. This gives rise to the question of whether the primary to be held on August 8, 1916, is a regular or general election within the meaning of those terms as found in said section.

The terms regular, general and primary election each have a generally well understood and accepted meaning. A general election is understood to mean the November election at which state and county officers may be elected, and is so defined by section 4948, G. C., for the purposes of chapter 6, title XVI of part first of the General Code. A regular election is understood to comprehend those regularly recurring elections at which public officers are chosen, the time of holding which is definitely fixed by law. That is to say, when the word "election" is used in connection

with either of the qualifying terms "general" or "regular," reference is understood to be made to the annual November elections at which public officers are chosen as distinguished from special or primary elections which are authorized to be held for other purposes than the election of officers, or if for such purpose, at a time other than the first Tuesday after the first Monday of November of any year. A primary election is not generally understood to comprehend an election at which public officers are chosen. On the contrary, a primary election has for its purpose the choice of party candidates and the selection of representatives and controlling committees of voluntary political parties and not the election or choice of public officers. While the primary to be held on August 8th is now by statute required to be held regularly each year, it is in a sense not an election at all as that term is commonly accepted when used in connection with the terms "regular" and "general."

I am therefore of opinion that the primary election required to be held on August 8th, next, is neither a regular or general election within the terms of section 4227-5, G. C., supra, and that the petitions referred to in the statement submitted may not be submitted to the electors on that date.

This conclusion is in accord with an opinion of my predecessor, Hon. Timothy S. Hogan, found at page 942 of the report of the attorney-general for the year 1914, which follows his previous opinion to Hon. Don. J. Young, prosecuting attorney, under date of February 27, 1912, and also his further opinion found at page 1921 of the report of the attorney-general for the year 1912.

In the opinion at page 942 of the report of the attorney-general for the year 1914, it is said:

> "In an opinion rendered to Hon. Don. J. Young, prosecuting attorney, Norwalk, Ohio, under date of February 27, 1912, I said:
>
> " 'Then again, the requirement of the present primary election law only applies to voluntary political parties or associations, which at the next preceding general election polled in the state or any district, county or subdivision thereof, or municipality, at least ten per cent. of the entire vote cast (section 4949, G. C.), and as the object of the legislature in providing for the submission of the question of the issuance of bonds must have been to obtain an expression of the whole of the entire electorate at the election whereat every voter of the county would be eligible to vote, it is readily perceived that this could not always be had at a primary election, limited as it is to partisan voters. The right of the independent voter and of the Socialist or other party voter whose party may not have received the required percentage at the next preceding election to have his vote recorded for or against the bond issue must be jealously preserved.
>
> " 'I am therefore of the opinion that the primary election is not such an election as is included in the phrase "regular election" contained in section 3077, General Code.'
>
> "I am of the opinion that the same argument applies to referendum elections held in a municipality and that the term 'regular election' can have no application to primaries.
>
> "My conclusion is, therefore, that a primary may not be considered a 'regular' or a 'general' election within the meaning of the initiative and referendum act."

I therefore advise that there is not now authority either in the secretary of state, as state supervisor of elections, or in the board of deputy state supervisors of elections of Jefferson county, to fix a date on which the positions in question may be submitted at a special election, as provided by said section 4227-5, G. C.

The right of the petitioners and the people of the city of Steubenville at large

to have the petitions in question submitted to a vote on Tuesday, July 25, 1916, that being the fifth Tuesday after the filing of the petitions, has been defeated by a violation of the plain duty of the board of deputy state supervisors of elections, the performance of which could have been enforced by mandamus had the circumstances rendered the same practicable.

It was certainly never intended by the legislature that public and individual rights should be defeated by the arbitrary refusal of public officers to perform official duties or by reason of a misapprehension of the duties imposed by law, on the part of such officers, and I am constrained to believe that the courts would not, under the circumstances of this case, permit the purpose of the law to be wholly defeated thereby.

Though the request for a special election contained in the petitions has been defeated in the manner above pointed out, that fact in no way affects the validity of the petition in question nor will it be permitted to result in the ultimate defeat of the right to have the same submitted to a vote. These petitions fully meet the requirements of section 4227-1, G. C., 104 O. L., 238, which are as follows:

> "Ordinances and other measures providing for the exercise of any and all powers of government granted by the constitution or now delegated or hereafter delegated to any municipal corporation, by the general assembly, may be proposed by initiative petition. Such initiative petition must contain the signatures of not less than ten percentum of the electors of such municipal corporation.
>
> "When there shall have been filed with the city auditor, if it be a city, or village clerk, if it be a village, a petition signed by the aforestated required number of electors proposing an ordinance or other measure, said city auditor or village clerk shall, after ten days, certify the petition to the board of deputy state supervisors of elections of the county wherein such municipality is located. Said board shall submit such proposed ordinance or measure for the approval or rejection of the electors of such municipal corporation at the next succeeding regular or general election in any year, occurring subsequent to forty days after the filing of such initiative petition. * * *"

I am therefore clearly of the opinion that the ordinances or measures proposed by the petitions in question should be submitted by the deputy state supervisors of elections of Jefferson county to the electors of the city of Steubenville, at the general election to be held on the first Tuesday after the first Monday of November next, that being more than forty days subsequent to the filing of the petitions.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1833.

ROADS AND HIGHWAYS—WHERE CONTRACTOR FAILED TO PERFORM CONTRACT—HIGHWAY COMMISSIONER RE-ADVERTISED AND RELET SAME—CONTRACT RELET AT EXCESS AMOUNT—SURETY LIABLE.

It appearing that The Illinois Surety Company, acting by C. H. Bancroft, attorney-in-fact, signed as surety the proposal and contract bond of Parrish & Bales of Dayton, Ohio, successful bidder for the construction of section "R" of the Cleveland-Kent road, petition No. 1618, *I. C. H. No.* 460, *in Franklin township, Portage county, Ohio, and that because of the failure of said firm to perform their contract the state highway commissioner was compelled to re-advertise said contract, and relet same at a consideration of* $3,281.35 *in excess of the sum for which said Parrish & Bales had agreed to perform the work, the state highway commissioner is advised to make demand upon the receiver of The Illinois Surety Company for the payment of said sum of* $3,281.35, *and is further advised that upon the failure or refusal of said receiver of said company to make payment of said amount proper action will be taken to enforce the collection.*

COLUMBUS, OHIO, August 5, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication of July 28, 1916, which communication reads as follows:

"On October 8, 1915, the state highway department received bids for contract known as section 'R' of the Cleveland-Kent road, I. C. H. No. 460, petition No. 1618, Franklin township, Portage county. Parrish & Bales, contractors, Dayton, Ohio, were the low bidders, and subsequently the contract was awarded to them at their bid of $24,180.00.

"The contractors failed to start the work and it became necessary for me to relet the same, and bids were asked for on June 15, 1916. S. S. Senter, Canton, Ohio, was the low bidder, and the work was awarded to him for $27,461 35.

"When bids were first received on this contract the total estimate was $28,189.99. When bids were taken the second time for the work the estimate was the same, except that the steel reinforcing was omitted, thereby reducing the expense of the job possibly $1,500.00.

"The original contract called for 3/8 inch square twisted rods, 8 feet long, placed 18 inches center to center in the concrete, and in Mr. Senter's concrete this steel reinforcement was omitted.

"You will note the difference in the contract price of the Parrish & Bales' contract and S. S. Senter's contract is $3,281.35.

"The Illinois Surety Company appears as surety on the original contract of Parrish & Bales, and I am submitting the above facts to you in order that action may be taken to recover the difference in the two contracts, which is $3,281.35, as above stated, if in your judgment this is the proper procedure."

Replying to the above communication I advise you that you should forthwith make a demand upon the receiver of The Illinois Surety Company for payment of the difference between the bid of Parrish & Bales and the bid of S. S. Senter, being

$3,281.35. The receiver is James S. Hopkins, who may be addressed at 134 So. LaSalle St., Chicago, Ill., and your demand upon him for the payment of the loss sustained may be phrased as follows:

> "I desire to direct your attention to the fact that on the 8th day of October, 1915, The Illinois Surety Company, acting by C. H. Bancroft, attorney-in-fact, signed as surety the proposal and contract bond of Parrish & Bales, of Dayton, Ohio, successful bidder for the construction of section 'R' of the Cleveland-Kent road, I. C. H. No. 460, in Franklin township, Portage county, Ohio, petition No. 1618, the amount of the bond being $28,189.99, and the bid of Parrish & Bales being $24,180.00. Said Parrish & Bales, in violation of the terms of their agreement with the state of Ohio, failed to commence their work within a reasonable time, and wholly failed and refused to comply with and complete their said contract, and performed no work whatever thereon, and, therefore, the undersigned, in compliance with the requirements of the General Code of Ohio, duly re-advertised said contract, and on the 15th day of June, 1916, relet the same to one S. S. Senter, of Canton, Ohio, said S. S. Senter being the lowest and in fact the only bidder for said work, and his bid being $27,461.35, said bid of S. S. Senter being $3,281.35 in excess of the sum for which said Parrish & Bales had agreed to perform said work.
>
> "By reason of the foregoing the state of Ohio has been damaged, and has suffered a loss in said amount of $3,281.35, and the undersigned, therefore, makes demand upon you, as receiver for said The Illinois Surety Company, for the payment of said sum of $3,281.35. Payment of this amount should be made to the undersigned, and I trust that there may be a prompt settlement of this claim."

In case the receiver for The Illinois Surety Company fails or refuses to make payment to you, I will, upon being advised of that fact, take the proper action to en force collection.

Respectfully
EDWARD C. TURNER,
Attorney-General.

1834.

ROADS AND HIGHWAYS—WHERE CONTRACTOR DEFAULTS IN CONTRACT FOR STATE WORK—WHERE SURETY COMPANY WHICH SIGNED HIS BOND IS IN HANDS OF RECEIVER—PROPER COURSE TO PURSUE BY HIGHWAY COMMISSIONER.

Where a contractor defaults in his contract for state highway work, and it appears that the surety company which signed the bond of said contractor is in the hands of a receiver at the time of such default, the only recourse of the state highway department is to make demand upon said receiver for any loss occasioned by such default and incident to the reletting of said contract, and in the event of a failure or refusal on the part of the receiver to make settlement the matter should be referred to this department for appropriate action.

COLUMBUS, OHIO, August 9, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—On April 22, 1916, you addressed to me the following communication:

"It has come to our attention that the Illinois Surety Company of Chicago, Illinois, has had a receiver appointed for the purpose of liquidation.

"As the Illinois Surety Company appears as surety on a large number of bonds which contractors have furnished the state of Ohio, I will appreciate your taking such steps as you deem necessary to protect our interests."

It having come to my knowledge that a reinsurance agreement had at least been proposed, if not actually consumated, between The Illinois Surety Company and the receiver for that company, on the one hand, and The National Surety Company of New York, on the other hand, I requested you, under date of May 27, 1916, to furnish me a list of all the bonds furnished to your department by contractors on work not yet completed and signed by The Illinois Surety Company, as surety. You complied with this request on June 27, 1916, and I then wrote The National Surety Company, asking that company to advise me as to whether any reinsurance agreement had been effected between that company and The Illinois Surety Company, and if so, whether such agreement covered the bonds given to your department. Under date of July 19, 1916, The National Surety Company replied as follows:

"We have your letter of July 14th with reference to certain bonds on which The Illinois Surety Company appears as surety, these bonds being in behalf of certain highway contractors.

"In reply, I have to advise that the proposed agreement by which we hoped to reinsure certain of the unexpired live bonds of The Illinois Surety Company was not approved by the superintendent of insurance and therefore never became effective. We have not reinsured any of the bonds to which you refer, nor have we assumed any liability under any of them.

"If you decide that new bonds are necessary, we of course shall be glad to consider writing them just as we would any other bonds, but at the present time we have absolutely no liability under any of these bonds."

The above facts account for the delay in answering your communication of April 22nd. The letter of The National Surety Company removes from consideration the hope of realizing on any of the bonds of The Illinois Surety Company by reason of any reinsurance agreement between that company and The National Surety Company. It therefore remains to consider the question of what, if any, further action may be taken by your department to safeguard the interests of the public.

In considering this question it is important to refer to the sections of the General Code relating to the bonds to be given by contractors for said highway work. Prior to the going into effect of the Cass highway law on September 6, 1915, this matter was controlled by the provisions of section 1203 G. C., 103 O. L. 456, which section read as follows:

"The state highway commissioner may reject any or all bids. Before entering into a contract he shall require a bond with sufficient sureties conditioned that if the proposal is accepted, the contractor will perform the work upon the terms proposed, within the time prescribed and in accordance with the plans and specifications, and will indemnify the state and county against any damages that may be claimed by reason of the negligence of the contractor in the construction of the improvement. The bond as above required shall be in an amount not to exceed one hundred and fifty per cent. of the contract price and may include indemnity against liens and claims for material and labor furnished in the construction of the improvement.

An approved surety company may be accepted as surety on such bonds. In no case shall the state be liable for damages sustained by reason of the construction of an improvement under this chapter."

Since September 6, 1915, the controlling statutory provisions are those found in section 201 of the Cass highway law, section 1208 G. C., which section reads as follows:

"The state highway commissioner may reject all bids. Before entering into a contract the commissioner shall require a bond with sufficient sureties, conditioned that the contractor will perform the work upon the terms proposed within the time prescribed, and in accordance with the plans and specifications thereof, and that the contractor will indemnify the state, county or township against any damage that may result by reason of the negligence of the contractor in making said improvement. Such bond shall also be conditioned for the payment of all material and labor furnished for or used in the construction of the road for which such contract is made, and which is furnished to the original contractor or subcontractor, agent or superintendent of either engaged in said work. The bond may be enforced against the person, persons or company executing such bond by any claimant for labor or material, and suit may be brought on such bond in the name of the state of Ohio on relation of any claimant within one year from the date of delivering or furnishing such labor or material, and such bonds or sureties thereon shall not be released by the execution of any additional surety, note or other instrument on account of such claim or for any reason whatsoever, except the full payment of such claims for such labor or material. In no case shall the state be liable for damages sustained in the construction of any improvement under this chapter."

Whether reference be had to the existing statutes or to the prior law, a bond must be executed before a contract may be entered into between the state of Ohio and a bidder for highway work let by your department. There is no provision in either section, either requiring or authorizing the taking of an additional or supplementary bond in case the surety on the original bond should, subsequent to the execution of such bond, become insolvent or the affairs of a surety company signing such bond be thereafter placed in the hands of a receiver. Not only is this true but it is also true that no method exists by which a contractor could be forced to give an additional or supplementary bond. It might be, indeed, that contractors who have been successful in their work and who have found their contracts profitable would be willing to give additional or supplementary bonds if so requested, but contractors who find themselves so placed may be reasonably expected to complete their work and in such instances there will be no necessity for resorting to the bond. Contractors who through mismanagement, or otherwise, are not succeeding with their work and who are finding the same unprofitable would, especially if financially irresponsible, welcome a forfeiture of their contracts and if such contractors were to be requested to give additional bonds and were to refuse to do so, there would be no method of compelling compliance on their part with such a request and it might be reasonably expected that they would refuse to so comply. A forfeiture of their contracts under such circumstances and for the sole reason that they had refused a supplemental bond, might, and indeed probably would, have the effect of releasing the surety on the original bond. It is therefore my opinion that there is no action which you can take at the present time in the premises and that in case of a default on the part of any contractor whose bond has been signed by the Illinois Surety Company, demand should be made on the receiver of that company for settlement, as will be

pointed out in a separate opinion and that in the event of a failure or refusal on the part of the receiver to make settlement, the matter should be referred to this department for appropriate action.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1835.

STATE ARMORY BOARD—MAY LAWFULLY PAY FOR INSTALLATION OF LOCKERS IN LEASED ARMORY.

The state armory board may lawfully pay from its appropriation for "Armory Fund" the expense of materials furnished for the installation in a leased armory of locker equipment for the safe keeping of public property.

COLUMBUS, OHIO, August 9, 1916.

Ohio State Armory Board, Columbus, Ohio.

GENTLEMEN:—Under date of July 28th we received a letter from Honorable E. S. Bryant, assistant adjutant general, to the following effect:

> "I enclose herewith letter from the commanding officer of troop 'B,' Ohio cavalry, to the state armory board, enclosing a bill for $205.00 for the material entering into the construction of certain lockers for the use of troop 'B' in their armory. This claim was allowed by the state armory board, provided that your opinion is that such lockers may be paid for by the state armory board, as will appear from an extract of the minutes of July 27, 1916. I believe that the facts are fully stated in the enclosed letter.
>
> "Your opinion upon the question of whether or not the state armory board may expend funds for this purpose is respectfully requested."

The letter referred to by Colonel Bryant in his communication is as follows:

> "Columbus, Ohio, July 22, 1916.
>
> "From: The C. O. Troop B. First Squadron, Ohio Cavalry.
>
> "To: The State Armory Board.
>
> "Subject: Bill for construction of lockers.
>
> "1. I enclose herewith certified claim, executed by myself, for the material entering into the construction of lockers for troop B Armory. The size of our troop has recently been increased and we have had a great deal of theft of property from the armory. In order to accommodate the increase and further safeguard property, I have had constructed 50 lockers for the clothing and personal equipment of the enlisted men, and 80 lockers for the saddle equipment of each man. By means of these lockers each equipment is locked up securely, and the saddle equipment lockers each have two locks, the man carrying one key and the quartermaster sergeant the other.
>
> "2. These lockers are detachable without injury to the building. The lockers for the personal equipment of the men have already been detached since the call of the president, June 19th. The saddle lockers can easily be removed without injury or destruction of the premises by the removal of a few nails.

"3. The armory occupied by our troop is held under lease, and is not an armory constructed by the state.

"4. Under our arrangement with the contractor we have paid him for the labor and furnished part of the labor by our own men, and the bill of the contractor is presenting his claim only for the material used.

"5. It is requested that this account be allowed and vouchers for payment.

"(Signed) Simeon Nash,
"Captain Troop B, First Squadron, Ohio Cavalry."

From an extract of the minutes of your board at a meeting held July 27, 1916, it appears that the following resolution was adopted:

"TROOP 'B' ARMORY. RESOLVED: That the claim of E. R. Smith for $205.00 for furnishing and installing lockers be allowed for payment, on condition that said payment is approved by the attorney-general.

"(Signed) Byron L. Bargar,
"Secretary Ohio State Armory Board."

The question arises, therefore, as to whether or not your board would be authorized to pay the claim of a contractor for furnishing and installing lockers in a building under lease, as an armory, by the state.

The sections of the General Code which prescribe the duties of the state armory board are sections 5253 to 5271 G. C. inclusive. Section 5255 G. C. provides as follows:

"The board shall provide armories for the purpose of drill and for the safe keeping of arms, clothing, equipments, and other military property issued to the several organizations of organized militia, and may purchase or build suitable buildings for armory purposes, when, in its judgment, it is for the best interests of the state so to do. The board shall provide for the management, care, and maintenance of armories, and may adopt and prescribe such rules and regulations for the management, government and guidance of the organizations occupying them as may be necessary and desirable."

Sections 5258 to 5261 G. C. inclusive provide for the construction of a building for an armory or the purchase of such a building.

Section 5261 G. C. was amended in 106 O. L. 103 by the addition of the following:

"Provided, that in addition to the amount so allowed for building and grounds there shall be allowed a sum not to exceed one thousand dollars for the furnishing and equipment of each such armory building so built or purchased."

The amendment of section 5261, G. C., above noted, in no way affects the question at issue. Section 5255 G. C., providing that the state board shall provide armories for the safekeeping of arms, etc., either by lease, purchase or construction of armories, is sufficient, as I view it, to authorize said board to provide lockers in a leased armory, for the reason that if the lessor had provided such armories, and included the cost price thereof in the lease, undoubtedly the state armory board would be entitled to pay an increased rental by reason thereof.

While it is true that section 5287 G. C., 106 O. L. 520, provides a fund yearly for the various organizations for the care of state property and other incidental expenses, nevertheless I do not believe that such fact in any way deters the state armory board from paying the bill in question. If the state armory board could have pro-

vided the lockers in the first instance I do not see any reason why it should not recognize, approve and adopt the expenditure for lockers made in the case in question.

The fund out of which the amount is to be paid by the state armory board is undoubtedly the appropriation made under the designation "Armory Fund" in house bill No. 701, 106 O. L. 666. Section 6 of said bill requires that vouchers drawn on appropriations made in said bill shall show that competitive bids were secured, unless an emergency existed requiring purchase.

From a letter received from Colonel E. S. Bryant, under date of August 2nd, it appears that the lockers in question were not let by competitive bids, and that the same were purchased about June 10, 1916. Therefore, the appropriation made to the state armory fund in house bill No. 701 at page 711 is the appropriation available for the purpose.

From the letter of Captain Nash, under date of July 22nd, hereinbefore set out in full, it appears that there was a great deal of theft of property from the armory, due to the fact that the property was not sufficiently under lock and key, moreover it appears that doubtless due to the call of the president there was a sudden and unusual increase in the numerical strength of the company. Such being the facts I well believe that the purchase of the lockers was an emergency, and, therefore, did not require competitive bidding.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1836.

APPROVAL, RESOLUTIONS FOR IMPROVEMENT OF CERTAIN ROADS IN ADAMS, HOCKING, LOGAN, MAHONING, PERRY AND ROSS COUNTIES.

COLUMBUS, OHIO, August 9, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your letter of August 1, 1916, transmitting to me for examination final resolutions relating to th- following road improvements:

"Adams County—Sec. 'C,' West Union-Sinking Springs, I. C. H. No. 124, Pet. No. 2009-T. (Twp.)

"Hocking County—Sec. 'E,' Lancaster-Logan, I. C. H. No. 360, Pet. No. 2496.

"Logan County—Sec. 'D,' Bellefontaine-Richwood, I. C. H. No. 236, Pet. No. 2595-T. (Twp.)

"Mahoning County—Sec. ',A' Youngstown-Lowellville, I. C. H. No. 14, Pet. No. 3132.

"Mahoning County—Sec. 'O,' Akron-Youngstown, I. C. H. No. 18, Pet. No. 3133.

"Perry County—Sec. 'J,' Lancaster-New Lexington, I. C. H. No. 357, Pet. No. 2798.

"Ross County—Sec. 'A,' Dayton-Chillicothe, I. C. H. No. 29, Pet. No. 2878."

I find these resolutions to be in regular form and am therefore returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1837.

TAXES AND TAXATION—LIMITATION OF TWO-TENTHS OF ONE MILL IN SECTION 5643 G. C. DOES NOT APPLY TO INTEREST AND SINKING FUND LEVIES—APPLIES TO SPECIAL TAXES WHICH MAY BE LEVIED IN ANY ONE YEAR FOR PURPOSE OF BUILDING OR REPAIRING BRIDGES—TAX LIMITED TO SINGLE LEVY—BONDS PAYABLE WHEN TAX COLLECTED.

The limitation of two-tenths of one mill, mentioned in Section 5643 G. C. does not apply to the interest and sinking fund levies which may be made for the retirement of bonds issued under the latter part of section 5644 of the General Code, as to which there is no limitation, excepting the general ones of the Smith law.

Said limitation applies to the special taxes which may be levied in any one year for the purpose of building or repairing bridges as therein referred to. Such special tax is limited to a single levy on one duplicate, and if bonds are issued in anticipation of its collection under the first paragraph of section 5643 G. C. they must be made payable when such tax is collected.

COLUMBUS, OHIO, August 9, 1916.

HON. DON C. PORTER, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of August 5th, submitting for my opinion the following question:

> "In case county commissioners decide to sell bonds, by virtue of sections 5643 and 5644 of the General Code, for the construction of a bridge to replace one that has become dangerous to public travel, does section 5643 limit the amount of the bond issue or does it merely limit the proportion of the bond issue that can be paid in any one year?"

The answer to your question will, I am sure, be suggested by a careful analysis of sections 5643 and 5644 General Code, which must be read together. They are as follows:

> "Section 5643. If an important bridge, belonging to or maintained by any county, becomes dangerous to public travel, by decay or otherwise and is condemned for public travel by the commissioners of such county, and the repairs thereof, or the building of a new bridge in place thereof, is deemed, by them, necessary for the public accommodation, the commissioners, without first submitting the question to the voters of the county, may levy a tax for either of such purposes in an amount not to exceed in any one year two-tenths of one mill for every dollar of taxable property upon the tax duplicate of said county.
>
> "Section 5644. If the county commissioners deem it necessary or advisable, they may anticipate the collection of such special tax by borrowing a sum not exceeding the amount so levied, at a rate of interest not exceeding six per cent. per annum, payable semi-annually and may issue notes or bonds therefor, payable when said tax is collected, or the commissioners, without such submission of the question, may proceed under the authority conferred by law to borrow such sums of money as is necessary for either of the purposes before mentioned, and issue bonds therefor. For the payment of the principal and interest of such bonds, they shall annually levy a tax as provided by law."

Generally speaking, our statutes recognize two distinct theories of procedure or methods in the issuance of bonds, viz.:

First, The levy of special taxes and the issuance of bonds in anticipation of their collection; and

Second, The issuance of bonds and the levy of taxes to pay the interest thereon and retire them when due.

Also, there are two kinds of bonds which may be issued under either of these schemes, namely, serial bonds in which the principal of the entire indebtedness is represented by obligations falling due periodically, and sinking fund bonds in which the entire issue falls due at the same time.

The above quoted sections confer three distinct powers which may be pointed out as follows:

1. The power to levy a tax which must not in any one year exceed two-tenths of one mill.

2. The power to anticipate the collection of the special tax by borrowing money, either by the issuance of bonds or by the issuance of notes, which obligations must be payable when the tax is collected.

3. The power to borrow money "under the authority conferred by law" and then to levy an annual tax for the payment of the principal and interest thereon.

The first of these powers is conferred by section 5643, The second and third of them are conferred by section 5644. The reference in the latter section to the "authority conferred by law" is to section 2434 of the General Code to which I refer you. It will be observed that this section of itself, and as adopted and referred to in section 5644, provides for the issuance of bonds according to the second general scheme or theory above described.

When section 5644 confers the power to issue bonds otherwise than in anticipation of the special tax provided for in section 5644, it does not impose any limitation thereon. It is expressly provided that the money to be borrowed in this way may consist of "such sums * * * as is necessary for either of the purposes before mentioned." And the tax that is to be levied for the payment of such bonds is to be such as is sufficient for the payment of the principal and interest thereon.

In other words, the limitations of section 5643 do not apply to the sinking fund and interest levy provided for by the last part of section 5644. The two levying powers are, as above pointed out, quite separate and distinct. It follows that if the county commissioners proceed under the second half of section 5644 and under section 2434 General Code, to issue bonds without reference to the special tax provided for by section 5643, as they may do, the limitations of the last named section do not apply at all. In this sense, section 5643 does not in any way limit the amount of the bond issue which the commissioners may make under the sections, if they decide to proceed in this way.

But if the commissioners wish to levy the special tax provided for by section 5643, and merely to borrow money by the issuance of bonds or otherwise, in anticipation of the collection thereof, the question which you submit is squarely raised. Furthermore, another question, which you do not suggest, is here encountered and must be considered before reaching a conclusion on your query. Section 5643 provides that under the circumstances therein named the commissioners "may levy *a tax* * * * in an amount not to exceed *in any one year* two tenths of one mill"&c.; and that part of section 5644, which completes this scheme of raising money, provides:

> "They may anticipate the collection of such special tax by borrowing a sum *not exceeding the amount so levied*, at a rate of interest not exceeding six per cent. per annum, payable semi-annually, and may issue notes or bonds therefor, payable when said tax is collected."

The introductory question suggested by these phrases is as to whether or not the commissioners, under favor thereof, have authority to levy more than one special tax at a time; that is to say, does this power authorize the commissioners in one action to levy a tax that shall run on the duplicate for more than a year? Under the language of the sections under examination, I think the answer to this question is in the negative. It is true that many statutes of the state, authorizing the levy of taxes and the issuance of bonds in anticipation of their collection, have been so construed in practice as to authorize the making of a levy which is to run for a number of years, until the amount to be raised, with interest, is produced. But for several reasons, which I shall state, I do not think that section 5643 can be so interpreted.

In the first place, while not conclusive in itself, it is to be observed that the thing to be levied is designated in the singular number as "a tax." As a general rule at least, and subject to such exceptions as may exist in the case of levies of the general character above referred to, the act of the county commissioners, in levying taxes, is effective only with respect to a single year.

Section 5627 General Code provides as follows:

> "The county commissioners, at their March or June session, annually, shall determine the amount to be raised for ordinary county purposes, public buildings, the support of the poor, interest and principal of the public debt, and for road and bridge purposes. They shall specifically set forth in the record of their proceedings the amount to be raised for each of such purposes."

The Smith one per cent. law, section 5649-1 *et seg.*, General Code, clearly recognizes that levies are annual, and the machinery of the budget commission, with its power to revise levies, &c. is adapted to this theory. Perhaps no clearer recognition of this idea is found than that which is expressed in section 5649-1, as amended 104 Ohio Laws 12. This section *requires* the making of annual sinking fund levies, adequate for the payment of interest and the retirement of the bonded indebtedness of the taxing district. These are the only mandatory levies of which the Smith law speaks; it treats all other levies as discretionary and clearly implies that such discretion is to be exercised annually.

If, therefore, the special tax referred to in section 5643 is to be regarded as a continuing levy, for the retirement of bonds (when bonds have actually been issued in anticipation of its collection), it is by virtue of section 5649-1 alone, and not by its own force and that of section 5627 General Code, under which its amount in any one year would be within the control of the county commissioners.

The Smith law, however, is of recent enactment, and obviously its provisions can not reflect upon the previously established meaning of section 5643 in this particular. Therefore, when said section 5643 was enacted, and its meaning became fixed, it provided for an annually redetermined levy, if it provided for any continuing levy at all.

2. The fact that ample provision is made for the issuance of long time bonds, in the last part of section 5644, is some evidence, at least, that the general assembly did not think that when it provided for the issuance of bonds, in anticipation of the collection of the special tax, it was making it possible to issue such long time bonds.

3. The third reason for the conclusion which I have expresssed respecting the question as to whether section 5643 authorizes a levy for more than one year, is in a way an answer to your specific question. The phrase "in an amount not to exceed in any one year two tenths of one mill," &c., modifies the phrase "may levy a tax." The two possible meanings of this phrase, suggested by your letter, may be stated thus:

(a) That the commissioners may levy taxes in any amount necessary to build

the bridge, and then the amount so levied is to be distributed over a number of years, in such manner as that the levy in any one of the years will not exceed two tenths of one mill.

(b) The amount which the commissioners may levy for the purpose is limited to two tenths of one mill for that year.

The second of these two interpretations is certainly the most natural one to be given to the language of the section, and in my opinion it is correct. It is the amount of the levy made by the commissioners which is not to exceed two tenths of one mill in any one year. The section does not say that the amount of the levy may be any sum fixed by the commissioners in their discretion and required for the pusposes indicated, provided that only such part thereof shall be placed on the duplicate in any one year as will necessitate a levy of two tenths of one mill or less. To make it read so, would be doing manifest violence to its plain provisions.

The only doubt here is as to the meaning of the words "in any one year." If these words were not in the section at all, the interpretation which I have given to it would, I am sure, not be questioned. What is the true purport of this phrase? In my opinion, light is shed upon this question by the fact that the levy is to be made "for either of such purposes." While this phrase is of itself far from clear, I am strongly inclined to the view that the limitation here is upon the total amount of taxes that may be levied in any one year for any purpose, under section 5643. That is to say, if the commissioners decide to levy such special taxes for the restoration of two important bridges which are dangerous to public travel and are condemned, &c., it can not levy the taxes, up to this limitation, for each of the bridges, but the amount raised for both of them together must come within the limitation. This, then, is the purpose of the phrase "in any one year." The total levies made in any one year for "either" (i. e., any) of the purposes mentioned in section 5643 can not exceed two tenths of one mill.

Now, if this interpretation be correct, it has a definite bearing upon the general question as to whether the levy under section 5643 may last more than one year. Suppose, for example, the commissioners proceeded on the theory that they had the power under section 5643 to make a levy which should be binding on their successors at least as soon as the bonds were issued, and should require its own repetition during a number of years until a given amount of money had been raised; suppose too, that the levy was such as to require in the first year two tenths of one mill, i. e., to exhaust the limitation, then, if the duplicate of the county should remain exactly stationary during the remaining years within which it was supposed that the commissioners might by a single act cause a levy to be made, the limitation would be exhausted for each of those years also, unless the taxes previously provided for be not counted in ascertaining the two tenths of a mill limitation for such subsequent years. The result then would be that during such subsequent years the commissioners would be powerless to make any other levies under section 5643.

Does then section 5643, if it is to be interpreted as authorizing a continuing levy, impose any limitation upon the amount of the levies for the subsequent years? Obviously the answer to this question must be in the affirmative. It is distinctly provided that the amount to be levied "in any one year" shall not exceed two tenths of one mill. If the statute is susceptible of such an interpretation as to authorize a continuing levy, the levies for the subsequent years would have to be counted in ascertaining the limitation, as well as the one for the initial year.

I do not think that the legislature contemplated, in the enactment of this ambiguous section, that the county commissioners of one year should have it in their power to disable their successors in a later year from exercising this power at all; and yet this is the practical result which would follow if section 5643 be given this meaning. It may be argued that the commissioners of a subsequent year, being faced with the existence of a levy in a prior year under section 5643, might redistribute the amount

originally levied, and extend its collection beyond the time originally contemplated. This, however, will not do, because section 5644 requires that when bonds have been issued they shall be made payable "when said tax is collected." It necessarily follows, therefore, that if bonds are to be issued the time of the final collection of the tax must be certain, because it fixes the time when the bonds are to be paid.

For all these reasons, then, I conclude that under section 5643 but one special tax for a single year can be levied. And if notes or bonds are issued they must be made payable at the time of the final collection of such tax. This conclusion of course answers your question by showing that the second alternative suggested by you is impossible, because a bond issue, to be retired in annual installments, can not be made under section 5643 and the first part of section 5644 of the General Code.

But it is not exactly accurate, either, to say that section 5643 limits the amount of a particular bond issue. What it does is to limit the amount of taxes that may be levied for the purpose indicated in any one year, as its terms plainly express.

I am aware that some of the arguments which I have used run counter to the established practice in levying taxes and issuing bonds in anticipation of their collection under other sections. In this group of sections, however, clear provision is made, as I have pointed out, for the issuance of long time bonds and the making of annual levies for their retirement. It is because the intention of the legislature to distinguish between the two kinds of bond issues is so plain in these sections, and because I think it is clear that the legislature intended that the long time bonds should be issued as provided for in the latter part of section 5644, that I have come to the conclusion above expressed.

Recapitulating, then, I am of the opinion that under the sections above named long time bonds may be issued without any limitation on the sinking fund levies necessary to retire them, other than the general limitations of the Smith one per cent. law, provided the commissioners proceed under the last part of section 5644 and under section 2434 General Code. But if the commissioners desire to levy a special tax, and to anticipate its collection by the issuance of notes or bonds, the force of such levy expires in one year, and the levy itself is to be extended upon one duplicate only; and the limitation of two tenths of one mill relates to all such taxes which may be levied in any one year.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1838.

TEXT BOOKS—WHEN MAJORITY OF MEMBERS OF VILLAGE OR RURAL SCHOOL BOARD DO NOT VOTE FOR ADOPTION OF TEXT BOOKS, RECOMMENDED BY DISTRICT SUPERINTENDENT, BOARD MAY UNDER SECTION 7713 G. C. ADOPT BOOKS WITHOUT FURTHER RECOMMENDATION BY DISTRICT SUPERINTENDENT—TIME FOR ADOPTING TEXT BOOKS.

If a majority of the elected members of a village or rural school board do not vote for the adoption of a text book or text books, which have been recommended by the district superintendent, the board may then proceed, pursuant to the provisions of section 7713 G. C., to adopt for use in the schools under its control other text books instead of those so recommended, without further recommendation by the district superintendent.

The school board of a village or rural school district may adopt text books for use in the schools under its control after the first Monday of February and before the first Monday of August, as provided by section 7713 G. C., though no recommendation thereof has been made by the district superintendent.

COLUMBUS, OHIO, August 9, 1916.

HON. FRANK B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Yours under date of July 13, 1916, is as follows:

> "I respectfully ask an opinion on the following question:
> "Section 7706-2 reads:
>
> " 'It shall be the duty of the district superintendent to recommend to the village and rural boards of education within such district, such text-books and courses of study as are most suitable for adoption.'
>
> "Section 7713 reads in part:
>
> " 'At a regular meeting held between the first Monday in February and the first Monday in August, each board of education shall determine by a majority vote of all members elected the studies to be pursued and which of such text-books so filed shall be used in the schools under its control.'
>
> "Is a board of education of a district within the jurisdiction of a district superintendent obliged to receive and act upon his recommendation in order to adopt text-books? If such board refuses to adopt the book or books recommended by him, may the board proceed then to adopt without receiving a second recommendation from him or giving him an opportunity to make such a recommendation? To put it in another way, is an adoption a legal adoption if the district superintendent's recommendation has not been received at all or, if after offered, such a recommendation has once been rejected the adoption is made without further report from him?"

In defining the powers and duties of district superintendents, section 7706-2 G. C., 104 O. L. 133, as quoted in your inquiry, was enacted, which imposes upon such superintendent the duty of recommending to the village and rural boards of education within his supervision district such text-books and courses of study as in his judgment are most suitable for adoption. It is similarly provided in section 7706 G. C., 104 O. L. 133, that such superintendent shall be the chief executive officer of all boards of education within his district and that "he may take part in their deliberations but shall not vote." The manifest purpose of this provision is that boards of education may have the benefit of the judgment of the district superintendent in

their deliberations. It would not, however, be argued that in the absence of statutory declaration to that effect the board of education must be guided in their actions by the suggestions of the superintendent altogether in any matter.

A consideration of the provisions of section 7706-2 G. C. supra, readily suggests a similar purpose in its enactment. A careful examination of the further sections of the General Code, relative to the powers and duties of the district superintendent and village and rural school boards, as to the adoption of text-books, fails to disclose any provision which would indicate a legislative intent that the recommendation of the district superintendent, authorized or required by section 7706-2 G. C. should be binding upon the school board and such construction of the provision of that section would be inconsistent with the provisions of section 7713 G. C. quoted in your inquiry. This latter section requires that the board shall determine by a majority vote of all members, which of such text-books filed by the publishers shall be used in the schools under its control. It would be idle to require action by a majority vote of the board, if that action is conclusively predetermined by the district superintendent.

The requirement of section 7706-2 G. C. is fully met when the superintendent has made a recommendation and I find no requirement or authority for his making a second or further recommendation.

While it may not be an unreasonable, yet it seems it would be a somewhat unnatural, construction to give to the language of the above mentioned sections to hold that if a majority of the members of the board of education refused to vote for the adoption of a book or books recommended by the superintendent no substitute for the book or books so recommended could be adopted, except upon further recommendation by the superintendent. To so hold, it seems clear, would necessitate reading into these sections language which neither appears nor is there suggested.

As in the case of the provision of section 7706 G. C. above referred to, it seems clear that the only purpose of section 7706-2 G. C. is to give to the boards of education the benefit not of a second, third or subsequent choice of the superintendent, but rather of his best judgment as to the most suitable books only.

I am therefore of the opinion, in answer to your inquiry, that if a majority of the members of a board of education elected thereto do not vote for the adoption of a book or books which have been duly recommended by the district superintendent, the board may then proceed without further recommendation, to adopt by a majority vote of all members elected, a substitute or substitutes therefor, if the period of five years has elapsed since the adoption of a text which such newly adopted book or books are to supersede. It will be observed that by the provisions of section 7713 G. C. supra, the board of education is authorized to determine the text-books to be used at a regular meeting held between the first Monday in February and the first Monday in August. There is no requirement that notice should be given to the district superintendent by the board of education of the time when such action is contemplated nor is the authority here clearly conferred made dependent in any way upon the recommendation of the superintendent having been made, and I am of opinion that if the district superintendent fails or refuses to make his recommendation prior to the action of the board in determining the text-books to be used in the schools under its control, at a regular meeting of the board after the first Monday of February and before the first Monday of August, as required by section 7713 G. C., such determination would be valid notwithstanding the absence of the recommendation by the district superintendent.

The above also fully answers your communication under date of July 21, 1916, upon the same subject.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1839.

COLONEL JENNINGS MEMORIAL HALL—DISAPPROVAL OF CONTRACT—CONSIDERATION GREATER THAN BALANCE OF APPROPRIATION.

Contract for erection of Colonel Jennings Memorial Hall not to be approved because consideration is greater than the balance of the appropriation.

COLUMBUS, OHIO, August 10, 1916.

Honorable Frank B. Willis, Governor of Ohio, Columbus, Ohio.

MY DEAR GOVERNOR:—You have submitted to me for consideration a contract dated August 1, 1916, between I. N. Roselle and The Colonel Jennings Memorial Commission for the erection of the Colonel Jennings Memorial Hall, the said contract calling for the expenditure of four thousand ($4,000.00) dollars.

The erection of this building is not within the purview of sections 2314 et seq., G. C., and there is therefore no statutory provisions governing the method of awarding the contract other than that found in the appropriation made in 103 O. L., 607, which appropriation reads as follows:

> "To an honorary commission, appointed by the governor, appointment not requiring confirmation by the senate, to serve without compensation, except actual expenses. Said commission to enter into a contract to be approved by the governor, for the erection of a memorial building, in commemoration of the life and services of Colonel William Jennings and his company of soldiers who erected a fort at Fort Jennings, the present site of the village of Fort Jennings, Putnam county, Ohio. After appointment the commission shall organize and elect one of its members chairman. The chairman shall approve and sign all vouchers for the payment of costs in the erection of said memorial building, for which there is hereby appropriated the sum of .....$4,000.00."

In the appropriation bill found in 106 O. L., 843, the balance remaining unexpended in the above appropriation were all appropriated "to remain subject to all the terms and conditions of the original appropriation."

I have examined the contract as submitted and find no legal objection to the same save and except that upon inquiry at the office of the auditor of state I find there is only $3,972.85 remaining in the fund. The contract calling for $4,000.00 is therefore in excess of the appropriation. The appropriation calls for your approval of the contract.

Since there are not sufficient funds in the hands of the auditor of state appropriated for the purpose of paying the contract price, I do not believe that you should approve the contract. In this connection also I would call your attention to Opinion No. 1597 rendered to you under date of May 20th, 1916.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1840.

COLLATERAL INHERITANCE TAX—WHERE, BY TERMS OF WILL, ESTATES IN REMAINDER PASS TO COLLATERAL HEIRS DETERMINED ACCORDING TO PROVISIONS OF STATUTE OF DESCENT AND DISTRIBUTION IN FORCE AT TIME OF DEATH OF TESTATOR—SUCH ESTATES TAXABLE—WHEN TAX BECOMES A LIEN—TIME OF DETERMINATION POSTPONED UNTIL DEATH OF LIFE TENANT—WHEN STATUTES FOR COLLECTION OF TAX BEGIN TO RUN.

Where, by the terms of a will, estates in remainder pass to collateral heirs determined according to the provisions of the statute of descent and distribution in force at the time of the death of the testator, such estates are subject to the collateral inheritance tax.

While, by the provision of the latter part of section 5331, *G. C.*, 103 *O. L.*, 463, *said tax becomes a lien upon the property so passing to said collateral heirs immediately upon the death of the testator and remains a lien until paid, in case it is impossible at the time of the death of the testator to determine the value of the life estate for the purpose of deducting the same from the appraised value of the entire estate in order to determine the value of said estates in remainder, the time of the determination of said tax must be postponed until the death of the life tenant, and the statutes governing the limits of time for the collection of said tax will begin to run at the date of the death of said life tenant.*

COLUMBUS, OHIO, August 10, 1916.

Honorable H. C. Fish, Prosecuting Attorney, Pomeroy, Ohio.

DEAR SIR:—I have your letter of July 31st enclosing copy of the will of Joseph P. Bradbury, who died July 8, 1915.

You state that said testator left a widow who is still living; that he left no direct descendants but left two sisters and the descendants of one sister and of two brothers, and that the widow elected to take under the will.

You request my opinion upon the following questions:

"(1) Does the interest passing under Item IX of this will pass such an estate that the collateral inheritance tax should be paid?

"(2) If the collateral inheritance is to be paid on this estate, should it be paid now, or at the death of the widow?"

Provisions of the statutes pertinent to your inquiry are as follows:

"Section 5331, G. C. (103 O. L., 463):

"All property within the jurisdiction of this state, and any interests therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which pass by will or by the intestate laws of this state, or by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor, to a person in trust, or otherwise, other than to or for the use of the father, mother, husband, wife, lineal descendant or adopted child, shall be liable to a tax of five per cent. of its value above the sum of five hundred dollars. Fifty per cent. of such tax shall be for the use of the state and fifty per cent. of such tax shall go to the city, village or

township in which said tax originates. All administrators, executors and trustees, and any such grantee under a conveyance made during the grantor's life, shall be liable for all such taxes, with lawful interest as hereinafter provided, until they have been paid, as hereinafter directed. Such taxes shall become due and payable immediately upon the death of the decedent and shall at once become a lien upon the property, and be and remain a lien until paid."

Section 5333, G. C. (103 O. L., 463):

"When a person bequeaths or devises property to or for the use of father, mother, husband, wife, lineal descendant, or adopted child, during life or for a term of years, and the remainder to a collateral heir, or to a stranger to the blood, the value of the prior estate, shall be appraised, within sixty days after the death of the testator, in the manner hereinafter provided, and deducted, together with the sum of five hundred dollars, from the appraised value of such property."

Section 5343, G. C.:

"The value of such property, subject to said tax, shall be its actual market value as found by the probate court. If the state, through the prosecuting attorney of the proper county, or any person interested in the succession to the property, applies to the court, it shall appoint three disinterested persons, who, being first sworn, shall view and appraise such property at its actual market value for the purposes of this tax, and make return thereof to the court. The return may be accepted by the court in a like manner as the original inventory of the estate is accepted, and if so accepted, it shall be binding upon the person by whom this tax is to be paid, and upon the state. The fees of the appraisers shall be fixed by the probate judge and paid out of the county treasury upon the warrant of the county auditor. In case of an annuity or life estate, the value thereof shall be determined by the so-called actuaries' combined experienced tables and five per cent. compound interest."

The items of said will, the provisions of which are material for the purpose of answering your questions are as follows:

"Item III. I give to her (Emma L. Bradbury, widow of testator) also as long as she remains unmarried, the residence in which we now live, situated on Butternut street in the village of Pomeroy, the grounds of which extend from the northeast line of the residence lot of the late Henry Koehler, and extending southeasterly to the low cement block wall standing between my residence lot and the premises upon which H. H. Blackmore now resides; that southeasterly line extending from the southeast end of said wall in a southerly direction to a point four feet distant from the stable now standing on Lot No. 41; then parallel with the northwesterly side of the stable to the big wall; thence along the big wall in a westerly line to Lot No. 37 owned by Frank Deihl; thence northwesterly along that line to the westerly end of a stone wall lying between my residence property and the lot owned by Edward Koehler; thence along that stone wall in a southeasterly direction to

the line between the lot owned by the late Henry Koehler above mentioned, and my residence lot.

"Item IV. "I further desire and direct that the sum of four hundred and eighty dollars ($480.00) per year be paid in quarterly installments to my wife out of my estate, quarterly from the time of my death.

"Item V. I further direct that in case any blood relative of my own, or any blood relative of my wife should reside with her on said residence, and such person considers residing with her there, that he or she shall not remain a guest of the house longer than two weeks at any one time; and that he or she shall not remain an inmate or guest of the house longer than four weeks during any one year; that should any of the relatives reside with her beyond the time prescribed in this item, then the annual sum of $480.00 directed to be paid to my said wife in Item III of this will, shall be reduced to three hundred and eighty dollars ($380.00).

"But if her brother, Mark Woods, should desire to reside with her, and pay weekly two dollars per week to my said wife, and assist her in taking care of the yard and garden to the extent of his ability, the above provision in reference to relatives shall not apply to him.

"Item VII. I further desire and direct that after paying my wife the said sum of $480.00 per year, or $380.00 per year in the case she forfeits the one hundred dollars mentioned in Item V, that the balance of the income from my said estate shall be divided equally between my wife and my sister Augusta, the amount received by each of them, however, not to exceed the sum of one hundred dollars per year.

"Item IX. "I desire and direct that at the death of my wife, the balance of the property remaining shall be divided among my kindred according to the statute of descent and distribution in force in the state of Ohio at the time of my death."

It will be observed that by provision of Item III, Emma L. Bradbury, widow of the testator, has the use of the residence property so long as she remains unmarried. By provision of Items IV and V, the amount of her yearly allowance depends upon her compliance with the requirement of the provisions of said items. By provision of Item VII, her additional allowance is indeterminate.

The estate of Emma L. Bradbury is exempt from the collateral inheritance tax by provision of section 5331, G. C., supra, and in view of the provisions of Items III, IV, V and VII of said will, as above set forth, it is evident that it is impossible at this time to determine the value of said estate in the manner provided by section 5343, G. C., for the purpose of deducting the same from the value of the entire estate of the testator, as required by section 5333, G. C., and for the purpose of ascertaining the estate in remainder which would be subject to the collateral inheritance tax under the provision of said section 5331, G. C., it appearing from your statement of facts that there are no direct descendants of said testator who by provision of said section 5331, G. C., would be exempt from said tax.

Inasmuch as the value of the life estate of the said Emma L. Bradbury cannot at this time be determined, it necessarily follows that the estate in remainder cannot at this time be determined in the manner provided by section 5343, G. C., supra, and if it were not for certain provisions of the statutes to be hereinafter considered, I would at once conclude that the determination of the value of the estate in remainder must be postponed until after the termination of the

life estate by the death of the said Emma L. Bradbury, widow of said testator.

It seems clear, however, that the provisions of Item IX disposes of the estate that will remain after deducting the life estate of the said Emma L. Bradbury by adopting by reference the provisions of the statute of descent and distribution in force in the state of Ohio at the time of the death of said testator, and I am of the opinion, in answer to your first question, that by the terms of said Item IX of said will there were vested in the collateral heirs of said testator, determined according to said statute of descent and distribution in force at the time of said death and still in force, estates in remainder the respective amounts of which cannot be determined at this time, and that said estates, the values of which are to be determined as hereinafter set forth, are subject to the collateral inheritance tax.

The answer to your second question is difficult to determine, in view of the fact that the courts of this state have not attempted to interpret the statutes governing the determination of collateral inheritance taxes and the time and manner of their collection as applied to a case where at the time of the death of the testator it is impossible to determine the value of the life estate.

It will be observed that by the terms of the provision of the latter part of section 5331, G. C., supra, "such taxes shall become due and payable immediately upon the death of the decedent and shall at once become a lien upon the property, and be and remain a lien until paid."

Section 5333, G. C., read in connection with section 5343, G. C., provides for the appraisal and deduction of the life estate or estate for a term of years from the entire estate of the testator for the purpose of determining the estate in remainder, said section 5333, G. C., providing that the value of the prior estate shall be appraised within sixty days after the death of the testator in the manner provided by section 5343, G. C., and deducted, together with the sum of five hundred dollars, from the appraised value of said entire estate.

Section 5335, G. C., provides that:

> "If such taxes are not paid within one year after the death of the decedent, interest at the rate of eight per cent. shall be thereafter charged and collected thereon, and if not paid at the expiration of eighteen months after such death, the prosecuting attorney of the county wherein said taxes remain unpaid, shall institute the necessary proceedings to collect the taxes in the court of common pleas of the county, after first being notified in writing by the probate judge of the county of the non-payment thereof. The probate judge shall give such notice in writing. If the taxes are paid before the expiration of one year after the death of the decedent, a discount of one per cent. per month for each full month that payment has been made prior to the expiration of the year, shall be allowed on the amount of such taxes."

In view of the foregoing provisions of the statutes, can it be said that the determination of the tax in question and the collection of the same, may be postponed until the death of the life tenant? Numerous authorities from other states may be cited in support of the proposition that the tax must be postponed when the interests are not presently ascertainable.

In the case of People v. McCormick, 208 Ill., 437, it was held that when the basis of the tax, the rate and the exemption, if any, cannot be fixed the tax itself cannot be fixed. The fourth branch of the syllabus in that case is as follows:

> "Where the person who is or will ultimately be entitled to the benefi-

cial interest in a remainder cannot be identified or the proportion thereof cannot be determined, the imposing of an inheritance tax must be postponed until such matters can be definitely ascertained."

To the same effect, see Ayers v. Chicago Title & Trust Company, 187 Ill., 42.

Upon investigation I find that the provisions of the statutes of Illinois are almost identical with those of this state.

In the case of in re Babcock, 75 N. Y. Supp. 926, the syllabus is as follows:

"Where testatrix devised to her brother during his life all her personal property with a right to use as much of the principal as was necessary, no transfer tax can be assessed against the remainder as it cannot be determined until the death of the life tenant how much of the principal will be used by him."

I observe, however, that under the statutes of New York provision is made for the postponement of the determination of the value of the estate in remainder where, at the time of the death of the testator, the prior estate cannot be determined.

While the foregoing provisions of the statutes, generally speaking, require the determination of the tax and the collection of the same within the time limits therein provided, I am nevertheless of the opinion that the only reasonable interpretation of said statutes as applied to the particular facts presented in your inquiry is to hold that while the tax on the estate in remainder became a lien upon the property upon the death of the testator and will remain a lien until paid, the time of the determination of said tax must be postponed until the death of the said Emma L. Bradbury, widow of said testator, and that the statutes governing the limits of time for the collection of said tax will begin to run at the date of the death of said life tenant.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1841.

STATE BOARD OF SCHOOL EXAMINERS—REFUSAL TO GRANT CERTIFICATE TO APPLICANT—UPON REQUEST BOARD SHOULD DISCLOSE TO APPLICANT ALL EVIDENCE SUBMITTED TO IT.

When the state board of school examiners refuse to grant a certificate to an applicant as provided by sections 7805, 7806-6 *and* 7806-7, *G. C.*, 104 *O. L.*, 100, *upon evidence, not submitted to the board by the applicant, upon the questions of the good moral character, professional experience and ability, and the period of successful teaching therein prescribed, the board should, upon request of the applicant, disclose to him all such evidence and the source thereof.*

COLUMBUS, OHIO, August 10, 1916.

Hon. Frank B. Pearson, Superintendent of Public Instruction, Columbus, Ohio.

DEAR SIR:—Yours under date of July 14, 1916, is as follows:

"It seems necessary for me to submit to you the following question:

"Under sections 7807, 7807-6 and 7807-7, the state board of school examiners issue state life certificates. In investigating the experience of

the candidates to determine whether they have completed the requisite period of teaching successfully, members of the board submit questionnaires to those who are acquainted with the teaching experience of the applicants. These are intended to be confidential reports. The question is, are these public documents of such a nature that members of the board of examiners are obliged to open them to the inspection of interested persons?"

Section 7805, G. C., 104 O. L., 100, provides for the creation of a state board of school examiners. That part of section 7807, G. C., 104 O. L., 100, pertinent to your inquiry, is as follows:

"The board thus constituted may issue three grades of life certificates to such persons as are found to possess the requisite scholarship, and who exhibit satisfactory evidence of good moral character and of professional experience and ability."

Sections 7807-6 and 7807-7, G. C., 104 O. L., 100, to which reference is made, provide as follows:

"*Sec.* 7807-6, *G. C.* It shall be the duty of the state board of school examiners to issue without examination to every holder of a state provisional certificate, a life certificate of similar kind upon satisfactory evidence that the holder thereof has completed at least twenty-four months of successful teaching, after receiving such provisional certificate.

"*Sec.* 7807-7, *G. C.* The state board of school examiners shall issue without examination, a state life high school certificate to the holder of a degree from any normal school, teachers' college, or university that has been approved by the superintendent of public instruction, upon satisfactory evidence that the holder thereof has completed at least fifty months of successful teaching."

Under sections 7807-6 and 7807-7, G. C., the board is required to issue certain classes of certificates under other conditions therein set forth, upon satisfactory evidence that the applicant has completed at least twenty-four months of successful teaching, after receiving a provisional certificate and upon satisfactory evidence that the applicant has completed at least fifty months of successful teaching, respectively.

These sections clearly impose upon the applicant the burden of producing before the board, in the first instance, satisfactory evidence of the requisite facts as to the prescribed periods of successful teaching in like manner as it is incumbent upon the applicant to produce satisfactory evidence of good moral character and of professional experience and ability, under the provisions of section 7807, G. C,. supra.

It is, of course, within the authority of the board to determine, in the exercise of its discretion, what constitutes satisfactory evidence of these essential matters of fact and in doing so the board would not only be authorized, but it would seem to be their duty, to establish and to follow, in so far as practicable, some uniform rule or regulation as to the character and amount of evidence upon these matters, which it would deem to be satisfactory, and require to be exhibited and submitted by the applicant. The establishment of such uniform rule would seem to be necessary in order to place all applicants upon an equal basis. The determination of the board, as to what evidence of these matters of

fact would be deemed by it to be satisfactory, in the absence of gross abuse of its discretion, would be conclusive. Until such satisfactory evidence of the matters of fact here under consideration is submitted by the applicant, there would seem to be neither reason nor occasion for investigation on the part of the board in respect thereto. If the board of examiners, after the submission of what, in an ordinary case, would be by it deemed satisfactory evidence of good moral character, successful teaching experience, etc., has reason to doubt the verity of a part or all of the evidence so submitted, occasion might then arise for investigation to enable the board to properly determine the sufficiency of the evidence before it in the particular case. It will be readily observed that a board of examiners in such case bears a relation to the applicant somewhat similar to that of a court to parties to an action.

I learn from personal interview with Mr. T. Howard Winters, of the department of public instruction, from whom the above inquiry primarily comes, that the "interested persons" therein referred to are, generally speaking, the applicants for certificates in reference to whom the investigations mentioned in the request are made.

While an examination fails to disclose express statutory authority for the state board of school examiners making investigations of the character above referred to, I am inclined to the view that where there is reasonable ground to doubt the truth of such evidence as has been submitted on behalf of an applicant on the matters of fact here under consideration, it would be entirely proper for the board to consider other evidence of a similar character to that required of the applicant upon the question and to secure such evidence by means most practicable and convenient. When such evidence is so secured by the board, your question then is, must the board of examiners disclose such evidence to the applicant. If the action of the board is adverse to the applicant and the evidence thus procured by such investigation tends to discredit that submitted by the applicant, certainly every principle of justice and fairness would demand that the applicant have full opportunity to meet such derogatory evidence—a palpable right wholly defeated if the nature and source thereof is concealed by those public officers, whose first duty is to deal fairly and openly in all matters affecting the rights of individuals. While it would certainly be within the power of the legislature to provide that the qualifications of teachers for certificates should be determined by the state board of school examiners by secret inquisitions, such a course is so contrary to our whole policy of the administration of public affairs that it is not believed that the same could be adopted in the absence of express statutory authority therefor, and in the absence of such express statutory provision it is hardly conceivable that it was the legislative intent that the rights of applicants for certificates should be determined upon information, the course of which they may not know, the nature of which they may not learn and the truth of which they may not question.

I am therefore of opinion, in answer to our inquiry, that where by means of questionnaires, or otherwise, evidence is obtained by the state board of school examiners relative to the moral character, professional experience and ability or to the period of successful teaching of an applicant for a certificate, upon which the board refuses to grant a certificate to an applicant as provided by said sections 7807-6 and 7807-7, G. C., all such evidence and the source thereof should be disclosed to the applicant that he may have full opportunity to meet the same.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1842.

MUNICIPAL COURT OF CLEVELAND—FEES—"SITTING AT TRIAL"—POLICE OFFICER OR BAILIFF—WITNESSES.

In civil causes of which courts or justices of the peace have jurisdiction in which a trial is had in the Municipal Court of Cleveland, a fee of one dollar for sitting in the trial of such cause may be taxed as costs.

In civil jury trials in which courts of justices of the peace have jurisdiction, in forcible detainer without a jury and in criminal trials in causes of which courts of justices of the peace have jurisdiction, a fee of one dollar may be taxed as costs for the attendance of a bailiff or deputy bailiff in the municipal court of Cleveland.

Witness fees may not be taxed in criminal cases for the attendance of police officers, police-detectives or bailiffs, as witnesses in the municipal court of Cleveland.

COLUMBUS, OHIO, August 11, 1916.

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

GENTLEMEN:—Yours under date of May 25, 1916, is as follows:

> "We would respectfully request your written opinion upon the following questions:
>
> "(1) In what event should $1.00 be taxed as a part of the costs of judge for 'sitting at trial'?
>
> "(2) In what event should $1.00 be taxed as a part of the costs of the police officer or bailiff attending trial?
>
> "(3) Is it legal in any event to tax a fee of 50 cents for attendance at the trial as a witness, or otherwise, of a police officer, detective, or bailiff?
>
> "P. S.—The above questions relate to the legal fees taxable in the municipal court of the city of Cleveland, Ohio."

The municipal court of Cleveland is established and conducted under the provisions of sections 1579-1 to 1579-54, G. C., as amended, 103 O. L., 682, and 106 O. L., 274. By section 1579-21, G. C., 103 O. L., 889, it is provided:

> "The judges or a judge of the court may summon and impanel jurors; tax costs; compel the attendance of witnesses, jurors and parties; issue process; preserve order; punish for contempt; and may exercise all powers which are now or may hereafter be conferred upon the court of common pleas or the judges thereof, or upon justices of the peace, or upon police courts of cities or the judges thereof necessary for the exercise of the jurisdiction herein conferred and for the enforcement of the judgments and orders of the court."

This provision confers upon the judges or a judge of the municipal court of Cleveland authority to tax costs but does not prescribe the costs to be so taxed.

Section 1579-47, G. C., 103 O. L., 695, provides as follows:

> "Except as otherwise provided for in this act, in actions and proceedings wherein the said municipal court has jurisdiction concurrent with a court of a justice of the peace, the fees and costs may be the

same and taxed in the same manner as is now, or may hereafter be provided for actions and proceedings heard and determined in a court of a justice of the peace. In other actions and proceedings the fees and costs may be the same and taxed in the same manner, as is now, or may hereafter be, provided for actions and proceedings heard and determined in the court of common pleas. In criminal proceedings all fees and costs may be the same as now fixed in the police court of said city. Provided, however, that the municipal court, in lieu of the aforesaid methods of taxing costs, by rule of court may establish a schedule of fees and costs to be taxed in all actions and proceedings, in no case to exceed fees and costs provided for like actions and proceedings by general law."

Except it be otherwise provided in the act in 103 O. L., 682, there may be taxed as fees and costs in the municipal court of Cleveland (1) in actions and proceedings wherein that court has concurrent jurisdiction with courts of justices of the peace the same fees and costs as may be taxed by justices in such cases; (2) in other actions and proceedings the same fees and costs as are authorized to be taxed in similar matters in the court of common pleas and (3) in all criminal proceedings the same fees and costs as are authorized in the police court of said city, provided that such municipal court has not by rule established a schedule of fees and costs to be taxed in all proceedings in no case in excess of the fees and costs provided in like actions and proceedings by general law.

Section 4580, G. C., prescribes the witness fees in police courts, and section 4581, G. C., provides as follows:

"Other fees in the police court shall be the same in state cases as are allowed in the probate court, or before justices of the peace, in like cases, and in cases for violation of ordinances such fees as the council, prescribes, not exceeding the fees for like services in state cases."

Section 1746, G. C., in so far as pertinent, provides:

"Except as otherwise provided, justices of the peace, for the services named, when rendered, may receive the following fees: * * * * * sitting in the trial of a cause, civil or criminal, where a defense is interposed, whether tried to the justice or to a jury, one dollar; * * * *."

It is assumed that this latter provision gives rise to your first question. Since the costs in the municipal court of the city of Cleveland in all criminal proceedings are limited by the provisions of section 1579-47, G. C., 103 O. L., 695, supra, to the fees and costs fixed in the police court of said city, the same are governed by the provision of section 4568, G. C., as follows:

"The judge of the police court shall receive no fees or perquisites, but shall receive such annual compensation, not to exceed two thousand dollars as the council may prescribe * * * * *."

This provision renders it conclusive that a judge of the municipal court of Cleveland may not receive the fee of one dollar for sitting in the trial of the cause as provided by section 1746, G. C., supra, in any criminal proceeding. It is provided, however, by section 1579-41, G. C., 106 O. L., 278, in which the powers and duties of the clerk of the municipal court of Cleveland are defined that:

"He shall receive and collect all costs, fines and penalties, and shall

pay therefrom annually six hundred dollars in quarterly installments to the trustees of the law library association as provided in division IV, chapter 1, of the General Code, and he shall pay the balance thereof quarterly to the treasurer of the city of Cleveland and take proper receipts therefor, but money deposited as security for costs shall be retained by him pending the litigation."

So that if the fee of one dollar for sitting in the trial of a cause prescribed by section 1746, G. C., supra, may be taxed as costs in any criminal proceeding, the same is required to be collected by the clerk and disposed of according to the above provision of section 1579-41, G. C.

I am inclined to the view, however, that the effect of the provision of section 4568, G. C., above quoted, is to eliminate from the costs in criminal cases in police courts the item of one dollar for sitting in the trial of a cause as provided by section 1746, G. C., supra, and that therefore the same is not required to be collected by the clerk in criminal cases.

The above inhibition against a police judge receiving fees is not applicable to the fee for sitting in the trial of a cause in a civil proceeding because, as will be noted, it is provided by section 1579-47, G. C., supra, that in civil proceedings in which the municipal court has concurrent jurisdiction with justices of the peace, costs may be taxed in the same manner as is provided for actions in courts of justice of the peace.

The one dollar item in question is by section 1746, G. C., a proper item of costs in the court of a justice of the peace, and it is therefore the duty of the clerk of the municipal court of Cleveland, in civil cases, to collect and make disposition thereof as provided by section 1579-41, G. C., 106 O. L., 278, supra.

Answering your first question specifically, I am of opinion that in civil cases of which courts of justices of the peace have jurisdiction, and in which a trial is had in the municipal court of Cleveland, a fee of one dollar for sitting in the trial may be taxed as costs, and should be collected and disposition thereof made according to the provisions of section 1579-41, G. C., supra.

Your second question, it is assumed, has reference to the provision of section 3347, G. C., as follows:

"For services rendered, duly elected and qualified constables shall be entitled to receive the following fees; * * * on each day's attendance before justice of the peace, or jury trial, one dollar; each day's attendance before justice of the peace on criminal trial, one dollar; on each day's attendance before justice of the peace in forcible detainer, without jury, one dollar; * * * * * *."

In the original enactment of this section, 62 O. L., 90, the word "or" in the above phrase "or jury trial" was "on," and should in my opinion be so interpreted here.

Section 1579-45, G. C., 106 O. L., 278, provides in part as follows:

"A bailiff and deputy bailiffs, shall be designated as hereinafter provided for in this act. They shall perform for the municipal court services similar to those usually performed by the sheriff for courts of common pleas and by the constable for courts of justice of the peace. The bailiff shall have power to approve all undertakings and bonds given in actions of replevin, all redelivery bonds in attachment, and all bail bonds given upon arrest before judgment. The bailiff shall receive such

compensation not less than three thousand six hundred dollars per annum and deputy bailiffs shall each receive such compensation not less than one thousand two hundred dollars, per annum, as the council may prescribe, payable in monthly installments, out of the treasury of the city of Cleveland. * * * * * *"

The bailiff and deputy bailiffs are here required to perform services similar to those performed by constables for courts of the justice of the peace, one of which services is to attend trial by jury before a justice and to attend before justice in forcible detainer without jury, and criminal trials for which a fee of one dollar is provided by section 3347, G. C., supra. It therefore follows that by force of section 1579-47, G. C., supra, in those civil cases in which a jury trial is had of which the court of a justice of the peace would have jurisdiction, and in forcible detainer without a jury and in criminal trials in causes of which courts of justices of the peace have jurisdiction, a fee of one dollar may be taxed as costs in said cause for the attendance of a bailiff or deputy bailiffs, and should be collected and disposition thereof made as provided in section 1579-41, G. C., supra.

As to your third inquiry, the statutory provisions hereinbefore referred to are subject to the special provisions of section 3024, G. C., as follows:

"No watchman or other police officer is entitled to witness fees in a cause prosecuted under a criminal law of the state, or an ordinance of a city, before a police judge or mayor of a city, justice of the peace, or other officer having jurisdiction of such cases."

The manifest purpose of the enactment of this section was that it serve as an inhibition against taxing as costs, in the cases mentioned, witness fees of those police officers whose official duty it is to enforce the law and to prosecute such cases, and who are at the same time being paid a compensation or salary for the discharge of such duties from public funds. In the light of such purpose of the above quoted statute, the term police officer would clearly include as well bailiffs of the municipal court of Cleveland and detectives who are in the police service of the city. It would not include detectives otherwise receiving compensation for their services in connection with the cause so prosecuted from the city or other public funds.

The above statutory provision has no application to witnesses in civil causes, and I am of opinion that when a police officer, detective or bailiff is subpoenaed or called as a witness in a civil cause in the municipal court of Cleveland, he is entitled to the same fees as other witnesses in like cases.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1843.

TAXES AND TAXATION—CONTRACT BETWEEN THE CLEVELAND RAILWAY COMPANY AND CLEVELAND, PAINESVILLE AND EASTERN RAILROAD COMPANY—EXCISE TAXES—GROSS EARNINGS FOR PURPOSE OF TAX.

A contract between an interurban railroad company and a local railroad company, whereby it is agreed that the latter will receive the cars of the former and so operate them upon its lines as to transport passengers and freight therein to a designated point in the city, and that passenger fares and freight charges earned in the city transit shall belong to the city company, at the expense and risk of which the city transit shall take place, differs from a contract of the kind subsisting between the interurban company and the local company in Cincinnati, Milford and Loveland Traction Company v. State, 94 O. S. Such a contract amounts to a joint traffic agreement, and payments made in pursuance thereof by the interurban company to the local company constitute merely a settlement and accounting for earnings belonging in the first instance to the local company; nor is a different character to be ascribed to rebate payments made under such contract by the local company to the interurban company on account of passenger earnings from city business originating on or going to points on the interurban line. Such payments, therefore, may be deducted from the total income of the interurban company or the city company, as the case may be, for the purpose of ascertaining its gross earnings as a basis of the computation of the public utility excise tax.

COLUMBUS, OHIO, August 11, 1916.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"In re Omitted Excise Taxes of The Cleveland Railway Company. P. U. No. 2247."

The above entitled claim, which has been certified to this department for collection, represents moneys paid by The Cleveland Railway Company to The Cleveland, Painesville and Eastern Railroad Company as a rebate on passenger fares and freight charges upon business originating on or going to points on the lines of the latter railroad, under contract between the two companies. This rebate was deducted by The Cleveland Railway Company from its statement of gross earnings made to the commission for the purpose of the apportionment of the public utility excise tax.

The question of law which is involved here is as to whether or not the case presented is governed by the decision of the supreme court in Cincinnati, Milford and Loveland Railway Company v. State of Ohio, 94 O. S., ——.

In the case cited, the decision hinged upon the interpretation to be given to a contract between The Cincinnati Traction Company and The Cincinnati, Milford and Loveland Railway Company, by virtue of which permission was given to the latter company to operate its cars for the transportation of passengers and freight over certain designated tracks of the former company.

As compensation for the privilege thus granted by the owner of the tracks and the city franchises, the interurban company, the user thereof, was to pay in the first instance a certain annual stipend, and in addition thereto was to pay a fixed sum for each passenger carried in its cars over said tracks; was to divide

freight earnings on the basis of freight car mileage, and was to make certain other payments and divisions of particular earnings, which it is not necessary to mention in this connection.

The court held that in its essence the contract was, as above stated, merely one for the use of property and facilities, as distinguished from one for the interchange of traffic; that, accordingly, whatever might be the form of any particular payment to be made by the interurban company to the local company, in pursuance thereof, all transactions referable to the contract were to be interpreted in the light of the relation of the parties thus generally described, and not regarded as joint enterprises, the income of which was merely being divided. On this ground the court distinguished the preceding case of State v. Coshocton Gas Company, 88 O. S., 608, wherein a contract between a local gas company and a producing or transporting gas company was, because of its particular terms and the situation of the parties, held to contemplate the transaction of a joint business, and the division between the parties of the receipts from or earnings of such joint business; so that, for the excise tax report purposes, only the share of one of the parties constituted its earnings.

It is apparent that the solution of the question raised by the claim above referred to must depend upon the relation of The Cleveland, Painesville and Eastern Railroad Company to The Cleveland Railway Company. Were the two companies, during the time to which the statement relates, engaged in a joint enterprise, in such manner and upon such terms and conditions as that particular earnings of such joint enterprise, though collected by one company, belonged in the first instance to the other; or, was the one company merely using facilities of the other company and paying therefor in such manner as might be agreed upon, so that the payments so made represented merely operating expenses of the payor, rather than the payee's share of the fruits of a joint undertaking? This question must be answered by examining the contract between the parties, for it is clear, upon consideration of the grounds upon which the two cases above cited were decided, that the mere fact that the cars of an interurban railway company may be operated over the tracks of a local street railway company, and that the interurban company may be making payments to such local company, or *vice versa*, is not conclusive.

Through the courtesy of the secretary of the Cleveland Railway Company, I have been permitted to examine copies of a general or main traffic agreement between The Cleveland Electric Railway Company and The Cleveland City Railway Company on the one hand, and a number of interurban railroad companies, including The Cleveland, Painesville and Eastern Railroad Company, on the other hand, entered into November 29th, 1897, and a separate contract between The Cleveland Electric Railway Company and The Cleveland, Painesville and Eastern Railroad Company, supplementary to said main contract and entered into on the same date. It appears that these contracts are still in force, although the obligations thereof have been assumed by different corporations. Thus The Cleveland Electric Railway Company and The Cleveland City Railway Company have, as I understand it, been merged into The Cleveland Railway Company, or at least the latter company has assumed the obligations of the other two companies. So also with respect to some of the interurban companies mentioned in the main agreement.

For the present purposes, the following provisions of the "general or main traffic agreement" may be quoted:

> "WHEREAS, It is desired by the parties hereto (to) so adjust their relations that the said city companies shall have the street railway business within the present or future limits of the city of Cleveland, ex-

cept as hereinafter provided, or points adjacent thereto to which they now carry passengers for a single fare, and that the said suburban companies shall have the suburban traffic over territory reached by their respective lines and territory naturally tributary thereto, up to the limits of said city, or to the present connecting points with said city companies, without interference with each other; and also to agree upon terms and conditions upon which said city companies may operate the cars of said suburban companies.

* * * * * * * * * * * *

"3. The general terms upon which said suburban cars shall be operated by the city companies are as follows:

"The city companies shall pay to the suburban companies, for cars delivered to and used upon the lines of the city companies, mileage at the rate of two cents per car-mile during the first two years of the existence of this contract.

* * * * * * * * * * * *

"Settlement for mileage shall be made monthly and payments for each month made on or before the 20th of the succeeding month.

"4. The city companies shall receive and be entitled to all fares collected from incoming and outgoing passengers from and to the points at which such cars are received and delivered by them, except as otherwise provided in special contracts between either of the city companies and any of the suburban companies, parties hereto, and the suburban companies shall receive and be entitled to all fares collected from passengers outside of such points.

"5. The net revenues received from freight, express, other sources than passenger traffic and U. S. mail, in earning, which the city and suburban companies participate, shall be apportioned between the two participating companies in proportion to the length of their respective hauls; the provisions of this section to remain in force for two years, and then to be subject to adjustment as is hereinbefore provided for an adjustment of car mileage; it being understood that the city companies are not required to haul anything but passengers in their own cars.

* * * * * * * * * * * *

"7. Each of the city companies shall be responsible for the cars received by it from the point at which they are received and until they are returned to the same point, and agrees to be responsible for all damages to persons or property occasioned in its operation of such cars, and to return the cars received by it at the point of delivery in as good condition as when received, wear and tear only excepted.

* * * * * * * * * * * *

"9. It is agreed that in all cases where baggage is carried by the suburban companies without charge, the city companies will carry the same baggage, in the suburban companies' cars, free of charge. It is mutually understood that the city companies shall not be required to transport more than 150 pounds of baggage for any passenger."

The following provisions of the separate contract between The Cleveland Electric Railway Company and The Cleveland, Painesville and Eastern Railroad Company are of interest:

"2. The first party shall take all cars tendered to it by second party at the junction of the lines of said parties, and shall, except as otherwise

mutually agreed, place upon said cars its own motormen and conductors, and operate said cars, at its sole expense and risk, and under its exclusive directions and control, over what is known as said first party's Euclid Avenue line, or such other line as the parties hereto may agree upon, to the Public Square, or other point in the city of Cleveland which may hereafter be mutually agreed upon, and return said cars over the same route, and deliver them to second party at said junction.

"3. Said first party shall be entitled to collect from all passengers on said cars, while in its possession, its regular rate of fare for operating its own cars over the same line.

* * * * * * * * * * * *

"7. Said first party agrees to pay a rebate to the second party of 25% of the gross receipts of the line in Euclid avenue between the easterly limits of the village of East Cleveland and its present terminus in Euclid hamlet collected from passengers who come from or go to points east of said terminus; the intention being that such rebate shall be made to the suburban company only upon business originating on or going to points on the suburban line."

There is also a contract between The Cleveland City Railway Company and The Cleveland, Painesville and Eastern Railroad Company, entered into on the date above named, which seems to be identical in terms with the contract between The Cleveland Electric Railway Company and The Cleveland, Painesville and Eastern Railroad Company.

The purport of the above quoted provisions of the main and supplemental contracts is plain and unmistakable. They witness a joint traffic agreement in the most exact sense of the term. The contract is such as might be entered into between any two connecting railroad companies. Under this contract the operation of the interurban cars within the limits of the franchise territory of the city companies is the act of the city companies. Instead of the local companies agreeing to permit the interurban companies to operate their cars over the local tracks, as in the Cincinnati case, the local companies agree to receive such cars and themselves to operate them over their own tracks. Moreover, there is no underlying payment for privileges conferred by the local company upon the interurban company, as in the Cincinnati case, and what may be referred to as the passenger payments, instead of being apportioned according to the number of passengers hauled, amounts to nothing more than that the local fare shall belong to the local company and that the fare representing suburban and interurban transit, i. e., what might be termed the ride outside of the city territory, is to belong to the interurban companies; so that if either company collects the whole through rate, it must account for the fare belonging to the other company, in its periodical settlements with the latter.

With respect to the division of freight earnings, it is to be observed that the same, together with express and like receipts, are to be divided between the local and the interurban companies "in proportion to the length of their respective hauls," instead of such earnings being apportioned on the basis of car-mileage, irrespective of the particular haul, as in the Cincinnati case.

In other words, the companies speak accurately in their contract of themselves as participating in the through freight rate, just as two commercial steam railroads, having connecting lines, would participate in such a through rate.

What has been said is, I think, sufficient to show that the relation between The Cleveland Railway Company and the interurbans, with which it has agreed in the above quoted main contract and special contracts like that with The

Cleveland, Painesville and Eastern Railroad Company, is that of connecting carriers under joint traffic arrangements. Thus it appears that any collection of revenue made by one company on account of the transportation of passengers, freight or express in a continuous journey over the lines of both companies, belongs in the first instance to both companies in the proportion in which, under the contract, they are respectively entitled to participate therein.

The precise question, of course, relates to the nature of the rebate payments made by the local company, The Cleveland Railway Company, as successor to the two local companies, parties to the original contracts to The Cleveland, Painesville and Eastern Railroad Company, under section 7 of the supplemental contract, as above quoted. In my opinion the character of these payments was fixed by the nature of the relation of the parties as hereinbefore described.

While this stipulation has the effect of calling for something more than a mere accounting for earnings belonging in the first instance to the respective parties to the joint traffic agreement, as their respective shares of joint rates, yet it does not destroy the nature of the relation established by the contract, which is that of participants in a joint enterprise. The undertaking being carried on for the benefit of both parties, the contract may, of course, further stipulate exactly as to what shall be the respective shares of each party in the fruits of the enterprise. While the simplest kind of a stipulation to this effect which could be imagined, would be one for the mere participation on the mileage basis, or some equivalent rule, in the through rate, yet it is competent for the parties to stipulate in addition for rebate of this character, without changing the nature of the agreement. Therefore, the rebate provided for by section 7 belongs, in my opinion, in the first instance to the interurban company, the same as its share of all joint rates participated in.

It follows, of course, that the claim against The Cleveland Railway Company is not covered by the decision in the Cincinnati, Milford and Loveland case, but that in a general way, at least, the principles of the Coshocton Gas Company case apply.

I am also just in receipt of a letter from the general manager of The Lake Shore Electric Railway Company, against which a claim (P. U. No. 2250) of a similar nature has been certified to this department for collection. My information is that The Lake Shore Electric Railway Company is the successor in interest of The Lorain and Cleveland Railway Company, which was a party to the general or main traffic agreement. I have seen a copy of a special or additional agreement between The Lorain and Cleveland Railway Company and the local companies, and between The Lake Shore Electric Railway Company and such local companies which is in all respects similar to that between The Cleveland, Painesville and Eastern Railroad Company and The Cleveland Electric Railway Company.

The manager of The Lake Shore Electric Railway Company states in his letter that of the claim certified to this department for collection against The Lake Shore Electric Railway Company, so much as represents taxes upon $12,-680.00, amounts paid to the Toledo local railway company, is conceded to be due from the company; but that the remainder, representing Cleveland payments, is, in the view which he takes, not collectible.

For the reasons above stated, the contention of the manager of The Lake Shore Electric Railway Company is, upon the facts as he represents them to be, correct. In fact, though the particular contracts should in all cases be examined, I have been assured that all arrangements made by The Cleveland Railway Company, or its predecessors, with interurban railroads, are of the same general character; whereas, all arrangements made by the local railway and light company in Toledo, with incoming interurban railroads, are of the character similar

to those made by The Cincinnati Traction Company with interurbans using its tracks. This would most likely be the case, because the local company in all such cases is in position virtually to dictate terms upon which it will permit the use of its tracks by the incoming interurban railroad, or enter into traffic arrangements with such railroad. Accordingly, it is quite usual for the local company to have a stereotyped form of contract which it imposes upon the interurban company which desires to make terms with it.

Upon the principles above laid down, I advise and recommend that the claim against The Cleveland Railway Company, P. U. No. 2247, be settled and compromised by the cancellation of the entire amount certified for collection; and that the claim against The Lake Shore Electric Railway Company, P. U. No. 2250, be settled and compromised upon the basis above referred to, viz., the payments made to The Cleveland Railway Company are to be deducted from the amount on which the omitted tax certified for collection is based and the amount of the claim be reduced accordingly, and payment accepted upon that basis. I assume that the commission is able from its files to verify the statement of the general manager of The Lake Shore Electric Railway Company to the effect that the sum of $12,680.00 represents Toledo payments. My recommendation goes to the basis of settlement and not to the exact amount thereof.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1844.

MUNICIPAL CORPORATION—COUNCIL—AUTHORIZED TO LEVY FOR FUNDS TO CARE FOR INDIGENT SICK OF CITY—WITHOUT AUTHORITY TO LEVY TAX FOR PAYMENT OF LOSSES SUSTAINED BY HOSPITALS BY REASON OF CONTRACT BETWEEN CITY AND HOSPITALS —SECTION 4021, G. C., CONSTRUED—CITY OF YOUNGSTOWN.

The city council, while authorized under the provisions of section 4021, *G. C,. to levy a tax for the purpose of raising funds for the care of indigent sick of the city, is without authority to levy such tax for the payment of losses sustained by hospitals in previous years under the operation of a contract with the city which provides for the payment to the various hospitals, parties to the contract, of a proportionate share of the sum raised by taxation under section* 4021, *G. C.*

Whether or not a moral obligation exists on the part of the city to reimburse the hospitals for such losses, is debatable; but if it be assumed and admitted by the city that such moral obligation exists, and under such assumption the proceeds of the tax levy are paid to the hospitals, no recovery back of the money thus paid could be made.

A contract made between the city and the hospitals, to provide for the care of the sick under the provisions of section 4021 *would be subject to modification, and if under its modified form moneys were raised by taxation, to take care of anticipated losses in future years, such moneys could legally be paid to the hospitals. Amounts levied and collected under the provisions of section* 4021, *G. C., to pay losses sustained by hospitals under a contract covering service for past years, are the proceeds of a special tax in the treasury, and there being no authority for their expenditure, they should, under the provisions of section* 5654, *G. C., be transferred to the sinking fund of the city.*

COLUMBUS, OHIO, August 11, 1916.

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

GENTLEMEN:—Your request for an opinion is as follows:

"We would respectfully request your written opinion upon the following questions:

"On January 1, 1912, a contract became effective between the city of Youngstown and the Youngstown City Hospital and St. Elizabeth Hospital whereby said hospitals agreed, 'To render medical and surgical attention, to furnish board and nursing to the city poor for the consideration of a just proportion of the funds appropriated by city council for hospital purposes * * *. To accept in full compensation for the services to be rendered our proportionate part of the moneys appropriated by council for this purpose in the following proportion and manner; that each hospital receive such proportion of the money so appropriated by council for this purpose as the number of hospital days' treatment by each hospital shall bear to the total number of days of hospital treatment rendered by all, it being mutually understood and agreed that the board of health shall distribute patients in such a manner that the number of hospital days shall be as nearly equal as possible for each hospital, equalization being effected each quarter.'

"November 30, 1914, council passed an ordinance to the effect that

said hospitals had submitted claims, alleged losses in caring for the indigent sick in the years 1912, 1913, 1914 and estimated for 1915 in the amount of $80,622.00 under the terms of the aforesaid contract, and that said amount be included in the 1916 tax budget, said amount to be in addition to the amount required to care for the indigent sick during said year 1916.

"Said amount of $80,622.00 was included in said tax budget, and a mill levy sufficient to produce approximately said amount was incorporated in the municipal tax rate for 1916.

"*Question* 1: Was the action taken by council on November 30, 1914, to provide for losses alleged to have been sustained under said contract of January 1, 1912, legal?

"*Question* 2: If not legal, should the city auditor refuse payment of said tax money to said hospitals?

"*Question* 3: Could said funds be used to pay bills for care of indigent sick incurred since January 1, 1916, when a new contract became effective between the city and the hospitals?"

In addition to your letter, I have before me the copies of the ordinances passed by the city council of Youngstown, Ohio, which you have furnished at my request.

It appears that on November 27th, 1911, the council of the city of Youngstown passed an ordinance wherein they accepted a proposal made by several private charitable hospitals of the city, among which were the Youngstown City Hospital Association and St. Elizabeth's Hospital, the ordinance having for its purpose the securing of medical and surgical attention, boarding and nursing of the indigent poor of the city of Youngstown.

By the terms of the agreement created by the proposal and acceptance, the two hospitals above mentioned contracted to "accept in full compensation for the services to be rendered our proportionate part of the monies appropriated by council for this purpose in the following proportion and manner, to wit":

"We agree to render medical and surgical attention, to furnish board and nursing to the 'city poor,' for the consideration of a just proportion of the funds appropriated by city council for hospital purposes, upon the following conditions:",

the conditions being as to the residence of the applicant for admission, certification by a practicing physician as to the condition of such applicant, emergency cases, etc.

The arrangement went into effect January 1st, 1912, and continued without interruption or protest, so far as my information goes, until the city council on November 30th, 1914, passed an ordinance as follows:

"Providing a method for determining the amount of money to be raised for hospital purposes in the year 1916 and succeeding years, and for making compensation for the work done by the Youngstown Hospital Association and St. Elizabeth's Hospital under a method provided by the ordinance of November 24th, 1911, the cost of which has exceeded the appropriations made by council to said hospitals for said work.

"WHEREAS, Under the laws of the 28th day of March, 1898, council is authorized to levy and collect a tax not exceeding one mill and

pay the amount so collected to private hospitals which furnish free care to the indigent sick of such municipality; and

"WHEREAS, Under the terms of said statute an arrangement was made by an ordinance dated November 24th, 1911, to levy a sufficient amount of money to pay to The Youngstown Hospital Association and St. Elizabeth's Hospital an amount of money to be equal to the cost of caring for the indigent sick of Youngstown; and

"WHEREAS, The work done by said hospitals in caring for the sick of this municipality, sent to said hospitals by the municipal authorities of the city of Youngstown, has exceeded the amounts so levied and collected during the years 1912, 1913 and 1914, and on account of the present depression in business, an abnormal amount of work will be sent to said hospitals for 1915, and the value of said work will greatly exceed the amount provided for the year 1915, said losses for said years 1912, 1913 and 1914 amounting to thirty-nine thousand, five hundred forty dollars and forty-four cents ($39,540.44) on the part of the Youngstown Hospital Association, and nineteen thousand, eight hundred fourteen dollars and seventy-six cents ($19,814.76) on the part of St. Elizabeth's Hospital, and the loss anticipated for the year 1915 will be twenty-one thousand, two hundred and sixty-six dollars and seventy cents ($21,266.70), making a total of eighty thousand, six hundred twenty-two ($80,622.00) dollars.

"Now, therefore, in order to provide a method for computing the cost of such services in future, and in order to provide compensation to said hospitals for their losses during the years 1912, 1913, 1914 and the anticipated loss during the year 1915;

"Be it ordained by the council of the city of Youngstown, state of Ohio:

"First. That in order to determine the amount of money to be raised for hospital purposes in future years, the cost thereof shall be determined by an examination of the accounts of said hospital by the hospital committee and finance committee of council and a computation of the expected increase for the coming year, and the levy for such year shall be based upon the cost so determined.

"Second. That in order to reimburse said hospitals for losses sustained since January 1st, 1912, that the amount of eighty thousand, six hundred twenty-two dollars ($80,622.00) be levied in the budget of 1916, in addition to the amount provided for the care of the sick for said year, as provided for in section one, and that the total amount of money so determined for hospital purposes for the year 1916 shall be the total of the two amounts so determined.

"Third. That as early as possible after the first day of January, 1915, the hospital committee and finance committee of council shall meet with the proper officials of The Youngstown Hospital Association and St. Elizabeth's Hospital and determine a method for designating the persons who are to receive municipal relief at such hospitals, and shall further provide a method of determining the cost of such services, and a method of estimating the amount of services to be given by said hospitals during the coming year, and the amount so determined shall be reported to council and included in the budget in 1916, and the method so determined shall be followed in future years.

"This ordinance shall take effect and be in force from and after the earliest period allowed by law."

No complaint is made that the city council failed to appropriate, during the years 1912, 1913 and 1914, as much for the care of the indigent sick of the city as the hospitals anticipated and expected when they submitted their proposal which was accepted by the ordinance of November 27th, 1911; nor is any claim made by the hospitals, or any one else, that the cost and expense of caring for the indigent sick of the city was greater during those years than was anticipated, by reason of epidemic or other unusual and unforeseen conditions.

From the facts presented, it appears that the hospitals made an unfortunate agreement, under which they suffered heavy loss, and the city council, by its action, has indicated that the city should assume and bear the burdens of the loss and reimburse the hospitals accordingly.

Concerning the losses suffered by these two hospitals during the years 1912, 1913 and 1914, amounting in the aggregate to $59,355.20, I call your attention to an opinion of my predecessor, dated January 7th, 1915, addressed to Honorable George J. Carew, city solicitor, Youngstown, Ohio, to be found at page 1775, volume 2, 1914 report of the attorney-general, wherein substantially this same question was presented. In that opinion the city solicitor was advised that the city of Youngstown was under no legal obligation to reimburse said hospitals for the losses sustained by them during previous years, under their contract of November 27th, 1911, to treat and care for the indigent sick of the city, and further that the city council was without authority to borrow money under section 3916, of the General Code, to reimburse for such losses.

I concur in the opinion of my predecessor and believe that the reasoning and principles upon which that opinion was based are here applicable, as the situation is in nowise changed, except that council has levied and, apparently without opposition or protest, collected a tax for the express purpose of reimbursing said hospitals.

Assuming that the city of Youngstown is under a moral obligation to reimburse these hospitals, which under the facts presented is debatable, the fact that a tax has been levied and collected is not sufficient to transform a moral obligation to a legal obligation, nor is the liability of the city any greater now than before.

Section 4021, of the General Code, under which the tax levy in question was made, is as follows:

> "The council of each municipality, annually, may levy and collect a tax not to exceed one mill on each dollar of the taxable property of the municipality and pay the amount to a private corporation or association which maintains and furnishes a free public hospital for the benefit of the inhabitants of the municipality, or not free except to such inhabitants of the municipality as in the opinion of a majority of the trustees of such hospital are unable to pay. Such payment shall be as and for compensation for the use and maintenance of such hospital. Without change or interference in the organization of such corporation or association, the council shall require the treasurer thereof, annually, to make a financial report setting forth all of the money and property which has come into its hands during the preceding year and the disposition thereof, together with any recommendations as to its future necessities."

While under the section just quoted a municipality is authorized to levy a tax to secure funds with which to care for the indigent sick, there is no authority therein contained for the raising of funds for the purpose of discharging a supposed or alleged moral obligation arising from an executed contract

to care for such indigent sick. Although the money realized from the tax levy is in the treasury, the payment of the same to the hospitals may be enjoined, because there is no authority of law for its payment.

As before stated, the question as to whether there is a moral obligation on the part of the city to reimburse the hospitals for the losses sustained is doubtful. If the facts should disclose that the losses suffered were due to an unexpected number of patients treated and cared for, or to unreasonably small appropriations made by council, and it should be determined that a moral obligation to reimburse the said hospitals exists, then under the doctrine laid down in the State ex rel. v. Fronizer et al., 77 O. S. 7, there could be no recovery back from the hospital, if the proceeds of the tax levy were paid to said hospitals in settlement of the moral obligation as such.

Concerning that portion of the tax levy amounting to $21,266.70, provided in the ordinance of the 30th day of November, 1914, supra, for anticipated losses during the year 1915, it is to be observed that the raising of that amount and the payment of the same to the hospitals was legally authorized under the principle that the parties to the original contract, made November 27th, 1911, were competent to change or modify the contract and provide for compensation on the basis of a different or a higher rate. Force is given to this position by reason of the fact that the contract of November 27, 1911, was not executed for any definite period of time, but from its terms it must be assumed that it was expected to continue until terminated by some positive act of the parties. either by abrogation or modification.

In volume 2 on Municipal Corporations, section 820, with reference to modification of contracts, Dillon says:

> "A city or other municipal corporation, having the power to make a contract, can deal with the contract in the same manner as if it were a natural person, and may, in the absence of statutory limitation upon its powers or conformably with such limitation, *change, modify it or cancel* it in the same manner as it might originally contract, but the modification must be made by *officers of the municipality* having *authority* to act in that respect. If the officers are without authority, the modification is not binding on the municipality. But the *assent* of a municipal corporation to the *variation or modification* of a *contract* need not necessarily be expressed by the formal action or resolution of the common council; it may be *implied from acts* relating to the contract work subsequent to the date of the contract."

Again, at section 821, Dillon says:

> "If it has obtained a contract which by mistake or a change of circumstances it deems to operate oppressively upon the other party, an agreement to make an additional compensation or to modify or annul it is not, in the absence of special restriction, invalid for want of consideration."

Specifically answering your questions, I have to advise:

First. That the action of the city council on November 30th, 1914, to provide for losses sustained by the hospitals referred to during the years 1912, 1913 and 1914, was unauthorized, and payments to the hospitals of the funds raised by taxation under the ordinance may be enjoined. If no action is taken to prevent such payment, and the city officers, having custody of the moneys raised by said tax levy, elect to and do make payment thereof, assuming the ex-

istence of a moral obligation, no recovery back can be made from said hospitals. The action of the city council on November 30th, 1914, to provide for anticipated losses during the year 1915 was a valid exercise of its authority under section 4021 of the General Code.

Second. The city auditor should refuse payment of the amounts levied for the years 1912, 1913 and 1914, in so far as they relate to the reimbursement for losses sustained in previous years, but should permit payment of the amount levied to anticipate losses during the year 1915.

Third. The amounts levied and collected to pay losses for the years 1912, 1913 and 1914 are the proceeds of a special tax in the treasury, and, in the absence of an existing moral obligation to pay over said funds, there being no authority for their expenditure, the same should be transferred to the board of trustees of the sinking fund of the city, under the provisions of section 5654, of the General Code, as amended, 103 Ohio Laws page 521, as follows:

> "Sec. 5654. The proceeds of a special tax, loan or bond issue shall not be used for any other purpose than that for which the same was levied, issued or made, except as herein provided. When there is in the treasury of any city, village, county, township or school district a surplus of the proceeds of a special tax or of the proceeds of a loan or bond issue which cannot be used, or which is not needed for the purpose for which the tax was levied, or the loan made, or the bonds issued, all of such surplus shall be transferred immediately by the officer, board or council having charge of such surplus, to the sinking fund of such city, village, county, township or school district, and thereafter shall be subject to the uses of such sinking fund."

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1845.

MAUMEE VALLEY PIONEER AND HISTORICAL ASSOCIATION—ABSTRACT OF TITLE FOR PURCHASE OF REAL ESTATE FOR SAID ASSOCIATION, APPROVED.

COLUMBUS, OHIO, August 12, 1916.

Hon. W. H. Rheinfrank, Secretary Fort Meigs Memorial Commission, Perrysburg, Ohio.

DEAR SIR:—Some time since you submitted to me for examination an abstract of title to the following described real estate, to wit:

> "A part of River Tract No. sixty-six (66), in Perrysburg township, Wood county, Ohio, more particularly described as follows, to wit: Beginning at a point in the west line of said River Track 66, where said west line crosses the center line of the river road so called (said river road being a southwesterly extension or continuation of Front street in the village of Perrysburg), thence north along the west line of said River Tract 66, 490 feet to a point; thence south 74° 15′ east 661 feet to a point in the center line of the river road, so-called, at the western extremity of a culvert; thence south 6° 30′ east 275.2 feet to a point; thence south 1° 00′ west 132 feet to a point; thence south 75° 00′ west 707.9 feet to a point in the west line of said River Tract 66; thence north along said west line 292.5 feet to the place of beginning, containing 8.55 acres of land, more or less."

I have carefully examined the abstract of title, and while—as shown by said abstract—there are some minor defects in the title I am of the opinion that lapse of time has cured them.

As the property now stands in the name of The Maumee Valley Pioneer and Historical Association of Ohio, no taxes are chargeable against same.

The abstract of title is enclosed herewith. Respectfully,

EDWARD C. TURNER,
Attorney-General.

1846.

COLLATERAL INHERITANCE TAX—ESTATE FOR LIFE OF ANOTHER—ESTATE IN REMAINDER—WHEN TAXABLE.

Where a person, other than those having the relation to the testator mentioned in section 5331, *G. C.*, 103 *O. L.*, 463, *and who by the provision of said section are exempt from the collateral inheritance tax therein provided takes, by the terms of the will of such testator, an estate for the life of another and also an estate in remainder, both of said estates are subject to said collateral inheritance tax.*

COLUMBUS, OHIO, August 12, 1916.

HON. JOHN V. CAMPBELL, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—Your letter of July 21st is as follows:

"We beg to request your opinion in a collateral inheritance tax matter in re estate of Charles H. Albrecht. The provisions of the last will and testament of said decedent affecting the question propounded are as follows:

" 'Item 3. All the rest and residue of my estate, real and personal, I give, devise and bequeath to my executors hereinafter named, in trust to have, hold, manage and control for and during the natural life of my wife Hermine F. Albrecht, with full power and authority to sell, transfer, mortgage, lease, or otherwise to convey and incumber all or any part of my estate, publicly or privately and without any order of court and to invest and reinvest the proceeds according to their discretion.

" 'During the continuance of said trust my trustees shall pay the net income of said estate one-third to my wife, Hermine F. Albrecht, and of the remaining two-thirds one equal part to my son, Carl H. Albrecht, one equal part to my daughter, Hulda E. Albrecht, and one equal part in equal shares to my son, Robert A. Albrecht and his wife Maria Albrecht, or to the survivor of them.

" 'Item 4. At the death of my wife, Hermine F. Albrecht, said trust shall terminate, and my said trustees shall convey, transfer, pay over and distribute all of my property in three equal shares absolutely and in fee simple as follows:

" 'One share to my son Carl.

" 'One share to my daughter Hulda.

" 'One share to my son Robert A. and his wife.'

"You will observe that under item 3 Maria Albrecht, the wife of Robert A. Albrecht, is taxable, she receiving one-ninth of the income of said estate during the life of Hermine F. Albrecht.

"In addition thereto, under item 4, she receives either one-ninth

or two-ninths of the corpus of the estate in remainder, the quantum of her interest in remainder depending upon the existence or non-existence of her husband Robert at the expiration of the life estate in said Hermine F. Albrecht.

"We contend that the state is entitled to the percentum tax on the present worth of the income bequeathed to the taxable person for the life of Hermine F. Albrecht, and that upon the death of Hermine F. Albrecht, the state is entitled to its percentum tax upon the value of the remainder devised to the taxable person, be the same one-ninth or two-ninths thereof.

"The counsel for the estate are contending that we cannot tax the income now and the corpus later, or rather that we cannot tax the value of the income and the corpus from which said income is derived, that if our position be correct, the taxable person would be doubly taxed."

Section 5331, G. C. (103 O. L., 463), provides:

"All property within the jurisdiction of this state, and any interests therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which pass by will or by the intestate laws of this state, or by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor, to a person in trust, or otherwise, other than to or for the use of the father, mother, husband, wife, lineal descendant, or adopted child, shall be liable to a tax of five per cent. of its value above the sum of five hundred dollars. Fifty per cent. of such tax shall be for the use of the state; and fifty per cent. of such tax shall go to the city, village or township in which said tax originates. All administrators, executors and trustees, and any such grantee under a conveyance made during the grantor's life, shall be liable for all such taxes, with lawful interest as hereinafter provided, until they have been paid, as hereinafter directed. Such taxes shall become due and payable immediately upon the death of the decedent and shall at once become a lien upon the property, and be and remain a lien until paid."

Section 5333, G. C. (103 O. L., 463), provides:

"When a person bequeaths or devises property to or for the use of father, mother, husband, wife, lineal descendant, or adopted child, during life or for a term of years, and the remainder to a collateral heir, or to a stranger to the blood, the value of the prior estate shall be appraised, within sixty days after the death of the testator, in the manner hereinafter provided, and deducted, together with the sum of five hundred dollars, from the appraised value of such property."

In view of the foregoing provisions of the statutes read in connection with the provisions of Items 3 and 4 of the will of the said Charles H. Albrecht, deceased, it is evident: First, that the life estate of Hermine F. Albrecht, widow of said testator, and the respective estates, *per autre vie* of Carl H., Hulda E. and Robert A. Albrecht are exempt from the tax prescribed by said section 5331, G. C., while the estate of Maria Albrecht, the duration of which is measured by the life of said Hermine F. Albrecht, is taxable if it can be said that said estate is an "interest" in the property of the said Charles H. Albrecht, deceased, within the meaning of that term as used in the first part of said section 5331, G. C.; second, that the respective estates in remainder of the said Carl H., Hulda E,

and Robert A. Albrecht are exempt from said tax while the estate in remainder of the said Maria Albrecht is subject to said tax.

By provision of the latter part of section 5331, G. C., the taxes on the respective estates of the said Maria Albrecht become due and payable *immediately* upon the death of the said Charles H. Albrecht, and at once become a lien upon said property, and will remain a lien until paid.

I do not think that the contention of counsel for the estate, as set forth in your letter, is justified in view of the above provisions of the statutes taken in connection with the provisions of section 5343, G. C., for the reason that in determining the estate in remainder for the purpose of estimating the collateral inheritance tax the value of the life estate must be deducted from the appraised value of the entire estate as found in the manner provided by section 5343, G. C., which reads as follows:

> "The value of such property, subject to said tax, shall be its actual market value as found by the probate court. If the state, through the prosecuting attorney of the proper county, or any person interested in the succession to the property, applies to the court, it shall appoint three disinterested persons, who, being first sworn, shall view and appraise such property at its actual market value for the purposes of this tax, and make return thereof to the court. The return may be accepted by the court in a like manner as the original inventory of the estate is accepted, and if so accepted, it shall be binding upon the person by whom this tax is to be paid, and upon the state. The fees of the appraisers shall be fixed by the probate judge and paid out of the county treasury upon the warrant of the county auditor. In case of an annuity or life estate, the value thereof shall be determined by the so-called actuaries' combined experience tables and five per cent. compound interest."

Numerous authorities may be cited in support of the proposition that the life tenant or the tenant for the life of another, not expressly exempted by the statute, is subject to the tax as a legatee, except possibly in the case of a contingent life estate. See in re Wolfe, 48 Ohio Weekly Law Bull. 211; Fitzgerald v. Rhode Island Hospital Trust Co., 24 R. I. 59; in re Cager, 111 N. Y. 343.

In the case of Westhus v. St. Louis Union Trust Co., 164 Fed. 795, it was held that where a testator died in December, 1901, bequeathing certain property in trust to pay the income to the son for life, the life estate of the son became vested on the death of the testator and was therefore subject to the inheritance tax. In this case, of course, the son was not in the class exempted by provision of the statute from the inheritance tax.

In the case of State v. Probate Court, 112 Minn. 279, it was held that when the testator gives the beneficial use of his property for a limited time to one person, after which the corpus of the estate goes to another, the right of each legatee is subject to taxation, and the fact that both bequests are to the same individual will not change the result. It was further observed by the court that "to hold otherwise would defeat the entire purpose of the statute, which can only be given effect by insisting that when the amount actually paid exists the exemption and tax based on that amount is then due."

On the question of the taxability of a contingent life estate it was held by the court in the case of in re Eldridge, 62 N. Y. Supp. 1026 that "where a devise is made to two for life and to the survivor of M, the remainder to the surviving children of M, and the remainder in fee to the children of A and W, if they have issue, the life estates of the first takers are alone taxable, since it is impossible to tell which of the children of M will take the second life estate;

nor can it be known into what number of shares the estate in remainder will be divided."

It will not be contended that a vested remainder is not subject to the collateral inheritance tax under the provisions of said section 5331, G. C., and in view of the foregoing authorities it seems clear to my mind that the respective estates of the said Maria Albrecht are taxable unless it can be said that a part of her estate in remainder is contingent, the amount of which cannot at this time be determined.

I am unable to concur with you in holding that, in so far as the estate in remainder of the said Maria Albrecht is concerned, any part of said estate is contingent. By the terms of Item 3 of said will, as above quoted, Robert A. and Maria Albrecht are each entitled to one-ninth of the net income of the estate during the life of Hermine F. Albrecht and, assuming that the expectancy of the life of Robert A. Albrecht is greater than that of Hermine F. Albrecht, the interest of the said Maria Albrecht in the net income of the estate during the life of the said Hermine F. Albrecht is limited to such fractional part of said net income. By the terms of Item 4 of said will the said Robert A. Albrecht and the said Maria Albrecht each has a vested undivided half interest in one-third of the entire estate in remainder.

The vested interest of the said Robert A. Albrecht in said estate in remainder may be disposed of by him during his life, or he may dispose of it by will, or if he is the owner of said vested remainder at the time of his death and dies intestate, the said interest in said estate will descend under the intestate laws of the state.

It cannot be said, therefore, that Maria Albrecht has an "interest" in the estate in remainder of her husband Robert A. Albrecht within the meaning of said term as used in the first part of section 5331, G. C., which would be subject to the collateral inheritance tax.

If not already ascertained, the value of the entire estate as well as the estate for the life of the said Hermine F. Albrecht, should be determined in compliance with the requirements of the foregoing provisions of the statutes and in the manner therein prescribed. I am enclosing copy of opinion No. 1269, of this department, rendered to Hon. George Thornburg, prosecuting attorney of Belmont county, under date of February 14, 1916, which will be of some assistance to you in determining the estate for the life of the said Hermine F. Albrecht.

It was held by my predecessor, Hon. Timothy S. Hogan, in an opinion found in the Annual Report of the Attorney General for the year 1914, at page 815, of said report, that the way to ascertain the value of a vested future estate dependent upon a prior taxable estate under the collateral inheritance tax law is to ascertain the value of the prior estate and to take that value together with the sum of five hundred dollars from the appraised value of the whole estate i. e., the whole inheritance subject to taxation.

The reasoning offered by Mr. Hogan in support of this conclusion is as follows:

> "It is clear, of course, that this statute does not, in terms, govern the ascertainment of the value of a subsequent estate save when the prior estate is not taxable. However, in Dow v. Abbott, 197 Mass., 283, under statutes, in this respect identical with those of Ohio, the supreme judicial court of Massachusetts held that the section corresponding to section 5333, as amended, should be applied in a case like that stated by you (similar to the one under consideration). In the language of Rugg, J., 'the statute makes no specific provision for a case exactly like this, but

the valuation can be ascertained according to the method pointed out in R. L. c. 15, section 2 * * * for analogous cases,' (the statute referred to being the one which corresponds to section 5333, General Code, and the case before the court being one in which the prior and ultimate estate were subject to taxation).

"I can find no other authorities upon the question. Under similar statutes the supreme court of Illinois holds that a section corresponding to section 5333, General Code, should be strictly construed. (In re Kingman, 220 Ill., 563.) Such a strict construction would, of course, lead to a result opposite to that indicated by the Massachusetts decision above cited, and would support the view that the actual present value of the subsequent estate should be ascertained in the way pointed out in In re Estate of Dow, supra. However, the Illinois decisions are not on the exact point, and for various reasons I have come to the conclusion that the Massachusetts rule should be followed in Ohio.

"Among the reasons which have led me to adopt this conclusion, I may state that the Ohio statute makes specific provision for the computation of future values of annuities and life estates (section 5353, of the General Code), the provision being that such computation shall be at five per cent. compound interest. There is no like provision for computing present worth of vested estates to be enjoyed *in futuro*. It does not seem possible to me that the legislature would have adopted the statutory rate and method of computation above referred to, had it not been intended that the same rate and method, if applicable at all, should be used in computing present worth. We are thus forced to the conclusion that in order to make the statute harmonious, the analogy of either section 5353, or that of section 5343, or that of both, must be applied to a case which neither one of them covers, viz.: the ascertainment of the value of a future estate dependent upon the value of a life estate which is taxable. That is to say, if neither statute controls, we have no statutory rate of interest for the computation of present worth, and it seems unlikely that the legislature intended a different rate of interest to be used in computing present worth from that which it has prescribed for the valuation of life estates and annuities; and if section 5343 be held applicable, it is equally as reasonable to hold section 5333, as amended, applicable."

I concur in the reasoning given in support of the conclusion expressed by my predecessor, as above set forth, as to the proper interpretation of the statutes hereinbefore referred to governing the determination of the estate in remainder in the case where the life estate is subject to the collateral inheritance tax.

Answering your question, I am of the opinion that the "interest" of the said Maria Albrecht in the estate of the said Charles H. Albrecht, deceased, which, under the provisions of section 5331, G. C., is subject to the collateral inheritance tax, is to be determined by adding to one-ninth of the estimated present worth of the net income from said estate for the life of the said Hermine F. Albrecht, one-sixth of the value of the entire estate in remainder, determined in the manner hereinbefore mentioned, and deducting from said sum the sum of $500.00 exempted by provision of the latter part of said section 5331, G. C.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1847.

BOARD OF EDUCATION—WHEN VILLAGE SCHOOL DISTRICT HAS TAX VALUATION OF LESS THAN $500,000, BOARD SHOULD SUBMIT TO ELECTORS QUESTION OF REORGANIZING OR DISSOLVING SUCH DISTRICT—SECTIONS 4681, 4682 AND 4682-1, G. C., CONSTRUED.

When a village school district has a tax valuation of less than $500,000, *as required by section* 4681, *G. C., its board of education should submit to its electors the question of reorganizing such district, as provided by section* 4682, *G. C., or of dissolving such district and joining some contiguous territory as provided by section* 4682-1, *G. C.*

COLUMBUS, OHIO, August 12, 1916.

HON. S. W. ENNIS, *Prosecuting Attorney, Paulding, Ohio.*

DEAR SIR:—I have your letter of recent date submitting the following statement and inquiry:

"Cecil village school district, Paulding county, Ohio, has a tax valuation of $336,510, and the board of education thereof still continues to act and perform all the duties of a legally constituted board of education of a village school district.

"In accordance with the provisions of section 4682 of the General Code of Ohio, does a village school district, which has a tax valuation of less than $500,000, legally exist as a village school district, and if they refuse and neglect to call an election under the provisions of said statute, does such village school district automatically become a part of the rural school district of the same township whose territory is contiguous thereto.

"I wish you would please pass an opinion upon the above matter as early as possible. It has become necessary to build a new school house in said district by reason of the old one being condemned, and the village board, if such can be done, desires to relinquish their right as a village school district, and become a part of the rural school district, and if your opinion sustains my views on this question, that when the village school district has a less valuation than $500,000, it becomes a part of the rural school district, and if that is the case, the rural district will proceed at once to erect a new school building to replace the one condemned."

Your foregoing inquiry involves a consideration of sections 4681 and 4682, G. C., as amended 103 O. L. 545, and section 4682-1, G. C., as amended 104 O. L. 133. It may be observed that prior to the amendment of the sections aforesaid, as found in 103 O. L., 545, the minimum total tax valuation of the property of a village school district was $100.000. As amended in 103 O. L., 545, the foregoing sections provide as follows:

"Sec. 4681. Each village, together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, and having in the district thus formed a total tax valuation of not less than five hundred thousand dollars, shall constitute a village school district.

"Sec. 4682. A village, together with the territory attached to it for

school purposes, and excluding the territory within its corporate limits detached for school purposes, with a tax valuation of less than five hundred thousand dollars, shall not constitute a village school district, but the proposition to organize the territory thus formed into a village school district may be submitted by the board of education, and shall be submitted by the board of education upon the presentation to it of a written petition for such purpose signed by 25 per cent. of the electors of the territory thus formed, to a vote of the electors of the territory thus formed at any general or a special election called for that purpose, and be so determined by a majority vote of such electors.

"Sec. 4682-1. A village school district organized as a village school district at the time of the passage of this act, or that may be hereafter organized, which has a total tax valuation of less than five hundred thousand dollars, shall continue as a village school district, but the proposition to dissolve such village school district may be submitted by the board of education, and shall be submitted by the board of education upon the presentation to it of a written petition for such purpose signed by 25 per cent. of the electors of such village school district, to a vote of the electors of such village school district at any general or a special election called for that purpose, and be so determined by a majority vote of such electors."

It will be observed that after the amendment of the sections as aforesaid, a village district was required to have a tax valuation of not less than $500,000, but where prior to said amendment a village school district has been organized under the limitation of $100,000, as provided by the prior statute, such village district was permitted to continue with the right to dissolve upon a vote of the electors thereof ordered either by the board of education upon its own motion or by said board upon the presentation of a written petition for that purpose signed by 25 per cent. of the electors of said district. The amendment of said section 4682-1, G. C., 104 O. L., 133, left said section as follows:

"A village school district containing a population of less than fifteen hundred may vote at any general or special election to dissolve and join any contiguous rural district. After approval by the county board such proposition shall be submitted to the electors by the village board of education on the petition of one-fourth of the electors of such village school district or the village board may submit the proposition on its own motion and the result shall be determined by a majority vote of such electors."

By reason of said amendment of said section 4682-1, G. C., the right of a village school district with a tax valuation of less than $500,000 to continue as such district was repealed, and by reason of this repeal it is now claimed that all village districts, when their tax valuation falls below the limitation of $500,000, are automatically dissolved. In other words, it is claimed that by reason of the failure of the legislature to make any specific provision for such districts to continue as village districts a strict construction of section 4682, G. C., precludes any further continuation of such districts as village school districts.

I am unable to concur in this contention. While the sections aforesaid may be susceptible of different constructions, it is my judgment that when considered together they afford a complete procedure for the disposition of a village district when it falls under the limitation of $500,000 tax valuation as

provided in section 4682, G. C., aforesaid. In other words, I am of the opinion that the provisions of said section 4682 aforesaid must be given a prospective operation in that their provisions mean that when a village district ceases to have a tax valuation of $500,000, it shall not continue as a village district under its former right as provided by section 4681, G. C., but that in the happening of such contingency it may proceed by vote, under the supervision of its board of education, either to organize as a village district and so continue as such as provided by said section 4682, or by vote, under the supervision of its board of education after the approval of the county board, determine to dissolve itself and join some contiguous rural district as provided by section 4682-1 aforesaid.

It seems to be the manifest purpose of section 4682, first, to take from a village district with a tax duplicate of less than $500,000 the right to continue as a village district and, secondly, at the same time to afford it the opportunity by vote to continue as such district. The board of education of any village district falling below the limitation aforesaid should know the sentiment of its citizens in regard to continuing it as a village district, and if no petition is presented and the board is of the opinion that the electors of such district desire it to continue as a village district they should submit the question of such continuance to the electors as provided by section 4682 aforesaid. If, however, the board is of the opinion that the electors desire such district to be dissolved, then either upon a petition or its own motion said board of education may submit the question of dissolution under the provisions of section 4682-1 aforesaid. It may be claimed in this connection that this last named section was not intended to afford a village school district of the class here considered the opportunity to vote under its provisions as it contains no reference to such districts. In view of the original provisions of said section, which dealt entirely with village school districts having a tax valuation of less than $500,000, such contention is not convincing. A village school district with a population of less than 1,500 is certainly empowered under the provisions of this section to vote on the question of dissolution regardless of its tax valuation, and while such district may have a tax valuation of more than $500,000, yet the fact, if it should be a fact, that its tax valuation is less than that amount presents no obstacle to a vote under its provisions.

My conclusion, therefore, is that when the tax duplicate of a village district falls below $500,000, the authority and jurisdiction of its board of education *en instanti* does not cease, but continues to enable said district either to organize as a village district and continue as such or to dissolve as such district and join some contiguous rural district.

In this connection some question may arise as to the disposition of the property of such district and of any of its indebtedness should such exist, in the event that such district should determine to dissolve and join some contiguous rural district. These matters are fully discussed and disposed of in an opinion found in volume I, page 554, of the attorney-general's report for the year 1915, to which opinion reference is here made.

Answering your inquiry, therefore, specifically I am of the opinion that the village district in question is not dissolved but that its board of education should submit to its electors the question of reorganizing as provided by section 4682, supra, or of dissolving and joining a contiguous rural district as provided by section 4682-1, supra.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1848.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY VILLAGE OF PAYNE.

COLUMBUS, OHIO, August 14, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

"Re bonds of the village of Payne, in Paulding county, Ohio, for the improvement of Oak and Laura streets, in the aggregate amount of $22,900.00, *as follows: One series,* $4,800.00, *to pay the village's portion of said improvement, and one series,* $18,100.00, *in anticipation of the collection of special assessments upon abutting and benefited property."*

I have examined the transcript of the proceedings of council and the other officers of the village of Payne, relative to the above bond issue; also the bond and coupon forms attached, and find the same legal and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted, and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of said village.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1849.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY VILLAGE OF PAYNE.

COLUMBUS, OHIO, August 14, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

"Re bonds of the village of Payne in Paulding county, Ohio, for the improvement of North Main street from the line of present pavement to the quarter post between sections 34 *and* 35, *in the aggregate amount of* $11,750.00, *as follows: One series, aggregating* $950.00, *to pay the village's portion of said improvement, and one series of* $10,800.00 *in anticipation of the collection of assessments upon abutting property."*

I have examined the transcript of the proceedings of council and the other officers of the village of Payne, relative to the above bond issue; also the bond and coupon forms attached, and find the same legal and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted, and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of said village.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1850.

CORPORATION—HAS AUTHORITY TO INCREASE CAPITAL STOCK BY ISSUANCE OF BOTH COMMON AND PREFERRED STOCK AFTER ITS ORIGINAL CAPITAL STOCK IS FULLY SUBSCRIBED AND AN INSTALLMENT OF TEN PER CENT. PAID ON EACH SHARE AND BEFORE STOCK AUTHORIZED BY SUBSEQUENT ISSUE HAS BEEN SUBSCRIBED OR ANY PART THEREOF PAID FOR.

After its original capital stock is fully subscribed and an installment of ten per cent. paid on each share, a corporation may increase its capital stock even though stock authorized by a prior certificate of increase has not been subscribed or issued and an installment of ten per cent. has not been paid on such shares.

COLUMBUS, OHIO, August 14, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of July 20, 1916, requesting my opinion as follows:

"We are in receipt of a communication from Maxwell and Ramsey, attorneys at law, Union Central building, Cincinnati, Ohio, and also a verbal request that we submit the question contained therein to your department for an opinion. The communication reads as follows:

"'I represent a manufacturing corporation organized under the laws of Ohio in 1912, with an original capital stock consisting of twenty million common and five million preferred, all of which has been paid in full and issued. In 1914 the capital stock was increased to thirty millions by an additional five millions of common, all of which has been subscribed, paid for, and issued, except two million five hundred thousand, which has been subscribed and ten per cent. paid thereon. In January, 1916, the capital stock was reduced by the redemption of five million preferred, and was thereupon increased by providing for twenty-five million preferred and twenty-five million additional common. Fifteen million dollars of said new preferred stock has been subscribed, fully paid for, and issued, but no part of such authorized increased common stock has been either subscribed, paid for, or issued. The total authorized capital stock at the present time is therefore seventy-five million, of which fifty million is common and twenty-five million is preferred.

"'The company now desires to further increase its capital stock both common and preferred. My client has asked my opinion as to whether under the laws of Ohio this can be done. I have advised that it can, but before taking corporate action to that end will be pleased to know whether the secretary will approve a certificate of increase which recites that all of the *original capital* stock has been subscribed, fully paid for, and issued, but which will not recite that all of the capital stock of the company has been subscribed and ten per cent. paid thereon.

"Section 8698 of the General Code provides for changes in capital stock by authorizing an increase in the capital stock or the number of shares into which it is divided prior to organization, after its original capital stock has been fully subscribed for and an installment of ten per cent. on each share has been paid thereon. It also provides that after organization the increase

may be made by the holders of a majority of the stock at a meeting called for that purpose or at a meeting of the stockholders at which all are present in person or by proxy, and also agree in writing to such increase. There is no provision in the section as a condition of increase except that the original capital stock be fully subscribed for and an installment of ten per cent. on each share paid. Therefore, it would seem quite clear that all this statute contemplates is, that the original capital stock must be fully subscribed and ten per cent. paid thereon, but not any increase subsequently authorized.

(Signed) "'Lawrence Maxwell.'

"We would like an opinion on the question as to whether a corporation can increase its capital stock after the original capital stock is fully subscribed but not a subsequent increase thereof."

The statement of Messrs. Maxwell and Ramsey quoted in your letter discloses that the corporation in question has a present authorized capital stock of $75,000,000.00, of which $50,000,000.00 is common and $25,000,000.00 preferred. Of this stock $25,000,000.00 common and $10,000,000.00 preferred have not been subscribed or issued. The question raised is whether such corporation may now secure authority to increase both its common and preferred stock without being able to certify and certifying that all of its authorized capital stock is fully subscribed and ten per cent. paid on each share.

Sections 8698 and 8699 of the General Code authorizing and prescribing conditions for the increase of capital stock of a corporation are as follows:

"Section 8698. After its original capital stock is fully subscribed for, and an installment of ten per cent. on each share of stock has been paid thereon, a corporation for profit, or a corporation not for profit, having a capital stock, may increase its capital stock or the number of shares into which it is divided, prior to organization, by the unanimous written consent of all original subscribers. After organization the increase may be made by a vote of the holders of a majority of its stock, at a meeting called by a majority of its directors, at least thirty days' notice of the time, place and object of which has been given by publication in some newspaper of general circulation, and by letter addressed to each stockholder whose place of residence is known. Or, the stock may be increased at a meeting of the stockholders at which all are present in person, or by proxy, and waive in writing such notice by publication and letter; and also agree in writing to such increase, naming the amount thereof to which they agree. A certificate of such action shall be filed with the secretary of state.

"Section 8699. Upon the assent in writing of three-fourths in number of the stockholders of a corporation, representing at least three-fourths of its capital stock, to increase the capital stock, it may issue and dispose of preferred stock in the manner by law provided therefor. Upon such increase of stock, a certificate shall be filed with the secretary of state, as provided in the next preceding section."

In opinion No. 563 rendered June 30, 1915, I referred to and approved an opinion of my predecessor, Hon. Timothy S. Hogan, dated March 16, 1914, wherein he advised the then secretary of state that an increase of capital stock by the issuance and sale of preferred stock is not governed by the conditions stipulated in section 8698 of the General Code. So that, capital stock already authorized need not be fully subscribed for and an installment of ten per cent. need not be paid

thereon prior to an increase of preferred stock solely under section 8699 of the General Code.

This ruling disposes of your question so far as it concerns any increase in the preferred stock of the corporation under consideration.

An increase in the common stock of the corporation must be made under the provisions of section 8698 of the General Code above quoted, which provides that before a corporation may make such increase its original capital stock must be fully subscribed and an installment of ten per cent. paid on each share. The original capital stock of the corporation is the stock which it secures authority to issue under its original articles of incorporation.

If it had been the legislative intent to deny a corporation the right to increase its capital stock until all its authorized capital stock were first subscribed and ten per cent. paid in on each share, such intent could have been easily accomplished and clearly expressed either by omitting the word "original" or by using in its stead "authorized."

I am therefore of the opinion that a corporation may secure authority to increase its capital stock by the issuance of both common and preferred stock after its original capital stock is fully subscribed and an installment of ten per cent. paid on each share and before stock authorized by a subsequent issue has been subscribed or any part thereof paid for. Respectfully,

EDWARD C. TURNER,
Attorney-General.

1851.

APPROVAL, RESOLUTION FOR IMPROVEMENT OF CERTAIN ROADS IN HURON, MADISON, MAHONING, MIAMI AND LOGAN COUNTIES.

COLUMBUS, OHIO, August 14, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your letter of August 11, 1916, transmitting to me for examination final resolutions relating to the following road improvements:

"Huron county, Sec. 'J-2,' Bellevue-Norwalk road, M. M. No. 1, I. C. H. No. 289, Pet. No. 2512.

"Huron county, Sec. 'A,' Barberton-Greenwich road, I. C. H. No. 97, Pet. No. 2520.

"Madison county, Sec. 'E,' Urbana-London road, I. C. H. No. 194, Pet. No. 2635. (1,135 ft.)

"Madison county, Sec. 'E,' Urbana-London road, I. C. H. No. 194, Pet. No. 2635. (17,319 ft.)

"Mahoning county, Sec. 'J,' Salem-Alliance road, I. C. H. No. 84, Pet. No. 2197.

"Miami county, Sec. 'F,' Piqua-Sidney road, I. C. H. No. 237, Pet. No. 2694.

Logan county, Sec. 'E,' Richwood-Bellefontaine road, I. C. H. No. 236, Pet. No. 2595-T (Bokes Creek township).

"Logan county, Sec. 'E,' Richwood-Bellefontaine road, I. C. H. No. 236, Pet. No. 2595-T (Rush Creek township)."

I find these resolutions to be in regular form and am therefore returning the same with my approval endorsed thereon. Respectfully,

EDWARD C. TURNER,
Attorney-General.

1852.

APPROVAL, CERTAIN LEASES FOR PARTS OF MIAMI AND ERIE CANAL AND LAND AT BUCKEYE LAKE, ST. MARYS AND INDIAN LAKES.

COLUMBUS, OHIO, August 14, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—Under date of August 3, 1916, you submitted to me for approval leases of canal lands as follows:

	"Valuation.
"The C. C. C. & St. L. Railway Company rights-of-way over the berme embankment of the Miami and Erie canal in Warren, Butler and Hamilton counties, being a renewal of two former leases held by this company	$4,981.00
"G. B. Nutter, cottage site at Buckeye Lake	300.00
"K. W. Osborn, cottage site at Buckeye Lake	300.00
"H. F. Nutter, cottage site at Buckeye Lake	300.00
"Mary Jane Morris, one-half lot at Lake St. Marys	166.66
"W. H. Edwards, M. and E. canal land at Napoleon	300.00
"The Miami Paper Co. M. and E. canal land at West Carrollton	100.00
"Callie C. Middleton, cottage site at Indian Lake	300.00
"H. M. Middleton, cottage site at Indian Lake	300.00"

Upon examination of the above mentioned leases, I find the same to be regular and legal in form, and am returning the same to you with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1853.

SUPERINTENDENT OF ARMORY—SALARY—WHEN TEMPORARILY ABSENT IN MILITARY SERVICE AND OTHERS PERFORM WORK—COUNTY COMMISSIONERS MAY WAIVE RIGHTS TO CLAIM PERSONAL SERVICES OF SAID SUPERINTENDENT.

When a superintendent of an armory is temporarily absent in the military service of the state and is employing and paying others to do his work as superintendent during said absence, if the work of the persons so employed is satisfactory to a board of county commissioners the latter may well waive their rights to claim the personal services of said superintendent and should allow and pay his salary.

COLUMBUS, OHIO, August 16, 1916.

HON. JOHN C. D'ALTON, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—I have your letter of July 24, 1916, as follows:

"One Ed. Rydman, a member of the sixth regiment, now quartered at Columbus, is on the county payroll as superintendent of the armory.

"Should the county pay him for services as superintendent while he is in active military service and not performing the duties of superintendent?

"We understand that your office has made a ruling with respect to General McMaken who resigned as tax commissioner of this county when called upon by the governor to take up his duties as brigadier general of the Ohio Guard. We desire to make our ruling with respect to Mr. Rydman in accordance therewith."

Your information with respect to the ruling of this department in the case of General McMaken is erroneous. His military position was not involved in the question upon which the former opinion was rendered. The only proposition considered in that opinion was his right to hold contemporaneously the office of a member of the county board of revision, and that of a member of the board of trustees of the Ohio Soldiers' and Sailors' Orphans' Home at Xenia, Ohio. It was held in said opinion that under the provisions of section 5590 G. C., as amended 106 O. L. 270, he could not continue in both offices, but as the provisions of said section expressly except from its operation offices in the state militia, said opinion had no bearing whatever on his right to continue to hold his military office. While I am not informed as to the exact cause which prompted General McMaken to resign from the county board of revision, I assume that he did so because he found it impossible to perform the duties of that position in connection with the duties devolving upon him as commander of his brigade in Camp Willis.

In the case presented in your inquiry it of course will be conceded that the commissioners, as a matter of law, are entitled to the personal services of said superintendent, and the fact that he is not personally performing the duties of his employment would constitute a legal defense to his claim for salary. However, it appears from the letter of your county auditor that he has employed and is paying others to do his work as superintendent during his absence, and that the services of the persons so employed are satisfactory, and further that he will probably return to his position within a very short time.

Under all these circumstances, therefore, and in view of the character of his present service to the state, I must advise your commissioners not to insist upon their technical legal rights under their contract with him, and especially upon the defense above mentioned, but to allow and pay said superintendent his salary.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1854.

SCHOOLS—METHOD OF MEASURING DISTANCE PUPILS LIVE FROM NEAREST SCHOOL—SECTION 7731 G. C. 104 O. L. 133.

Method of measuring distance pupils live from nearest school under provision of section 7731 G. C. 104 O. L. 133.

COLUMBUS, OHIO, August 16, 1916.

HON. JOSEPH W. HORNER, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—Yours under date of July 28, 1916, is as follows:

> "The following inquiry has been submitted to this office with the request for your opinion upon the question at law raised:
>
> "'In measuring the distance pupils live from the school house who claim transportation under section 7731 General Code, where should said distance begin and end?'"

Section 7731 G. C. 104 O. L. 133, to which you refer, provides as follows:

> "In all rural and village school districts where pupils live more than two miles from the nearest school, the board of education shall provide transportation for such pupils to and from such school. The transportation for pupils living less than two miles from the school house, by the most direct public highway shall be optional with the board of education. When transportation of pupils is provided, the conveyance must pass within one-half mile of the respective residences of all pupils, except when such residences are situated more than one-half mile from the public road. When local boards of education neglect or refuse to provide transportation for pupils, the county board of education shall provide such transportation and the cost thereof shall be charged against the local school district."

When the first two sentences of the above section are read together, as they must be, it seems clear that the effect thereof is to require that the distance of two miles therein referred to be measured upon the course of the most direct public highway between the residence of the pupil and the school which said pupil is required to attend. If, then, the residence of the pupil is upon such public highway, in my opinion the distance to the school should be measured from the entrance to the curtilage from such highway along the most direct public highway route to the nearest point to the school premises. If the residence of the pupil in question is not upon a public highway, the distance from the school could not then be measured from the entrance to the curtilage in which such pupil resides, the same being required to be measured, as above pointed out, on the most direct public highway only. In such case I am of opinion that the distance should be measured from that point in a public highway nearest to the residence of the pupil which is accessible to the pupil by traveling over the premises only on which such pupil resides. If there is no public highway which is accessible to the pupil by traveling over the premises on which he resides only, then the distance should be measured from that point in the public highway nearest to his residence to which he has most convenient access by private right of way, or otherwise.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1855.

TREASURER OF STATE—MAY NOT RECEIVE COUNTY WARRANTS TO QUALIFY TRUST COMPANIES TO DO BUSINESS IN OHIO—TEXAS COUNTIES.

The state treasurer may not receive road and bridge and court house and jail funding warrants of Live Oak and Panola counties, Texas, under section 9778 G. C., so as to qualify trust companies to do business in Ohio.

COLUMBUS, OHIO, August 16, 1916.

HON. R. W. ARCHER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of August 4, 1916, in which you request my opinion as follows:

> "W. L. Slayton and Company, of Toledo, Ohio, forwarded to this department today, to be placed to the credit of The Commercial Bank, Savings and Trust Company, of Findlay, Ohio, for the purpose of qualifying as a trust company the following:
>
> "25—State of Texas, county of Live Oak, 6%, road and bridge fund warrants, par value $1,000.00 each.....$25,000.00
> "25—State of Texas, county of Panola, 6%, court house and jail funding warrants, par value $1,000.00 each.....$25,000.00
>
> "Grand total $50,000.00
>
> "Under the trust laws, would I, as treasurer, be permitted to accept these warrants? I respectfully refer you to opinion No. 1314 under date of March 3, 1916, which may have some bearing on the matter in question.
> "These securities are being held here subject to your decision and can be examined by you, if desirable. An early opinion will be appreciated."

I am also in receipt of a letter from W. L. Slayton and Company, in which they inclose the opinion of their attorney, Harry E. Thurston of Toledo, Ohio, which I have carefully considered.

The opinion of Mr. Thurston constitutes an excellent argument in support of the desirability of extending the scope of section 9778 G. C. by legislative amendment. It does not, however, shed any new light upon the proper interpretation of the language of the section as it now stands; nor does it convince me that the conclusion expressed in my opinion of March 3, 1916 (No. 1314), is incorrect, wherein I advise that you were not authorized by said section 9778 to accept road and bridge improvement warrants of Atascoas county, Texas. I have examined the warrants referred to in your letter and find them to be securities of substantially the same character as the warrants of Atascoas county, referred to in my former opinion.

Without in any way reflecting upon or even considering the value or integrity of the securities, but solely upon the limiting language of the statute, I advise that you are not authorized, under section 9778, to accept the warrants described in your letter.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1856.

ROADS AND HIGHWAYS—NEW RIGHT OF WAY—COUNTY COMMISSIONERS MAY AGREE WITH PERSONS AS TO AMOUNT OF COMPENSATION AND DAMAGES THEY ARE ENTITLED TO RECEIVE BECAUSE THEIR PROPERTY RIGHT IN LAND IS TAKEN REGARDLESS OF WHETHER SUCH INTEREST IS HELD BY LEASE OR REVERSION.

In procuring the necessary right of way for road improvement constructed by co-operation of the county commissioners and the state highway commissioner, pursuant to section 1191 *G. C. et seq.,* 106 *O. L.* 627, *the county commissioners may agree with any and all persons having a property right in the land or property sought to be appropriated for such purpose, as to the amount of compensation and damages to which such person or persons may be entitled by reason of their property right in the land so taken and the damages by them sustained thereby.*

COLUMBUS, OHIO, August 16, 1916.

HON. A. C. MCDOUGAL, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—Yours under date of August 7, 1916, is as follows:

> "I desire to have your opinion on the following proposition: Have the county commissioners a legal right to compensate, in the way of compromise, an oil company, for moving rigs and boiler-house off a proposed right of way for a public road?
>
> "The above question arises where a right of way from an old to a new right of way has been changed under the state highway improvement law on what is known as the Woodsfield-Marietta road No. 389, said road being under process of construction, the oil rig and boiler-house being located on the new right of way."

It is learned from the state highway department, upon inquiry, that the improvement of the Woodsfield-Marietta road, No. 389, to which you refer, is being constructed by the co-operation of the state highway commissioner and the county commissioners of Monroe county, pursuant to section 184 of the Cass law, section 1191 G. C. et seq., 106 O. L. 627, upon the application of the county commissioners. In reference to procuring the right of way for improvements of this character, which are made upon the application of county commissioners or township trustees, section 194 of the Cass highway law, section 1201 G. C. 106 O. L. 631, provides in part as follows:

> "If the line of the proposed improvement deviates from the existing highway, or if it is proposed to change the channel of any stream in the vicinity of such improvement, the county commissioners or township trustees making application for such improvement must provide the requisite right of way. If the board of county commissioners or township trustees are unable to agree with the owner or owners of such land or property as may be necessary for such change or alteration, or if additional right of way is required for the same, and the county commissioners or township trustees are unable to agree with the owner or owners of the land or property in question then the board of county commissioners or township trustees, as the case may be, may by resolution declare it nec-

essary to condemn and appropriate for public use such land or property, and shall proceed to fix what they deem to be the value of such land or property sought to be condemned or appropriated, and deposit the value thereof with the probate court of the county for the use and benefit of such owner or owners, and thereupon the board of county commissioners or township trustees shall be authorized to take immediate possession of and enter upon said lands for the purpose aforesaid. * * *"

From the foregoing it clearly appears that in the case under consideration the duty of procuring the right of way for the improvement in question devolves upon the county commissioners. The duty on the commissioners imposed and the powers conferred may be performed and exercised in the manner in the above mentioned section prescribed. Provision is found in said section for condemnation proceedings by which necessary right of way may be had, but this is conditioned upon the county commissioners or the township trustees, as the case may be, being unable to agree with the owner or owners of the land or property sought to be appropriated in respect to the compensation and damages properly payable therefor. This condition, precedent to condemnation proceedings, beyond question confers upon the commissioners or trustees full authority to purchase the necessary land or property for a right of way, and if they can may agree with the owner or owners of the property so taken as to the amount of damage resulting therefrom to which such owner or owners may be entitled in any case where an improvement of the highway is proposed to be made by co-operation with the state highway commissioner.

While it is not so stated in your inquiry, I think it may be assumed, from what is therein set forth, that the oil company is the owner of some interest, presumably a leasehold estate in the land which it is sought to appropriate for a right of way. This being true, there are then at least two owners of the land or property in question with whom the county commissioners may agree as to the compensation and damages which such owners may be entitled by reason of the appropriation of the land and property in question for road purposes, viz., the lessee or oil company and the owner of the remainder and reversion of the estate after the expiration of the lease. This state of fact would then necessitate an apportionment of the whole amount of compensation and damages proper to be paid for the right of way in question between the lessees and the lessor or owner of the reversion, according to their respective interests in the particular land appropriated. If the owner or owners of the reversion or the lessor or lessors have agreed with the county commissioners as to the amount of compensation and damages to which they are entitled by reason of their interest in the land and property in question, it remains for the commissioners to agree, if they are able so to do, with the oil company as to the compensation and damages to which it is entitled by reason of its rights and interest in the land appropriated, if any such interest or right it has. Of course, if the oil company, contrary to the foregoing presumption, has no right to have its oil rig and boiler house upon the land in question, it could not be entitled to either compensation or damages. The measure of the compensation and damages to which the oil company would be entitled, if it has any right or interest which could be affected by the appropriation of the land in question, must depend upon all the facts peculiar to the case. Not having before me such facts, I am unable to express an opinion upon this question. It is not deemed improper to suggest, however, that if the oil field is productive and the property of the oil company is being operated, or capable of being profitably operated, and the circumstances of the case are such that in order to continue the production of oil and the utilization of its property and interest therein it would be necessary to re-erect

the oil rig and boiler house in another location on the property of the company, the cost and expense thereof would constitute a proper element of damage to be considered. On the contrary, if the property of the oil company is not susceptible of profitable operation in its present location and will not be during the life of the lease, then no damage would ordinarily result to the lessee by reason of having to remove the same, since the lessee would have to remove this property at the expiration of the lease in any event.

Cincinnati v. Eversman, 4 O. L. Rep. 140.

The only damage which could result in such case would be measured by the value of the right to allow the rig and boiler house to remain in their present location during the remainder of the life of the lease, whatever that might be.

A more definite answer to your inquiry is impracticable by reason of not having before me further facts.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1857.

MORRIS PLAN BANK—METHOD OF LOANING MONEY NOT AUTHORIZED BY LAWS OF THIS STATE.

The Morris Plan Bank method of loaning money is not authorized by the laws of this state.

COLUMBUS, OHIO, August 17, 1916.

HON. HARRY T. HALL, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Recently I received from your department through Mr. W. E. King, chief inspector, a communication in reference to the operation of certain banks in this state known as the Morris Plan Banks. Submitted with the inquiry was certain articles of incorporation, a pamphlet and literature disclosing the method and manner of doing business of said banks, and other memoranda reflecting on the question submitted.

The question upon which information is sought in said inquiry is whether a banking institution is authorized under the statutes to carry on the business of making loans and investments as shown by the data submitted in said inquiry, or whether such business is within the provisions of the statute with respect to chattel mortgage and loan companies.

Before discussing the facts shown by the correspondence, literature, advertising matter, printed application, note, pass book and other memoranda attached to your letter, it will be necessary to consider the statutory law controlling the licensing of loan companies as found in section 6346-1 G. C. as amended 106 O. L. 281, which is as follows:

> "It shall be unlawful for any person, firm, partnership, association or corporation, to engage, or continue in the business of making loans, on plain, endorsed, or guaranteed notes, or due bills, or otherwise, or upon the mortgage or pledge of chattels or personal property of any kind, or of purchasing or making loans on salaries or wage earnings, or of furnishing guarantee or security in connection with any loan or purchase, as aforesaid, at a charge or rate of interest in excess of eight per centum per

annum, including all charges, without first having obtained a license so to do from the superintendent of banks and otherwise complying with the provisions of this act."

The provisions of the foregoing section are very plain. They make it unlawful for any person, firm, partnership, association or corporation to engage or continue in the business of making loans on plain, endorsed or guaranteed notes or due bills, or otherwise, or upon the mortgage or pledge of chattels or personal property of any kind, or on salaries or wage earnings, at a charge or rate of interest in excess of eight per centum per annum, including all charges, without first having obtained a license so to do and otherwise complying with the provisions of the act of which said section is a part.

It is provided, however, in section 6346-5 G. C., being one of the sections of the act of which the first named section is a part, that

"Nothing in this act shall apply to pawn brokers who obtain a municipal license as provided in sections 6337 to 6346, inclusive, of the General Code or to national banks or to state banks or any person, partnership, association or corporation whose business now comes under the supervision of the superintendent of banks."

With the statutory provisions of the foregoing two sections in mind we will consider from the memoranda submitted the plan or method under and by which a Morris Plan Bank conducts its business. The data and memoranda submitted refer to the plan or method of making loans by one of the banks of the class named and this method may be best stated in its own language, which I quote from one of its pamphlets attached to your letter, and is as follows:

"The Morris Plan Bank makes loans of small amounts for a period not exceeding one year, on the basis of character and earning capacity.

"The borrower executes a note for the amount of the loan, which must be signed by two or more co-makers, who thus become responsible for its payment. The bank must be satisfied that the borrowers and co-makers are responsible and of good character. For every $50 loaned, or part thereof, the borrower agrees to buy a "C" certificate and to leave it with the bank as security. Weekly payments are required on these certificates. If the borrower fails to make his payments, the bank holds the co-makers responsible. This is all that is required.

"The amounts so loaned range from $25 to $500 or more. When the note is executed, the "C" certificate purchased is assigned to the bank and becomes a security for the note and a protection for the co-makers. When the borrower has completed his fifty weekly instalment payments, the certificate becomes fully paid and therefore equals the amount of the loan. Two weeks later his note becomes due and must be paid. He may then cash the "C" certificate, pay his note, and close the transaction.

"Interest (discount) at six per cent. per annum is deducted in advance. If the loan is made, but not otherwise, a charge of $1.00 towards the cost of investigation is made on each $50 or part thereof. No charge to exceed $5.00 if loan is for $250.00 or more.

"The whole operation of making and paying off a loan is as follows: Suppose you wish to borrow $100. You call at the office of the bank and make application for a loan. You will be requested to furnish certain information concerning yourself. If the information given by you is satisfactory, you will be handed an application blank with instructions as to

the manner in which it is to be filled out by yourself and your co-makers. When this application is completed, it is to be returned to the bank for consideration, at which time you will be provided with a note for the amount of your loan and instructions will be given as to signatures. After investigation the application will be submitted to the executive committee for their approval. If approved, you will be requested to call, bringing the fully signed note with you. You then agree to buy two "C" certificates of the value of $100.00, and upon delivery of the note and assignment to the bank of the certificates, you will receive in cash the amount of your loan, less the discount and investigating charge. For example:

"Amount borrowed		$100.00
"Less interest (discount)	$6.00	
"Less charge for investigation	2.00	8.00
"Amount received in cash		$ 92.00

"Suppose you receive this payment on a Wednesday. On or before the following Wednesday, and one each succeeding Wednesday, you will pay to the bank an instalment of $2.00 on the two "C" certificates purchased. When you make your last, or the fiftieth, instalment payment of $2.00 on your certificates, you will have paid $100.00 for them. Two weeks later when your note is due, and must be paid, you may surrender your certificates, for which the bank will pay you $100.00, and use the proceeds to pay off your note. In the meantime the bank has the use of the payments made by you for loaning to other borrowers."

It is further stated by the company in question in its advertisement that it obtains the money which it lends partly from its stockholders and partly from the investment certificates as explained below. It states that it accepts no deposit accounts. It issues two classes of certificates known as class "B" and class "C" certificates. Class "B" certificates are fully paid certificates in denominations of $50, $100, $500 and $1,000, interest bearing coupons attached, bearing interest at five per cent. per annum, payable semi-annually, January 1st and July 1st. Class "C" certificates are the instalment certificates mentioned in connection with the method hereinbefore described of making loans.

It is said with reference to said class "C" certificates that when fifty equal instalments have been regularly paid four per cent. interest per annum will be allowed on the aggregate amount paid on a "C" certificate, from and after the twenty-fifth payment, *provided the same has not been pledged with the bank as security for a loan.*

The foregoing two classes of certificates appear to furnish the only method whereby the bank obtains money in addition to its capital stock.

It appears from the printed application for loans, which is furnished by said company to applicants, and from the printed form of note used by said company to evidence said loan, constituting of course the contract between the company and the borrower, that the purchase of the instalment investment certificate designated as"C," as hereinbefore described, is a condition precedent to procuring a loan. In other words, the purchase of this certificate, which must be hypothecated as security for the loan, is required as one of the conditions upon which the loan will be made and without which it cannot be procured by the applicant. It is further provided in the note given as evidence of said loan that if any default is made in the payment of any instalment due the company on said "C" certificate hypothecated with said note, or in the event of the default in the observance of any

other regulation of said company "then this obligation at the option of the company shall become due and payable whether due according to its face or not."

As before observed, the weekly instalments paid for class "C" certificates are not permitted to draw interest when said certificate is pledged with the bank as security for a loan. Simply stated, therefore, the conditions upon which this bank loans money are: (1) That the loan shall be for a period not exceeding a year; (2) that the note must be signed by the borrower and two or more co-makers; (3) that a "C" certificate must be purchased by the borrower for the amount of the loan; (4) that said "C" certificate must be pledged as security for the loan, and (5) that any default in the payment of any instalments due on said certificate makes the whole loan due at the option of the company.

It therefore appears beyond question that the purchase of this "C" certificate with its consequent obligations for payment is a part of the contract made by the applicant in securing his loan and said purchase of said certificate and the procuring of said loan constitute one transaction. Whatever obligations are assumed in the purchase of the "C" certificate are imposed upon the borrower as a condition for the procurement of his loan as well as the purchase of said certificate.

To state the matter differently—the company will only agree to make a loan upon condition that the borrower shall buy from it a certificate for the amount of the loan and agree to pay for that certificate in weekly instalments, which if paid as promised will mature the certificate at the time said loan becomes due. While it does not appear that the borrower is compelled to surrender his "C" certificate in payment of his note when the latter becomes due, it is clearly to be inferred that such is the plain purpose of the transaction. It follows from this that whatever profit may flow to the company from the purchase of said "C" certificate is in reality the earnings of the loan itself. It is apparent that the profit on a loan made under such circumstances will be far greater than the rate of interest charged in advance therefor as advertised in said literature. If a borrower procures $100.00 and issues his note therefor for one year he receives on said note the sum of $92.00. He agrees as a condition of said loan to purchase a "C" certificate for the amount of $100.00 upon which he is to pay $2.00 per week. Therefore he has the use of $92.00 for one week only. By the payment of $2.00 on his "C" certificate the amount is reduced to $90.00, and at the end of the next week to $88.00, and at the end of the succeeding week to $86.00, so that it is evident upon the face of the transaction that the borrower is not having the benefit of the use of the money he actually borrows for the period named in his note or for a time any thing near the period so named in his note.

Attached to your letter are a number of statements including the calculations of experts upon the cost to a borrower of a loan made under the foregoing circumstances. If these calculations are true it appears that the cost of the loan described in the statement of the company, as above quoted, would equal a direct charge of interest of at least 19.2% per annum. Should any default be made in the payment of any weekly instalments due under the contract for the purchase of said "C" certificate a charge of five cents per week is made on each dollar so defaulted, and if there should be charges of this kind made upon each weekly instalment the rate of interest would very materially increase, and *might* under such conditions, it is stated, reach the enormous amount of more than 100% per annum. The calculation by which said experts aforesaid arrive at the above figures is stated as follows:

> "If 6% interest and a 2% fee is discounted on a loan of $100 made for a year the borrower receives $92. He repays this at the rate of $2.00 a week in 46 weeks. During the period of his weekly payments the amount

of which he has the actual use is decreased regularly at the rate of $2.00 a week, these amounts forming a simple arithmetical progression. The sum of this progression which is found by multiplying one-half the number of payments by the sum of the first and last factors, i. e., 46 divided by 2 times 92 plus 2 equals $2,162.00, of which he has the use one week. This is equivalent to the use of $41.58 for one year. The actual charge of $8.00 upon this amount is at the rate of 19.2% per annum.

"A slightly different method giving the same result is the following:

"As the borrower pays $2.00 each week, he repays the face of the loan, $92.00, in 46 weeks, the payments for the succeeding four weeks being $8.00 interest from his own funds. As the payments are equal and at equal intervals of one week the average time for which he has the use of all the 46 sums of $2.00 each is one-half the sum of the shortest and longest periods, or ½ of 1 plus 46, which is 23.5 weeks or .451 years. The interest divided by the product of the principal and the time in years gives the annual rate per cent., in this case 8 divided by 92 times .451 equals 19.2.

"Where 6% is discounted without a fee the borrower has the use of $2,256 for one week or $43.38 for one year. The charge of $6.00 upon this amount is at the rate of 13.8% per annum.

"The foregoing takes no account of penalty interest charged upon overdue weekly payments at the rate of 5% per week, and also takes no account of the fact that if the borrower, having paid interest for a year in advance decides to pay off his loan at the end of the first month he is supposed to receive no rebate of unearned interest. Obviously this increased the rate still further."

It appears from the foregoing computation of said experts that a loan made under this plan would cost the borrower interest at the rate of 19.2% per annum and therefore that said companies so making such loans are charging and receiving that rate of interest because, as before stated, the borrowing of the money and the purchase of the class "C" certificate constitute but one transaction.

However, another and perhaps a fairer method of computing the earnings of the company upon such loans is found in the following computation:

"The borrower gives his note for $100.00 receiving $92.00 in cash—$2.00 being deducted for expenses and $6.00 for discount taken out when the loan is made. This amount is to be paid by the borrower in fifty weekly installments of $2.00 each. That is to say,—for a loan of $92.00 he contracts to pay $100.00 in fifty weekly installments of $2.00 each; as $92.00 is the amount of money paid by the lender and received by the borrower this undoubtedly should be the proper basis on which to determine the interest in true discount. The first $2.00 payment being made seven days after the loan was made would be in the hands of the lender 358 days and the last one 15 days. Following the payments with a decreasing ratio of seven days the total number of days which the lender would have the use of the $2.00 would be 9,325 days or 18,650 days for $1.00; hence the interest on $1.00 at six per cent. for 18,650 days would be $3,066—which amount represents the interest on the payments. $3,066 added to the $8.00 which was taken out in the beginning would make $11.06 total income on the $92.00 given the borrower. To determine the rate of interest on the money actually received we must find what rate per cent. on $92.00 for one year produces $11,066. This we find to be 12.03%."

While the latter computation lowers the rate of interest, yet it is immaterial

to the question of whether usury is involved in the contract which of the above results represents the correct earnings of the company, for under both computations the rate of interest obtained is usurious.

It is maintained, however, by said companies that the purchase of said "C" certificate is a separate transaction and entirely disconnected with the contract under which the loan is made. In other words, it is contended that the payments made on said "C" certificate are not and may not be considered as partial payments on the loan, and in support of this contention authorities are cited to the effect that payments of dues on shares of stock in building and loan companies are not ipso facto payments of so much of a loan for which they are hypothecated, and that such payments are not applications of the money so paid to the reduction of the loan.

I am not disposed to question the authorities so cited, but it is manifest without argument that a share in a building and loan company represents a wholly different claim against said company from that of the "C" certificates against the companies in question, and that the former rests upon wholly different considerations. When shares are purchased in building and loan companies they are taken for better or worse; they represent an interest in the business of the company; they may at maturity be worth their par value—they may be worth much more than their par value, or they may be worth much less. In the case of the "C" certificates, when they are purchased they represent a liquidated amount, and upon maturity become a liquidated demand for only their face value.

If, however, we accept the contentions of said companies in this respect and conclude that the sales of said "C" certificates are not involved in any manner whatever in the making of the loan or the payment thereof, then we are confronted with other statutory provisions which impose even heavier burdens upon said companies.

It is provided in section 697 G. C. that:

> "Every corporation, partnership or association other than a building and loan association, which places or sells certificates, bonds, debentures or other investment securities of any kind, on the partial payment or instalment plan, and every investment guaranty company doing business on the service dividend plan shall be deemed a bond investment company."

It is further provided in the succeeding section, namely, section 698 G. C., that

> "Before doing business in this state, every bond investment company shall deposit with the treasurer of state one hundred thousand dollars in cash or bonds of the United States or of the state of Ohio, or of any county or municipal corporation in Ohio, for the protection of investors in the securities of such company. Such deposit shall be made out of the paid-up capital stock of such bond investment company."

If, therefore, as said companies claim, the sale of said "C" certificates is not involved in and no part of the loan transaction, then said companies undoubtedly are selling certificates on the partial payment or installment plan, and are clearly within the definition of a bond investment company, as found in section 697 supra, and are therefore subject to the provisions of section 698, supra, and by the sale of said certificates are operating a business in violation of the terms and conditions of said last named section.

It appears from the articles of incorporation of one of the companies under consideration, a copy of which is submitted with your memoranda, that said corporation

"is formed for the purpose of conducting a commercial and saving bank in accordance with the Morris plan of industrial banking and exercising all of the powers which may be exercised by a corporation engaged in such business and doing all things incident and necessary thereto."

It appears, therefore, that this company is chartered as a banking institution, and it is claimed by all companies doing business under the Morris plan in this state that they are banking institutions, they being chartered under similar provisions.

These facts, however, are not conclusive of their liabilities under the law nor of the rights of your department if as a matter of fact they are operating a business which is not within the legitimate functions of a bank.

It would not be profitable here to discuss in detail what is or what is not a bank. While it is undoubtedly true, as observed by the supreme court in the case of Niagara County Bank v. Baker et al., 15 O. S. 68, that

"In all the American systems of banking, with which we have any acquaintance, the furnishing of loans, at fixed rates of interest, to facilitate the business and commerce of the country, has been made a cardinal feature in the institution of banks, and in giving them extensive corporate privileges,"

it does not follow that the business of loaning money alone will constitute a banking business. On the contrary, it would seem from the authorities that the function of receiving deposits is the distinctive feature of the banking business, and that the loaning of money not connected with receiving deposits has not been considered sufficient to constitute the business of banking.

Tiffany on Banks and Banking, section 2.
Morse on Banks and Banking, section 2.
Miche on Banks and Banking, page 8.
Bouvier's Law Dictionary, 318.

It is contended, however, in behalf of the companies in question, that the loaning of money is sufficient to establish their status as banks, and that the feature of receiving deposits is not a necessary element under the statutes of this state in the banking business and especially in the business of those persons, companies and corporations coming under the supervision of the banking department of this state. In support of this contention it is alleged that the provisions of section 711 G. C., section 724 G. C. as amended 106 O. L. 360, and section 9793 G. C. must be construed as expressly excepting the qualifications of "receiving money on deposit" from corporations doing a banking business in this state.

Section 711 G. C. provides.

"The superintendent of banks shall execute the laws in relation to banking companies, savings bank, savings societies, societies for savings, saving and loan associations, savings and trust companies, safe deposit companies and trust companies and every other corporation or association having the power to receive, and receiving money on deposit, chartered or incorporated under the laws of this state. * * *"

Section 724 G. C., amended as aforesaid, provides:

"At least once each year and as often as the superintendent of banks may deem necessary, and also when requested by the board of directors

or trustees thereof, the superintendent of banks or an examiner appointed for that purpose shall thoroughly examine the cash, bills, collaterals or securities, books of account and affairs of each bank, savings bank, safe deposit and trust company, savings and loan society or association incorporated under any law in this state, or any person, partnership or association engaging in the business of receiving deposits. * * *"

Section 9793 G. C. provides:

"Every banking company, savings bank, savings and loan association, savings and trust company, safe deposit and trust company, society for savings, savings society, and every other corporation or association, except building and loan associations, empowered to receive, and receiving money on deposits, now existing and chartered or incorporated or which hereafter become incorporated shall be subject to the provisions of this chapter. * * *"

It is claimed that from the language of the foregoing sections it is clear that the business of receiving deposits does not necessarily apply to banking companies but applies only to the persons, associations or corporations with which it is directly connected in said statutes. In other words, for example, in section 711 aforesaid the term "having the power to receive, and receiving money on deposit" applies only to the term "every other corporation or association" mentioned in the statute. And, again, in section 9793 aforesaid the words "empowered to receive and receiving money on deposit" apply only to the term "every other corporation or association."

I am unable to concur in the conclusion thus urged. Not only is the business of receiving deposits ordinarily considered as the distinctive function of a bank, but I think the provisions of section 9796-1 G. C. as amended 104 O. L. 185, show very clearly the purpose of the legislature in all these statutes to connect the function of receiving money on deposit with the banking business. This section provides as follows:

"Whenever the term 'state bank' is used in this act, the said term shall be held to include every corporation or association having the power to receive, and receiving money on deposit, chartered or incorporated under any general or special law of Ohio, but shall not include building and loan associations; * * *"

It appears from the memoranda submitted that the institutions doing business in this state under the Morris plan are connected with a parent corporation known as "The Industrial Finance Corporation," with which said local institutions have contractual relations which authorize them to conduct business under said plan in this state. In the contract between the parent corporation and the local corporation it is stated in the preamble thereof:

WHEREAS, it is desirable to develop this system of industrial loans and investments on a business basis in order permanently to secure the advantages to be derived from its successful operation by separate and distinct companies incorporated as independent institutions and designed to be operated as such."

And again in paragraph 1 of the contract it is provided:

"The corporation does hereby sell, transfer and assign unto the company and its successors all its right, title and interest for the city of

> ----------, state of Ohio, and the county of ----------, state of Ohio, in and to the use of a certain system, including copyrights, plans and forms, together with all renewals and improvements thereof and additions thereto for the conduct and operation of a *loan and investment business*, known and designated as the Morris plan and belonging to the said corporation, which said copyrights are duly recorded in the office of the registrar of copyrights of United States at Washington, D. C."
>
> (Writer's underscoring)

The foregoing provisions taken in connection with the following provisions found in paragraph 19 of said contract, to wit:

> "The company further agrees that no substantial departure shall be made from the operation of the Morris plan as contemplated by this contract; that it will not accept deposits and that in so far as its directors deem practicable it will operate in substantial conformity to the rules and regulations, a copy of which is hereto attached, for the conduct of business under said Morris plan."

indicate conclusively to me that it was never contemplated by the originators of said Morris plan that the method of loaning money which it provides should be considered as a banking business. In fact, it is very clear that the Morris plan is precisely what its originators call it in their contract with the subordinate companies, viz.: "A loan and investment business."

In reaching this conclusion other very persuasive facts must be noted. It appears from the report of the superintendent of banks of the state of New York for the year 1915 at page 30 thereof, that companies operating under the Morris plan system in that state are listed as investment companies:

An examination of the laws of New York in respect to such companies discloses some very recent amendments which apparently were passed for the especial benefit of the Morris plan corporations, and in order to give them a legal status without which it was probable their methods were not authorized by the laws of that state. The first amendments referred to are found in volume 9, chapter 369 of the Consolidated Laws of New York for the year 1914, being sections 290 et seq.

Sections 292 of said chapter provides for a deposit of one thousand ($1,000.00) dollars with the superintendent of banks before companies organized under the provisions of said chapter may operate.

In section 293 thereof we find a delegation of powers to said company, among which is found the authority "to sell choses in action owned, issued, negotiated or guaranteed" by said company. And in paragraph 2 of said section said companies are authorized to receive money or property in installments or otherwise from any person or persons with or without an allowance of interest upon such installments.

In paragraph 4 thereof they are authorized

> "To deduct interest in advance on loans at the rate of six per centum per annum, provided such loans are secured by assignments of choses in action or other evidences of indebtedness issued by it and to be paid for in uniform monthly or weekly installments."

Said last named paragraph was amended to take effect March 30, 1915, said amendment being found in volume 10 of the Consolidated Laws of said state for the year 1915 at page 34 thereof. Said amendment reads as follows:

"To deduct interest in advance on loans at the rate of six per centum per annum, provided such loans are secured by assignments of choses in action or other evidences of indebtedness issued by it and to be paid for in uniform monthly or weekly installments. To charge for a loan exceeding fifty dollars made pursuant to this subdivision one dollar for each fifty dollars or fraction thereof loaned for expenses including any examination or investigation of the character and circumstances of the borrower, co-maker, or surety, and the drawing and taking the acknowledgment of necessary papers, or other expenses incurred in making the loan; provided, that no fee collected hereunder shall exceed five dollars.

"If any such loan made pursuant to this subdivision is fifty dollars or less, such charge shall not be more than one dollar. * * *"

An additional paragraph was also added to said section on said date, which reads as follows:

"To impose a fine of five cents for each default in the payment of one dollar or a fraction thereof at the time any periodical installment upon a certificate assigned as collateral security for the payment of a loan made pursuant to subdivision four of this section becomes due, provided, however, that such fines shall not be cumulative; that no fine shall be imposed for more than four successive defaults, and that the aggregate of such fines collected in connection with any such loan or renewal thereof shall not exceed one dollar."

It is manifest that the foregoing laws apply in every particular to companies operating under the Morris plan, and as before observed gives them a protection and legal status not provided for by the laws of this state.

Special legislation for the benefit of such companies was also enacted by the legislature of the state of Rhode Island, while I am informed that in the states of Kentucky, Pennsylvania, Texas, New Jersey, Wisconsin and Illinois additional legislation was found necessary to give such companies authority to operate, and that the legislatures of said states are now considering the question of enacting the same.

In view of these considerations it is apparent that such companies now have no place in the laws of this state, and I am therefore impelled to conclude that without additional legislation here, companies operating under the Morris plan have no legal status in this state.

What is here said is not to be understood as a criticism of such plan. It may possess advantages to borrowers not found in the methods of other companies engaged in loaning money in this state. When, however, all that may be said in favor of this plan has been considered, it does not remove the fact that there is no law in this state providing for companies operating under such plan, and that it possesses features which are clearly in violation of the laws now upon our statute books.

As your inquiry was prompted by the fact that applications are now pending before you for certificates to commence business under said plan, which certificates are necessary by virtue of the provisions of section 9720 and 9721 G. C., I must advise that said certificates may not legally be granted by you and that the companies now asking for said certificates to operate under said plan are not lawfully entitled to commence business in this state.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1858.

QUESTION OF SANITY OF PERSON ACCUSED OF CRIME—BEFORE AND AFTER INDICTMENT—HOW DETERMINED—WHEN INSANE PERSON IS COMMITTED TO LIMA STATE HOSPITAL—PROCEDURE—COSTS CANNOT BE COLLECTED FROM STATE WHERE PERSON FOUND GUILTY OF CRIME IS IN SAME VERDICT FOUND TO BE INSANE.

Section 13577 *G. C. provides for the disposition by the common pleas court of a person accused of crime before indictment when the question of sanity is raised before the grand jury.*

Section 13614 *G. C. provides for the disposition of one accused of crime after indictment by the common pleas court when the question of insanity is raised before trial.*

Under the provisions of sections 13577 *and* 13614 *G. C. the common pleas court is vested with jurisdiction to commit the accused, when found to be insane, to the Lima State Hospital.*

Section 13608 *G. C. provides a special proceeding to try the question of sanity of one accused of crime, and on such finding jurisdiction to commit the accused insane person is transferred to the probate court under the provisions of section* 13610 *G. C.*

Sections 13577 *and* 13614 *G. C. contemplate the determination of the question of sanity and the commitment of the accused insane person to the Lima State Hospital for special treatment until restored to reason when he may be placed on trial for the offense charged.*

A verdict finding the accused guilty and insane at the time of trial is not authorized and should not be received, as one who is insane cannot be said to be in position to make a proper defense in a criminal case.

Costs taxed in a criminal case cannot be collected from the state where a person found guilty of a crime is in the same verdict found to be insane and committed to the Lima State Hospital, because of his insanity no judgment being pronounced by the court to enforce the verdict of guilty.

COLUMBUS, OHIO, August 19, 1916.

HON. LINDSEY K. COOPER, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—Your request for an opinion is as follows:

> "One Scott Grubb was indicted at the last term of our common pleas court for larceny. Being in indigent circumstances, the court appointed an attorney to defend him. On the trial two defenses were made: First, that he did not burn the building. Second 'Insanity.' The jury acquitted him solely on the ground that he was insane. Judge Corn was undecided as to how to tax the costs in the case, and, after investigation, I was unable to advise him. He suggested that I write you and inquire your holding as to whether the state would pay the costs in a case of this kind. Inasmuch as the jury holds the defendant to be insane, we felt that the costs could not be taxed against defendant. * * *'

In your subsequent letter you state that you were mistaken in the statements made in your first letter to the effect that the jury acquitted Scott Grubb solely on the ground that he was insane, and that the journal entry shows that the verdict of the jury found him.

"Guilty of arson in the manner and form as he stands charged in the indictment, but we find him now to be insane."

Section 3016 of the General Code is as follows:

"In felonies, when the defendant is convicted the costs of the justice of the peace, police judge, or justice, mayor, marshal, chief of police, constable and witnesses, shall be paid from the county treasury and inserted in the judgment of conviction, so that such costs may be paid to the county from the state treasury. In all cases, when recognizances are taken, forfeited and collected and no conviction is had, such costs shall be paid from the county treasury."

One of the questions to be considered first in connection with your request for an opinion is as to the authority of the judge of the common pleas court, under the verdict rendered in this case, to commit the Defendant Grubb to the Lima State Hospital, and resort must be had to several statutes which deal with the disposition of insane persons accused of or indicted for crime.

The Lima State Hospital is an institution which has been especially designed for the care and special treatment of the criminal insane and special classes of insane persons who cannot be satisfactorily cared for in the regular hospitals for insane.

Section 13577 of the General Code, which deals with the disposition of a person accused of crime in connection with whom the question of insanity is raised before the grand jury, is as follows:

"If a grand jury upon investigation of a person accused of crime finds such person to be insane, it shall report such finding to the court of common pleas. Such court shall order a jury to be impaneled to try whether or not the accused is sane at the time of such impanelling, and such court and jury shall proceed in a like manner as provided by law when the question of the sanity of a person indicted for an offense is raised at any time before sentence. If such person is then found to be insane he shall be committed to the Lima State Hospital until restored to reason. This section shall not be in force and effect until the Lima State Hospital is ready for the reception of inmates as certified to the courts by the governor and secretary of state."

Section 13614 of the General Code, which was enacted to care for insane persons under indictment, is as follows:

"If a person under indictment appears to be insane, proceedings shall be had as provided for persons not indicted because of insanity. If such person is found to be insane he shall be committed to the Lima State Hospital until restored to reason when the superintendent thereof shall notify the prosecuting attorney of the proper county who shall proceed, as provided by law, with the trial of such person under indictment."

It is provided that section 13577 and 13614 of the General Code, supra, are not to be in full force and effect until the Lima State Hospital is ready for the reception of inmates as certified to the court by the governor and secretary of state; that condition having been met, the sections referred to are in full force and effect.

Under the provisions of section 13577 of the General Code, supra, the common pleas court is vested with jurisdiction to commit an insane person accused of

crime but who has not been indicted when such person has been certified to the common pleas court by the grand jury. The procedure prescribed is that a jury shall be impanelled to try the question of sanity of such person, and if it shall be found that he is insane he shall be committed to the Lima State Hospital until restored to reason.

Under the provisions of section 13614 of the General Code, supra, the court is vested with the same jurisdiction in dealing with an insane person who is under indictment.

Section 1985 of the General Code provides, in part, as follows:

> "The Lima State Hospital shall be used for the custody, care and special treatment of insane persons of the following classes: * * *
>
> "Persons accused of crime but not indicted because of insanity. * * * Persons indicted but found to be insane. * * *"

It is clear from a reading of sections 13577 and 13614 of the General Code, supra, that the intention of the general assembly in their enactment was to provide that persons within the jurisdiction of the common pleas court either held to the grand jury before indictment or after indictment should not be called to answer for the offenses with which they were charged if they were subjects for admission to the Lima State Hospital because of insanity until they had had the benefit of the treatment at Lima State Hospital and had been restored to reason, and the ordinary proceedings in the probate court were obviated by placing the jurisdiction to commit under the special provisions of sections 13577 and 13614 of the General Code in the common pleas court. It is clear from a reading of the sections referred to that it is contemplated that the question of insanity shall be raised in the common pleas court in advance of the trial of the accused.

Prior to the going into effect of sections 13577 and 13614 of the General Code, supra, provision was made for the trial of the question of the sanity of a person indicted in section 13608 of the General Cde, which is as follows:

> "When the attorney of a person indicted for an offense suggests to the court in which such indictment is pending, and before sentence, that such person is not then sane and a certificate of a reputable physician to that effect is presented to the court, such court shall order a jury to be impaneled to try whether or not the accused is sane at the time of such impaneling. Thereupon a time shall be fixed for a trial, a jury shall be drawn from the jury-box and a venire issued, unless the prosecuting attorney or the attorney of the accused demand a struck jury, in which case such jury shall be selected and summoned as required by law. The jury shall be sworn to try the question whether the accused is or is not sane and a true verdict given according to the law and the evidence, and, on the trial, the accused shall hold the affirmative."

It will be observed that the procedure therein authorized is special in its nature, that the sanity or the insanity of the accused may be determined by three-fourths of the jurors, and that upon a finding by the jury that the person accused of crime is insane the fact of the finding shall be certified to the probate court under the provisions of section 13610 of the General Code, and the probate court is vested with jurisdiction to dispose of the accused as upon inquest had.

In the case under consideration it does not appear that the question of the insanity of the defendant was raised prior to the impaneling of the jury to try him for the offense with which he was charged, hence resort was not had to either

section 13577, to 13614, nor 13608 of the General Code. I am at a loss to understand how upon the trial of the defendant for the crime with which he was charged, and in the absence of any of the special proceedings provided by law, evidence could be adduced as to his insanity at the time of the trial, and in the absence of any such evidence how the jury could arrive at a verdict such as appears to have been rendered in this case.

While the judge of the common pleas court would, as before stated, be vested with jurisdiction to commit a person accused of or indicted for crime to the Lima State Hospital under authority of the special proceedings provided for and referred to above, there is grave doubt in my mind as to the regularity of the verdict which appears to have been received by the court and upon which the commitment of the accused to the Lima State Hospital was made. The defendant either stands as convicted of the crime with which he was charged and the portion of the verdict declaring him to be insane is surplussage, or the verdict should be set aside on the ground that the defendant was insane at the time of the trial, therefore not in position to make a proper defense in the criminal proceedings. If the former proposition should be accepted and the conviction of the defendant should be regarded as regular, the jurisdiction of the judge of the common pleas court would, in my opinion, be limited to the sentencing of the defendant to the penitentiary or reformatory, as the case may be. If the defendant were sentenced to the penitentiary or to the reformatory and he was found to be insane, he might be dealt with under the provisions of sections 1841-2 and 1841-3 of the General Code as amended 103 O. L., pp. 681-682, which are as follows:

> "Sec. 1841-2. All persons committed to any institution under the control and management of the Ohio Board of Administration shall be considered as committed to the control, care and custody of such board. Upon resolution, duly entered upon the minutes of the board, any person committed to one of such institutions may, for reasons set forth in such resolution, be transferred to any other institution; provided that, except as otherwise provided by law, no person shall be transferred from a benevolent to a penal institution.
>
> "Sec. 1841-3. The board of administration acting as a commission of lunacy may adjudge any inmate in any institution under its control, or in any county jail, to be insane, feeble-minded, or epileptic, and may remove such inmate to any one of the state hospitals, or to the institution for feeble-minded, or to the Ohio hospital for epileptics."

The particular question propounded by you is as to whether or not the state should in the case under consideration pay the costs which have been taxed. From the facts as presented by you, the defendant stands convicted of the crime with which he was charged; however, it appears that judgment has not been pronounced by the court by the imposition of sentence for the crime of which he was found guilty, and as the machinery provided by law for the payment of costs by the state in felony cases where a conviction has been had is dependent upon the sentencing of the accused and his commitment to the warden of the penitentiary or to the superintendent of the reformatory, as provided in sections 13720 to 13727, inclusive, of the General Code, there is no ground upon which the costs in this case under its present status can be collected from the state. The conviction of the defendant followed by the imposition of sentence would, under the provisions of sections 13722 and 13723 of the General Code, authorize the clerk to make up a cost bill and issue execution to the sheriff of the county in which the indictment was found against the property of the defendant for the costs of the prosecution.

However, this case has never reached that stage, inasmuch, as stated above, the judgement of the court on conviction was not pronounced.

Aside from the question of the regularity of the proceedings which resulted in the commitment of the defendant to the Lima State Hospital, as referred to above, it is my opinion that in view of the failure of the court to pronounce judgment sentencing the defendant to the penitentiary or reformatory, and his not being delivered to the warden of the penitentiary or to the superintendent of the Ohio state reformatory, there is no machinery provided by law which will provide for the payment of the costs by the state.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1859.

COUNTY COMMISSIONERS—SECTIONS 2353 AND 2352 G. C. CONSTRUED —PROVISION FOR GIVING FIFTEEN DAYS NOTICE WHEN ESTIMATED COST OF CONTRACT DOES NOT EXCEED ONE THOUSAND DOLLARS, DIRECTORY—IF COMMISSIONERS DETERMINE TO GIVE FIFTEEN DAYS' NOTICE SAME MAY BE GIVEN BY POSTING, ONLY.

The provisions of section 2353 G. C. as to the giving of fifteen days' notice when the estimated cost of a contract does not exceed one thousand dollars, are directory and county commissioners may adopt such plan if they so desire, or may follow the general provisions of the law and advertise as provided by section 2352 G. C. If, however, the commissioners determine to give fifteen days' notice, as provided by said section 2353, aforesaid, then such notice may be given only by posting, as therein provided.

COLUMBUS, OHIO, August 19, 1916.

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

GENTLEMEN:—I have your letter of August 10, 1916, submitting the following inquiry:

> "Where the estimated cost of a public building, bridge or bridge sub-structure, or addition to or repair thereof, does not exceed one thousand dollars, may the county commissioners still advertise notice to contractors as provided by section 2352 G. C., or is the language of section 2353 mandatory in requiring them to give notice of the letting by posting on bulletin board where the estimated cost is less than one thousand dollars?"

Sections 2352 and 2353 G. C., to which you refer in your foregoing inquiry, provide as follows:

> "Sec. 2352 G. C. When the plans, drawings, representations, bills of material, specifications and estimates are so made and approved, the county commissioners shall give public notice in two of the principal papers in the county having the largest circulation therein, of the time when and the place where sealed proposals will be received for performing the labor and furnishing the materials necessary to the erection of such build-

ing, bridge or bridge substructure, or addition to or alteration thereof, and a contract based on such proposals will be awarded. If there is only one paper published in the county, it shall be published in such paper. The notice shall be published weekly for four consecutive weeks next preceding the day named for making the contract, and state when and where such plan or plans, descriptions, bills and specifications can be seen. They shall be open to public inspection at all reasonable hours, between the date of such notice and the making of such contract.

"Sec. 2353 G. C. When the estimated cost of a public building, bridge or bridge substructure or of making an addition to or repair thereof does not exceed one thousand dollars, it shall be let as heretofore provided, but notice of the letting need be given for only fifteen days, by posting on a bulletin board or by writing on a blackboard in a conspicuous place in the county commissioners' or auditor's office, showing the nature of the letting and when and where proposals in writing will be received. Plans or specifications, or both as hereinbefore provided shall be kept on file during the fifteen days and open to public inspection."

The foregoing sections were originally a part of section 798 R. S., which, as amended in 98 Ohio Laws, 19, and prior to the codification in 1910, read as follows:

"After such plans, descriptions, bills of materials, specifications and estimates are made and approved, as required by this chapter, the county commissioners shall give public notice in two of the principal papers in any such county having the largest circulation therein; but if there is only one paper published in such county, then it shall be published in such paper of the time and place, when and where sealed proposals will be received for performing the labor and furnishing the materials necessary to the erection of any such building, bridge or bridge substructure, or any addition to or alteration thereof, and a contract or contracts based on such sealed proposals will be made, which notice shall be published weekly for four consecutive weeks next preceding the day named for making such contract or contracts, and shall state when and where such plan or plans, descriptions, bills and specifications can be seen, and which shall be open to public inspection at all reasonable hours, between the date of such notice and the making of such contract or contracts; but when the estimated cost of any public building, bridge or bridge substructure or of making any addition to or repair of the same does not exceed one thousand dollars, the same shall be let as heretofore provided, but notice of such letting need only be given for fifteen days, and said notice shall only be by posting on a bulletin board or by writing on a blackboard in a conspicuous place in the county commissioners' or auditor's office, showing the nature of the letting and when and where proposals in writing will be received, plans or specifications, or both as hereinbefore provided shall be kept on file during said fifteen days and open to public inspection, and when the estimated cost of any public building, bridge or bridge substructure or of making any addition thereto or repair thereof does not exceed two hundred dollars, the same may be let at private contract without any publication or notice thereof."

It will be observed that but little change was made by the codifying commission in the foregoing statute except to divide it into three sections, viz., 2352, 2353 and 2354 G. C. There is nothing in the present language of section 2353, aforesaid, to justify the conclusion that its provisions in reference to the giving

of fifteen days notice may be regarded as mandatory. While it is true that in the original section 798 R. S., aforesaid, it is provided that said fifteen days notice shall "only be by posting," as therein directed, yet the effect of this provision is only to make the method of posting mandatory after the decision is made to give notice for only fifteen days. I am unable to conceive upon what theory the word "need," as used in said section, may be given the force and effect of a command.

Prior to the aforesaid amendment of section 798 R. S., and by the amendment of said section found in volume 85 Ohio Laws 221, it was provided as follows:

> "But when the estimated cost of any public building or a bridge, and the substructure thereto, or of making any addition to or repair of any public building, bridge and substructures for the same does not exceed one thousand dollars; the same may be let at private contract without publication."

In the case of State ex rel. v. Commissioners, 2nd N. P., n. s., 261, the court having under consideration the legality of certain contracts which had been made under the provisions of said section 798 R. S., as amended in volume 85, aforesaid, in referring to this particular provision used this language:

> "After all this is done the auditor shall advertise for sealed proposals, as directed in section 798 R. S., and the only discretion the commissioners can exercise is the making of a contract without advertising, when the estimated cost of the bridge and the substructure does not exceed one thousand dollars, and this discretion does not mean the omission of any of these preliminary acts or the utter disregard of the rights of the public."

The court in the foregoing case construed the then provisions of said section 798 as vesting the commissioners with a discretion in the matter of letting the contract without advertising. Further investigation of the provisions of said section 798, prior to the last named amendment, shows that in volume 68 O. L., pags 103, the provision here under consideration was carried in the following language:

> "Provided that when the cost of a building or a bridge or of making any addition to or repair of any building, will not exceed one thousand dollars, the commissioners may, if they are of the opinion that the interest of the public will be the best subserved thereby, cause such building or bridge to be built, or such addition or repair to be made by private contract, without publication or public letting, as is provided in this and the following section."

It will thus be observed that under the original provisions of the law in respect to contracts less than one thousand dollars, an exception was made from the general provision requiring advertising, which was purely permissive and which vested the county commissioners with a discretion to determine for themselves whether contracts coming within that class should be advertised as required by the general provisions of the law, or let by private contract.

It clearly appears to have been the purpose of the legislature in the prior enactments of the exceptions to the general law in respect to the contracts under consideration here, to make such exceptions discretionary with the county commissioners. By reason of this general purpose, as thus plainly expressed in a former provision of the law, I conclude that no change in this regard was intended

in the present amendment as it now appears in said section 2353, and that the provision of said section, viz., "but notice of the letting need be given for only fifteen days" is one intended to be permissive only, and that there is still reserved to the commissioners the right to advertise, as provided in section 2352 aforesaid. If in their judgment such plan would be more beneficial to the county.

I am of the opinion, therefore, that the provisions of section 2353, supra, as to the giving of fifteen days' notice, when the estimated cost of the contract does not exceed one thousand dollars, are directory and that the commissioners may adopt such plan, if they so desire, or may follow the general provisions of the law and advertise, as provided by section 2352 G. C. If, however, the commissioners determine to give fifteen days' notice, as aforesaid, then such notice may only be given by posting, as required by said section 2352 G. C., aforesaid.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1860.

POST-MORTEM EXAMINATIONS—OHIO HOSPITAL FOR EPILEPTICS——IF REMAINS CLAIMED BY RELATIVES, THEIR CONSENT MUST BE OBTAINED—EXCEPTION, DEATH FROM VIOLENCE.

Post-mortèm examinations of the remains of patients who die in the Ohio Hospital for Epileptics, whose remains are claimed by the husband, wife or next of kin, may be made without the consent of the husband, wife or next of kin only in those cases in which it is supposed that death resulted by violence, whereby an inquest is required to be held.

COLUMBUS, OHIO, August 19, 1916.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I am in receipt of a request for an opinion from Dr. G. G. Kineon, superintendent of the Ohio Hospital for Epileptics, which is as follows:

> "I should like an opinion regarding the extent of our rights to make post-mortem examinations on bodies of patients who die at the Ohio Hospital for Epileptics.
>
> "It has been our custom to hold post-mortem examinations on our patients, provided we could get the consent of the relatives. However, there have been some cases which we very much desired to examine after death in order to be absolutely sure of the diagnosis, but were unable to do so because the relatives refused consent."

In accordance with the practice of this department the opinion on the foregoing question is being addressed to you.

With reference to epilepsy, section 2044 G. C. provides as follows:

> "In the committment and conveyance to the hospital, the care and custody while there, and the discharge therefrom, of epileptic insane or eplieptics whose being at large is dangerous to the community, like proceedings shall be had, and like powers exercised by officers charged with like duties in the premises as is provided by law for the commitment and care of the insane."

Further provision as to the care, custody and control of patients in the hospital for epileptics is found in section 2051 G. C., as follows:

> "The board of trustees may make such rules and regulations respecting the care, custody, discipline and discharge of patients, as they deem best for the interests of the patients and the state. Until properly discharged, all persons admitted to the hospital as patients shall be under the custody and control of the manager. Subject to such regulations as the trustees adopt, the manager may restrain and discipline any patient in such manner as he deems best for the welfare of the patient and the proper conduct of the institution."

The foregoing provision must be read in connection with the provision of section 1841-2 G. C. 103 O. L. 681, as follows

> "All persons committed to any institution under the control and management of the Ohio Board of Administration shall be considered as committed to the control, care and custody of such board."

Thus the care, custody and control of inmates or patients in the Ohio Hospital for Epileptics is committed to the Ohio Board of Administration, and so long as any person remains a patient or inmate in such institution he is subject to all lawful rules and regulations of the board governing inmates thereof. On the death of a person who was theretofore an inmate of such institution, such person ceases, of course, to be an inmate and his remains then becomes subject to the provisions of law applicable to the disposition of dead bodies.

A careful examination of the statutes fails to disclose any authority thereby conferred upon the board of administration, or any of its agents or employes, or other public officer, to hold or order to be held a post-mortem examination of the remains of a deceased inmate of the Ohio Hospital for Epileptics, except in case of death under circumstances such as induce a supposition that death was caused by a violence, in which case it is within the jurisdiction of the coroner to make, or cause to be made, a post-mortem examination.

In respect to the disposition of the bodies of certain classes of deceased persons, it is provided by section 9984 G. C. as follows:

> "Superintendents of city hospitals, directors or superintendents of city or county infirmaries, directors or superintendents of work-houses, directors or superintendents of asylums for the insane, or other charitable institutions founded and supported in whole or in part at public expense, the directors or warden of the penitentiary, township trustees, sheriffs, or coroners, in possession of bodies not claimed or identified, or which must be buried at the expense of the county or township, before burial, shall hold such bodies not less than thirty-six hours and notify the professor of anatomy in a college which by its charter is empowered to teach anatomy, or the president of a county medical society, of the fact that such bodies are being so held. Before or after burial such superintendent, director, or other officer, on the written application of the professor of anatomy, or the president of a county medical society shall deliver to such professor or president, for the purpose of medical or surgical study or dissection, the body of a person who died in either of such institutions, from any disease, not infectious, if it has not been requested for interment by any person at his own expense."

Section 9987 G. C. provides as follows:

"In all cases the officer having such body under his control, must notify or cause to be notified, in writing, the relatives or friends of the deceased person."

The provisions of these sections give rise to the inference, at least, that where a body is claimed and is not required to be buried at public expense, those persons who claim the same have a right to its custody for burial. This inference, it seems, is made fully conclusive by the provisions of section 12689 and section 12692 G. C., as follows:

"Sec. 12689 G. C. Whoever, being a superintendent of a city hospital, city or county infirmary, workhouse, asylum for the insane, or other charitable institution founded and supported in whole or in part at public expense, coroner, infirmary director, sheriff, or township trustee, fails to deliver a body of a deceased person when applied for, in conformity to law, or charges, receives or accepts money or other valuable consideration for such delivery, shall be fined not less than twenty-five dollars nor more than one hundred dollars or imprisoned not more than six months.

"Sec. 12692 G. C. Whoever detains a corpse, claimed by relatives or friends for interment at their expense, shall be fined not less than twenty-five dollars nor more than one hundred dollars or imprisoned not more than six months."

The foregoing provisions are subject to modification effected by section 12960 G. C., which provides:

"The next preceding section shall not require a delivery of such body until twenty-four hours after death."

It is then the mandatory duty to deliver the remains of a deceased inmate of the Ohio Hospital for Epileptics to the relatives next of kin or friends who claim the same for burial after twenty-four hours subsequent to death.

This right of possession for burial after twenty-four hours subsequent to the death of an inmate does not, in itself, conclusively preclude the holding of a post-mortem examination.

At common law there was no property right in the remains of deceased persons (13 Cyc. 280; 8 Am. and Eng. Ency. 834), yet the right to bury a corpse and preserve its remains is a legal right which the courts will recognize and protect.

Larson v. Chase, 47 Minn. 307.

Foley v. Phelps, 1 N. Y. App. Div. 551.

"It follows as a corollary to the well-recognized rule in the United States of the right of possession of a corpse for the purposes of interment and the care of such remains after burial that the invasion or violation of that right furnishes a ground for a civil action for damages." 13 Cyc. 280.

At page 280 of the same volume it is stated:

"and the right to dispose of a corpse by decent sepulture includes the right to the possession of the body in the same condition in which death leaves it."

There is little authority in this state on the question here under consideration.

In the case of Farley v. Carson, 5 W. L. Bull 786, decided by the district court of Hamilton county, it was held:

"A husband or wife, relict, is entitled to the possession of the body of the deceased wife or husband for sepulture, and in the fitness for burial in which death leaves it.

"It does not show an infringement on this right to possess the body with decency of death, where the attendant physician, immediately on the death of decedent in a hospital, and without delaying the delivery of the body to the widow, made an incision in the body in order to ascertain the extent of an abscess, of which the patient had died, one part or organ being dismembered or removed, and the incision not being visible when the clothes are on."

While this case held that a mere incision of the length of from four to eight inches in the abdomen, which was sewed up and covered by a strip of adhesive plaster, made for the alleged purpose of determining the extent of an abscess of the liver by the attending physician after death, was not a violation of the right of the widow to possession of the remains for decent burial, I am not inclined to the view that this case can be taken as authority for making a post-mortem examination such as the case might require to determine the correctness of the diagnosis of the ailments of the deceased by a physician in attendance or otherwise.

In the case of Foley v. Phelps, 1 N. Y. App. Div. 551, the complaint alleged that the plaintiff's husband, having fallen through an elevator shaft, was taken to Bellevue hospital where he died three hours later; that the plaintiff was under the duty and obligation and had the right to bury her husband; that she applied at the hospital for his body and begged those who were in charge of it not to allow an autopsy to be performed, stating that she would send an undertaker for the body at once; that, notwithstanding her request and protestations, the defendant, without her knowledge or consent, procured, assisted, aided and abetted in performing an autopsy on her husband's body, and that this was done without any authority of law. To this complaint a demurrer was interposed. It was held:

"That the complaint stated a cause of action; that, prior to interment, the widow had a right to the possession of the body of her husband for the purpose of preservation and burial, and that her rights in this regard were paramount to those of the next of kin, and that she had a right to the possession of the body in the same condition it was in, when death occurred; that the unlawful and unauthorized mutilation of the body was a clear invasion of the plaintiff's right, and, irrespective of any statutory enactment, entitled her to bring an action for damages."

In the case of Larson v. Chase, 47 Minn. 307, it was held:

"The right to the possession of a dead body for the purposes of preservation and burial belongs, in the absence of any testamentary disposition, to the surviving husband or wife or next of kin, and the right of the surviving wife (if living with her husband at the time of his death) is paramount to that of the next of kin.

"This right is one which the law recognizes and will protect and for any infraction of it,—such as an unlawful mutilation of the remains,—an action for damages will lie. In such an action a recovery may be had for injury to the feelings and mental suffering resulting directly and proximately from the wrongful act, although no actual pecuniary damage is alleged or proved."

While the circumstances of a particular case might be such that a post-mortem examination would not involve a more substantial mutilation of the remains than

that under consideration in the case of Farley v. Chase, it certainly may not be said that a post-mortem examination would not in any case necessitate such a mutilation of the remains as would be a violation of the right of the husband or wife, or next of kin, to have possession of the body in the same condition in which death leaves it.

In the absence of statutory authority therefor, I am therefore of opinion that post-mortem examinations of the remains of patients who die in the Ohio Hospital for Epileptics, whose remains are claimed by the husband, wife or next of kin, may be made without the consent of such husband, wife or next of kin, only in those cases in which it is supposed that death was caused by violence, as that phrase is construed in the case of State ex rel. v. Billows, 62 O. S. 307, i. e., "whenever the coroner, from observation or information has substantial reason for believing or surmising that death was caused by unlawful means" in which case an inquest is required to be held.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1861.

COUNTY BOARD OF SCHOOL EXAMINERS—TERMS OF SUCH MEMBERS—THOSE ELIGIBLE TO APPOINTMENT AS MEMBERS OF SUCH BOARD.

If a superintendent of schools who is employed according to the provisions of section 4740 *G. C.,* 106 *O. L.* 439, *teaches a substantial part of each day in the schools of which he is superintendent, pursuant to the direction of the board of education of the district, and has all the other requisite qualifications, he is eligible to appointment as a teacher to membership of the county board of school examiners, under section* 7811 *G. C.,* 104 *O. L.* 100.

A superintendent of the schools of a village school district, which is exempted under the provisions of section 4688 *G. C.,* 104 *O. L.* 133, *is not eligible to appointment as a member of the county board of school examiners.*

If a county school examiner, who was appointed as a district superintendent, becomes a teacher or becomes a superintendent, under section 4740 *G. C.,* 104 *O. L.* 439, *or such examiner, who was appointed as a teacher becomes a district superintendent, or becomes a superintendent employed under section* 4740 *G. C., supra, and does not teach under the direction of the board of education of the district, a substantial part of each day, such examiner ceases to possess the requisite qualifications and is no longer eligible to serve in that capacity.*

If a superintendent, employed under section 4740 *G. C., supra, who teaches a substantial part of each day by direction of the board of education, was appointed a county school examiner as a teacher and thereafter ceases to be such superintendent and becomes a teacher only in the public schools of the county school district or of an exempted village school district, he does not thereby become disqualified to continue to serve as county school examiner.*

The regular terms of members of boards of county school examiners, at the time section 7811 *G. C.,* 104 *O. L.* 102, *became effective, expired on August* 31, 1914, 1915 *and* 1916 *respectively. The regular terms of the appointive successors of the examiners, whose terms expired on August* 31, 1915 *and* 1916, *respectively, will expire on August* 31, 1917 *and* 1918, *respectively.*

COLUMBUS, OHIO, August 19, 1916.

HON. FRANK B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Yours under date of July 24, 1916, is as follows:

"The department of public instruction desires an opinion on the following questions relating to appointment and eligibility of members of county board of school examiners:

"(1) May a superintendent of a village that is exempted from district supervision under section 4740 as amended, be legally appointed a member of the county board of school examiners?

"(2) May a superintendent of an exempted village (4688 G. C.) be legally appointed on county board of school examiners?

"(3) If the time for which two members of county board of school examiners expires on August 31, 1916, for what length of time shall each be appointed?

"(4) If a district superintendent becomes a teacher, or a teacher becomes a district superintendent, or either becomes a 4740 superintendent

during the time for which he had been appointed on the county board of school examiners, would his term as member of an examining board automatically end?

"(5) If No. 1 be answered in the affirmative, and a 4740 superintendent is now a member of a county board of school examiners until August 31, 1917, shall a teacher or a district superintendent be appointed on the board of examiners, whose term will begin September 1, 1916?"

Section 7811 G. C., 104 O. L. 100, relative to the appointment and qualifications of members of county boards of school examiners, provides as follows:

"There shall be a county board of school examiners for each county, consisting of the county superintendent, one district superintendent and one other competent teacher, the latter two to be appointed by the county board of education. The teacher so appointed must have had at least two years' experience as a teacher or superintendent, and be a teacher or supervisor in the public schools of the county school district or of an exempted village school district. Should he remove from the county during his term, his office thereby shall be vacated and his successor appointed."

By this section it is provided that the county board of school examiners shall be composed of the county superintendent, one district superintendent and one other competent teacher. That is to say, the third member is hereby required to be a competent teacher other than the county superintendent or a district superintendent, as held in opinion No. 679 of this department, rendered to Hon. Addison P. Minshall, prosecuting attorney of Ross county, found at page 1388 of the Opinions of the Attorney-General for the year 1915.

Section 4740 G. C., 106 O. L. 439, to which reference is made in your first question, provides as follows:

"Any village or rural school district or union of school districts for high school purposes which maintains a first grade high school and which employs a superintendent shall upon application of the county board of education before September 10, 1915, or before June 1st of any year thereafter, be continued as a separate district under the direct supervision of the county superintendent. Such district shall continue to be under the direct supervision of the county superintendent until the board of education of such district by resolution shall petition to become a part of a supervision district of the county school district. Such superintendents shall perform all the duties prescribed by law for a district superintendent, but shall teach such part of each day as the board of education of the district or districts may direct. Such districts shall receive no state aid for the payment of the salaries of their superintendents, and the salaries shall be paid by the boards employing such superintendents."

It will be first noted that the village or school district, or union of school districts, hereby continued for supervision purposes, separate from the supervision districts of the county school district established as required by law, is to be under the direct supervision of the county superintendent, and that the superintendent therein referred to as being employed is not a district superintendent and could not, therefore, qualify as such under section 7811 G. C., supra, for appointment as a member of the county board of school examiners, as held in opinion No. 679 of this department, heretofore referred to. If, then, the superintendent employed

under section 4740 G. C. may be a member of the county board of school examiners, it must be as a competent teacher.

It will be further observed that the superintendent employed by the board of education, reference to whom is made in section 4740 G. C., is required thereby to teach such part of each day as the board of education may direct, so that notwithstanding the requirement that he shall perform all the duties prescribed by law for a district superintendent, he must, of necessity, be a competent teacher. If, then, such superintendent shall have had at least two years' experience as teacher or superintendent, and teaches a substantial part of each day, pursuant to the direction of the board of education, in the schools of which he is superintendent, he would then be a competent teacher within the terms of section 7811 G. C., supra, and eligible to appointment as a member of the county board of school examiners as a teacher.

I am of the opinion, in answer to your first question, that a superintendent employed in any village or rural school district, or union of school districts, for high school purposes, which maintains a first grade high school, who teaches a substantial part of his time in such school, if possessed of all the other requisite qualifications, may be appointed, as a teacher, a member of the county board of school examiners.

Section 4688 G. C., 104 O. L. 133, to which reference is made in your second inquiry, provides as follows:

> "The board of education of any village school district containing a village which according to the last federal census had a population of three thousand or more, may decide by a majority vote of the full membership thereof not to become a part of the county school district. Such village district by notifying the county board of education of such decision before the third Saturday of July, 1914, shall be exempt from the supervision of the board."

While the village here referred to is exempted from the supervision of the county board of education, it is not thereby constituted a separate supervision district such as is under the supervision of a district superintendent, as referred to in section 7811 G. C., supra. The superintendent of the schools of such exempted village may not, therefore, be appointed a member of the county board of school examiners as a district superintendent. Neither would such superintendent be, in my opinion, a teacher within the meaning of the terms of section 7811 G. C., and would not therefore be eligible, as a teacher, to appointment as county school examiner.

Your third question necessitates a reference to the provisions of sections 7813 and 7814 G. C., prior to the amendment thereof in 104 O. L. 100. Prior to said amendment the term of one of the members of the county board, under section 7813 G. C., was three years and it was therein provided that the term of one of the examiners should expire on the 31st day of August of each year. No change was made in section 7814 G. C. by the amendment referred to except to change the appointing power from the probate judge of the county to the county board of education. By force of the provisions of the above mentioned section, there was at the time of the taking effect of the amendments thereof a board of school examiners, the term of one of whom expired August 31, 1914, and he was, by virtue of section 7811 G. C., as amended, superseded by the county superintendent; and one member whose term expired August 3, 1915, whose successor was required to be appointed for a term of two years ending August 31, 1917. The term of the

third member of the old board will expire August 31, 1916, the successor of whom should be appointed for a term of two years ending August 31, 1918.

Sections 7813 and 7814 G. C., 104 O. L. 102-3, provide as follows:

> "Sec. 7813. The term of office of such appointive school examiners shall be two years. The term of one of the examiners shall expire on the thirty-first day of August, each year. The county board of education shall revoke the appointment of any examiner, upon satisfactory proof that he is inefficient, intemperate, negligent, guilty of immoral conduct, or that he is using his office for personal or private gain.
>
> "Sec. 7814. When a vacancy occurs in the board, whether from expiration of the term of office, refusal to serve, or other cause, the county board of education promptly shall fill it by appointment for the full or unexpired term and within ten days, report this to the superintendent of public instruction, together with the names of the other members of the board and the date of the expiration of their several terms of office."

If for any reason a vacancy has occurred in the term of the examiner whose term began September 1, 1915, the term of the person appointed to fill such vacancy will not expire until August 31, 1917, and his successor cannot, therefore, be appointed this year. So that it appears that the assumption that the terms of two of the examiners will expire August 31, 1916, is based on a misconception of the law.

Since receiving your inquiry, it is learned that your third question is based upon the following state of facts: At the time section 7811 G. C., 104 O. L. 100, went into effect, the county board of school examiners of a certain county consisted of E., B. and H., whose terms of office expired on August 31, 1914, 1915 and 1916, respectively. B. was chosen county superintendent in 1914, and E., whose term then expired, was reappointed as a member of the county board of school examiners, whereupon it was apparently assumed that E., who was reappointed at the expiration of his regular term in 1914, was appointed for a term of two years ending August 31, 1916.

When B., whose term of office would have expired August 31, 1915, was chosen county superintendent in 1914, he became *ex officio* member of the county board of school examiners by operation of law, with his tenure as examiner dependent solely upon his tenure as county superintendent, and succeeded E., whose term expired that year. There then became a vacancy in the unexpired term which B. had theretofore held ending August 31, 1915, as above stated. It was then the duty of the county board of education in 1914 to choose a member of the county board of school examiners to fill the vacancy in the unexpired term of B., ending in 1915. For this unexpired term E. was appointed for the reason that it was the only term for which the county board of education had authority then to make an appointment. It then became the duty of the county board of education, in 1915, to appoint a successor to E., whose term expired on the 31st day of August of that year, for a term of two years ending August 31, 1917. This, as I understand, was not done and no successor to E. has as yet been appointed by the county board of education. Since the county board of education has thus far failed to make an appointment for the term beginning September 1, 1915, E. was entitled to hold over under the provisions of section 8 G. C., as follows:

> "A person holding an office of public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws."

E. is not, however, now holding a regular term which will expire at any definite time. He may hold only until his successor is appointed and qualified. At the expiration of his term on August 31, 1915, it became the duty of the county board of education, by virtue of section 7814 G. C., supra, to appoint his successor for a term of two years ending August 31, 1917, and that the duty of the board continues. So, it is now the duty of the county board of education to appoint a successor to E. for the unexpired term ending on the date last mentioned.

In answer to your fourth inquiry, it will be observed that it is specifically required by section 7811 G. C., supra, that one examiner shall be the county superintendent, one a district superintendent and one a competent teacher with certain specified qualifications. From this it is clear that where there are incumbents of any two of the above named classes serving, no one is eligible to appointment or to serve in the other place on the county board of school examiners, except a person of the other enumerated class. It is the palpable intent that neither two teachers nor two district superintendents may be members of the county board of school examiners at the same time. If, then, a district superintendent ceases to be such, he can no longer serve as an examiner. By reason of his ineligibility, he cannot then qualify as a teacher for, of necessity, there is already one teacher on the board and that teacher may not be ousted by reason of the change or lack of qualification of either member as district superintendent. For the same reason a teacher who becomes a district superintendent is ineligible longer to serve as an examiner so long as there is already one district superintendent on the county board of school examiners.

From the answer to your first inquiry it follows that if a district superintendent becomes a superintendent of schools, employed under section 4740 G. C., he would cease to be a district superintendent and therefore ineligible as examiner. If a teacher who is examiner is employed as a superintendent of schools under section 4740 G. C., if a substantial part of each day is employed in teaching, as directed by the board of education, he continues to be a teacher and therefore may continue to serve as member of the county board of school examiners as a teacher.

From the answer to your first question it also follows, in answer to your fifth question, that if a superintendent of schools employed under section 4740 G. C. is a member of the county board of examiners, whose term expires August 31, 1917, a district superintendent only may be appointed as member of the county board of school examiners for the term beginning September 1, 1916.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1862.

FIDELITY OR INDEMNITY INSURANCE COMPANY—MUST HAVE AUTHORIZED PAID UP CAPITAL STOCK OF NOT LESS THAN $250,000 TO QUALIFY AS SURETY UNDER PROVISIONS OF SECTION 2723 G. C.

The provisions of section 2723 G. C. requires that a fidelity or indemnity insurance company shall have an authorized paid up capital stock of not less than $250,000 to qualify as a surety on the undertaking therein named.

COLUMBUS, OHIO, August 19, 1916.

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

GENTLEMEN:—I have your letter of August 3, 1916, submitting the following inquiry:

> "Can a fidelity or indemnity insurance company which has paid in capital stock of $215,000.00, a reserve of $35,000.00 and surplus amounting to $44,000.00 legally act as surety for a county depositary under provisions of section 2723, General Code?"

Section 2723 G. C., to which you refer, in so far as its provisions apply to your inquiry, is as follows:

> "Such undertaking shall be signed by at least six resident free-holders as sureties or by a fidelity or indemnity insurance company, authorized to do business within the state and having not less than two hundred and fifty thousand dollars capital."

The undertaking referred to in the foregoing section is the bond to be given by banks or trust companies which have been selected as county depositaries. The requirements of this section in respect to the qualifications of the fidelity or indemnity insurance company which is offered as surety on said undertaking, are, first, that such company is authorized to do business in this state and, secondly, that it has a capital of not less than two hundred and fifty thousand dollars. It is apparent that the answer to your question depends upon what construction shall be given the term "capital" as used in this section. It is ably contended by the representatives of the company involved in your inquiry that the term "capital" as used in said section means the actual estate of the corporation, or, in other words, its assets of every description including not only the sum subscribed and paid in for its capital stock but all gains and profits, investments and reserves and all money and property of every kind and description owned by said corporation. If this contention may be sustained the company in question meets the requirements of the statute. If, however, the term "capital" as used in this section has reference only to the capital stock actually subscribed and paid for and is limited to such capital stock, it is clear that the capital of the company in question, being only two hundred and fifteen thousand dollars, is insufficient to meet the requirements of this section.

Without discussing in detail the arguments advanced aforesaid, it is sufficient to say that I am not disposed to question the contention that in the administration of the common law there is a broad distinction made by the courts between the capital of a corporation and its paid-up capital stock and if in the present instance

the section under consideration stood alone these facts would be very persuasive. The legislature, however, has given the term "capital" as applied to the affairs of the corporations named in said section 2723 a definite meaning and this term as applied to the operation and business of said companies has received a statutory construction which in my judgment must control in the interpretation of the section in question.

The insurance companies named in said section 2723 are organized under the provisions of section 9510 G. C. and it is provided in section 9524 G. C. that

> "Except as hereinafter provided, no joint stock insurance company shall be organized under this chapter, or permitted to do business in this state with a less capital than one hundred thousand dollars, which must be paid up before the company can transact business. But on the payment of twenty-five per cent. of its capital stock, a live stock company may do business."

Under the provisions of this section it is very clear that the capital of said companies as defined by the legislature and as applied by it to the right to operate is limited to the paid up capital stock of such companies, and this section specifically provides that unless the capital therein required shall be in the amount and of the character named, said companies shall not be permitted to do business in this state.

We have, then, in this section, which is the first legislative limitation placed upon the rights of said companies, a clear and definite expression of the legislature in respect to not only what it regards but what it requires as the capital of such companies. Following up further legislative actions we find other regulations imposed on said companies by other statutes. It is provided in section 628 G. C. that:

> "If it appears to the superintendent of insurance upon satisfactory evidence that the assets of an insurance company organized under the laws of this state after deducting therefrom all liabilities including reinsurance, reserve or unearned premium fund, computed according to the laws of this state, are reduced twenty per cent. or more below the capital required by law, he shall require such company to restore such deficiency within such period as he designates in such requisition."

It is further provided in the succeeding section that if the deficiency is more than forty per cent. of the capital required by law, such company shall not issue any new policies or transact any new business until it receives a license from the superintendent of insurance authorizing it to do business.

In both of the aforesaid sections the legislature uses the expression "capital required by law," and clearly distinguishes between "capital required by law" and the assets of such companies. The capital required by law is defined in section 9524, supra. It follows, therefore, that not only does the legislature in said sections 628 and 629 again clearly indicate what it considers shall constitute the capital which shall be the basis upon which such companies may be permitted to operate, but by the further provisions of said section conclusively negatives any contention that the capital required by law may be regarded as including the assets of such corporation. If called upon to interpret the term "capital" as used in any of the statutes hereinbefore noted, no difficulty would be had in limiting the term to the paid up capital stock of the companies in question.

I am of the opinion that the construction thus given the term "capital" under the sections quoted, and the sense in which it is used by the legislature in said

sections, must control in the interpretation of said term as used in section 2723 supra. That is to say, the capital required by section 2723 must be held to be the capital required by other sections of our statutory law or, as expressed in those sections, the capital "required by law."

I therefore hold that the company named in your inquiry may not legally become surety on the undertaking in question, and that under the provisions of section 2723 G. C. any fidelity or indemnity insurance company, in order to qualify as surety upon the undertakings specified in said section, must first be authorized to do business in this state and, secondly, must have a paid up capital stock of not less than two hundred and fifty thousand dollars.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1863.

ROADS AND HIGHWAYS—COUNTY COMMISSIONERS ARE AUTHORIZED TO VACATE ROADS BY PROVISIONS OF CASS HIGHWAY LAW—PROCEDURE TO BE FOLLOWED—LIABILITY OF PETITIONERS.

The county commissioners are authorized by sections 6860 *and* 6862 *G. C.,* 106 *O. L.* 574, *to vacate roads under the proceedings prescribed for establishment of roads in so far as the same may be applicable.*

In case the petition for a road improvement filed pursuant to section 6862 *G. C.,* 106 *O. L.* 574, *is granted, no liability upon the bond given pursuant to section* 6863 *G. C.,* 106 *O. L.* 575, *for costs and expenses of the proceedings can arise.*

In case the petition is granted and the petitioners are ordered by the commissioners to pay a part of the compensation and damages allowed and the petitioners fail to pay the same by the time fixed therefor, the petitioners then become liable for all costs of the proceedings. In all other cases when the petition is granted, the costs and expenses of the proceedings become a charge against the county.

COLUMBUS, OHIO, August 19, 1916.

HON. JOHN M. MARKLEY, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:—I have your request for an opinion under date of July 18, 1916, which request reads as follows:

> "An application has been filed with the county commissioners of Brown county, Ohio, praying for the vacation of a certain road in said county under the provisions of section 3 of the Cass highway act (section 6862 of the General Code of Ohio). A bond has also been given by the petitioners, under the provisions of section 4 of said act (section 6863 General Code of Ohio), conditioned that the petitioners will pay into the treasury of the county the costs and expenses incurred in the proceedings in case the prayer of such petition be not granted.
>
> "There seems to be no provision in chapter I of the Cass highway act to adjudge the costs against the petitioners in case the prayer of the petition is granted. In the application for an improvement, establishment, etc., of a road in case there are any damages or compensation, the commissioners seem to be authorized to require the petitioners to pay any or all of such damages or compensation. The question is this: In case

the commissioners grant the prayer of this petition for the vacation of said road, may they require the petitioners to pay the costs of advertising, etc., in connection with said petition, or will the county be required to pay the same."

A consideration of the question submitted by you involves an examination of the first nineteen sections of the Cass highway law, being sections 6860 to 6878 G. C., inclusive. In view of the language used in these sections, considerable doubt has arisen as to whether county commissioners are authorized to vacate roads, and while you do not inquire as to this matter, I deem it proper to consider the same before answering the specific question submitted by you.

Section 6860 G. C. reads as follows:

"The county commissioners shall have power to locate, establish, alter, widen, straighten, vacate or change the direction of roads as hereinafter provided. This power extends to all roads within the county, except the intercounty and main market roads."

Section 6861 G. C., relates to the width of roads to be hereafter established, and section 6862 G. C. reads as follows:

Applications to locate, establish, alter, widen, straighten, vacate or change the direction of a public road, shall be made by petition to the county commissioners signed by at least twelve freeholders of the county residing in the vicinity of the proposed improvement, which petition shall set forth the route and termini of the road, or part thereof to be located, established, or vacated, or the particular manner in which such road is to be altered, widened, straightened, or the direction thereof changed.

"When such road or proposed road lies wholly within any school district and is necessary for the convenience and welfare of the pupils in such district, the board of education of such district may, by resolution, petition for such road."

It will be noted that section 6860 G. C. provides, among other things, that the county commissioners shall have power to vacate roads and that section 6862 G. C. provides that applications to vacate a public road shall be made by petition to the county commissioners. The next fifteen sections of chapter I of the Cass highway law contain no reference whatever to the vacation of roads, except that found in section 6869 G. C., 106 O. L. 576, being section 10 of the Cass law.

Section 6863 G. C. provides that after "such" petition is filed the commissioners shall, within ten days, consider the same and shall fix a date when they shall view the proposed "improvement" and also a date for a final hearing thereon. Under the provisions of this section the county commissioners must require the petitioners to give a bond conditioned that they will pay to the county the costs and expenses incurred in the proceedings for "such improvement" in case the prayer of the petition is not granted. Section 6864 G. C. provides for a notice to be published in a newspaper, which notice, in addition to other matter, shall state briefly the object and prayer of the petition for "such improvement." Section 6865 G. C. provides, among other things, that if the commissioners, after the view of "said proposed improvement," consider "such improvement" of sufficient public importance, they shall instruct the county surveyor to make a plat and survey of the same, and under this section the county surveyor must report in writing, giving his opinion either for or against the granting of "such proposed improvement." The surveyor's report must be accompanied with a statement of the estimated

compensation and damages due each person whose land is to be taken if the "proposed improvement" is established, and shall also state the width to which "said improvement" shall be open. Under section 6866 G. C., the commissioners must find that "said improvement" will serve the public convenience and welfare before they are authorized to grant the same. Under section 6867 G. C. the county commissioners may grant the "improvement" prayed for in the petition, or they may grant "said improvement" with changes and modifications. Section 6868 G. C. relates to the payment of compensation and damages and contains frequent references to the "improvement." Section 6869 G. C. reads as follows:

> "When an improvement is ordered established on the final hearing thereon, the county commissioners shall cause a record of the proceedings including the plat and survey of said proposed improvement to be entered in the proper road records of the county, provided, however, that in case of an appeal to the probate court, no record of said improvement shall be made until the appeal shall have been finally disposed of. Said commissioners shall then cause said road to be opened up as established, and such road shall thenceforth be considered a public road and shall be kept open, maintained and improved as provided by law, and that part of the road, if any, made unnecessary by any change or alteration therein shall be ordered vacated. No road shall be opened up, however, until all compensation and damages allowed are paid. A county road or part thereof which remains unopened for seven years after the order establishing it was made or authority granted for opening it, shall be vacated and the right to build it pursuant to the establishment in the original proceedings therefor shall be thereafter forever barred.

Sections 6870 to 6873 G. C., inclusive, relate to the procedure where there are claims for compensation and damages and contain numerous references to the "improvement," and this is also true of sections 6874 to 6877 G. C., inclusive, which sections are applicable when the "improvement" petitioned for is along or upon a county line or across a county line. Section 6878 G. C. contains a further reference to the vacation of roads and reads as follows:

> "The commissioners of any county or any joint board of commissioners of two or more counties, at a meeting had for that purpose, may by resolution declare by unanimous vote their intention to locate, establish, alter, widen, straighten, vacate or change the direction of any road, and such notice shall thereupon be given as is provided for upon the filing of a petition for such improvement and like proceedings shall be had by such commissioners or joint board thereof as in the case of the filing of a petition before them asking for such improvement."

It will thus be seen that while the legislature has declared that the county commisioners shall have power to vacate roads, that applications to vacate a public road shall be made by petition to the county commissioners, and that the commissioners of any county or any joint board of commissioners of two or more counties may, by resolution, declare by unanimous vote their intention to vacate any road, in which case like proceedings shall be had as in the case of the filing of a petition, yet the machinery provided by the related sections is specificly designed for use in the location or establishment of roads and does not seem to be suitable for use in the vacation of roads, and under section 6869 G. C., after taking final action on the petition, the express duty is enjoined on the commis-

sioners of causing to be opened up as established the road petitioned for, which road shall thenceforth be considered a public road and shall be kept open, maintained and improved as provided by law. In view, however, of the clear and unambiguous language of sections 6860 and 6862 G. C., it is my view that county commissioners are authorized to vacate roads, that the word "improvement," occurring in sections 6862 to 6878 G. C., inclusive, must, where the sense so requires, be held to include anything that may be petitioned for under authority of section 6862 G. C., and that where the petition is for the vacation of a road, the general procedure outlined in the sections in question is to be followed, but the final order of the commissioners, instead of being for the establishment of a proposed improvement and for the opening up of the road so established, will be that an existing road shall be vacated and shall not thenceforth be considered or regarded as a public road.

The specific question submitted by you is to be answered by reference to section 6863 G. C., which relates to the terms of the bond to be given by the petitioners, the condition of the bond being that the petitioners asking for the improvement will pay into the treasury of the county the costs and expenses incurred in the proceedings for the improvement in case the prayer of the petition be not granted. Under a bond so conditioned no liability could arise where the prayer of the petition is granted. Under section 6868 G. C. the commissioners may order the compensation and damages paid out of the county treasury or they may order the same, or such part thereof as they deem reasonable and just, paid by the petitioners and the balance, if any, out of the county treasury. This section further provides that when a portion of the compensation and damages is ordered paid by the petitioners, in case of failure to pay the same by the time fixed by the county commissioners, the petitioners shall be liable for all the costs of said proceedings and the commissioners may, at their option, abandon the improvement.

In view of the foregoing provisions I advise you that where a petition for the vacation of a road is filed, acted upon and refused, the costs and expenses must be paid by the petitioners or their sureties. Where the petition is granted, the petitioners and their sureties are relieved from liability and the costs and expenses become a charge against the county. In the case of a vacation of a road, no question of compensation can arise, the question of damages may arise and in proper cases damages may be allowed. In such case if the damages or any part thereof are by the county commissioners ordered paid by the petitioners and the petitioners fail to make payment within the time fixed by the county commissioners, such petitioners become liable for all the costs of the proceedings but their liability is created by the statute and does not arise from the giving of a bond, and under such circumstances their sureties would not be liable for the costs and expenses of the proceedings.

I believe the above constitutes a complete answer to the question submitted by you.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1864.

WORKMEN'S COMPENSATION ACT—REDPATH CHAUTAQUAS COMPANY OF OHIO—LIABILITY TO SAID ACT, ESPECIALLY SO-CALLED "TALENT" USED IN ITS BUSINESS.

"Talent" so-called, used by the Redpath Chautauquas Company of Ohio in the conduct of its business may be divided into four classes, the first three classes of which are "talent" under contract with and in the service of the Redpath Lyceum Bureau, a corporation of the state of Massachusetts. This "talent" is used by the Ohio company for varying periods either consecutive or intermittent for special engagements but remains under contract with the Massachusetts corporation.

The only control the Ohio company has over the talent is as to the time and place of rendering the service.

Such "talent" are not in the service of the Redpath Chautauquas Company of Ohio as comprehended by the workmen's compensation law and amounts paid to them for services are not to be taken into consideration in computing the amount of premium to be paid into the state insurance fund by the Redpath Chautauquas Company of Ohio.

Of the fourth class of talent used by the Redpath Chautauquas Company the salaries of such as are employed continuously for a regular period should be taken into account in computing the amount of premium to be paid, such talent being employed direct by the Ohio company as distinguished from the first three classes employed by the Redpath Lyceum Bureau.

COLUMBUS, OHIO, August 19, 1916.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your request for an opinion is as follows:

> "I am enclosing herewith letter from Messrs. Webber, McCoy and Jones, attorneys at law, report of payroll Auditor Robert Naylor, and a copy of an opinion prepared by Mr. N. G. White, an employe of this department, relative to including in the payroll report of the Redpath Chautauqua Company the amounts paid to persons employed by the chautauqua company to deliver addresses and lectures and to furnish amusement and entertainment at chautauquas conducted by said company.
>
> "The Redpath Chautauquas Company contend that such persons, whom they class as 'talent,' should not be included in the payroll reports made to this commission.
>
> "We would be glad to have your opinion as to whether such 'talent' are 'employes,' 'workmen' or 'operatives' as defined in section 14 of the workmen's compensation act, General Code section 1465-61."

With your letter you enclose a communication from Messrs. Webber, McCoy and Jones, attorneys representing the Redpath Chautauquas Company of Ohio, together with a blank form of contract of the Redpath Lyceum Bureau, which lyceum bureau is a Massachusetts corporation with offices in Boston, New York and Chicago.

At the outset it may be stated that no question is raised as to the Redpath Chautauquas Company of Ohio being subject to the workmen's compensation law, which is admitted by your commission, that company admittedly having five or more workmen or operatives regularly employed in the various lines of work in connection with the operation of the Redpath Chautauquas Company.

The question presented by your enquiry is as to whether or not the salaries paid for the "talent" used by the Redpath Chautauquas Company of Ohio in carrying on its chautauqua work are to be considered in determining the amount of premium to be paid by the Redpath Chautauquas Company under the provisions of the workmen's compensation law.

Paragraph 2 of section 13 of the workmen's compensation law, section 1465-60 of the General Code (103 O. L. 72), which defines "employers," is as follows:

> "Every person, firm and private corporation, including any public service corporation, that has in service five or more workmen or operatives regularly in the same business or in or about the same establishment under any contract of hire, express or implied, oral or written."

The term "employe, workman and operative" as used in the act is defined in section 1465-61, paragraph 2, as follows:

> "Every person in the service of any person, firm or private corporation, including any public service corporation employing five or more workmen or operatives regularly in the same business or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens and also including minors who are legally permitted to work for hire under the laws of the state but not including any person whose employment is but casual or not in the usual course of trade, business, profession or occupation of his employer."

It will be noted from the sections quoted above that the requirement necessary to bring an employer within the operations of the workmen's compensation law is that he must employ five or more workmen or operatives regularly in the same business and that in making up that requirement persons casually employed are not to be considered.

The information submitted by your payroll auditor relative to the matter in hand being somewhat vague and indefinite, further investigation has been made by this office for the purpose of ascertaining the facts surrounding the operation of the Redpath Chautauquas Company of Ohio with the result that it has been found that the so-called "talent" used by the chautauquas may be divided into four classes, namely:

1st. Such talent as is known as list talent, or what may be described as talent under continuous contract with the Redpath Lyceum Bureau, the Massachusetts corporation.

2nd. Talent in the nature of musical organizations, opera companies, etc., under contract with the Redpath Lyceum Bureau, provided by a leader or manager, who, under special contract with the Redpath Chautauquas Company of Ohio, provides an attraction to fill engagements made by the Redpath Chautauquas Company.

3rd. Talent composed principally of lectures under contract with the Redpath Lyceum Bureau who engage in chautauqua work casually as an incident to their regular employment and generally during vacation periods.

4th. Talent made up of persons or attractions secured by the Redpath Chautauquas Company of Ohio direct, i. e., without resorting to the use of persons or attractions under contract with the Redpath Lyceum Bureau. This talent is made up of individuals hired especially or outside of attractions supplied by a manager or leader as the case may be, and generally speaking, contracts referred by the

Redpath Chautauquas Company of Ohio for the purpose of filling special engagements or as added attractions to the regular chautauqua for which talent is secured from the Redpath Lyceum Bureau.

The four classes of talent referred to above make up the line of attractions used by the Redpath Chautauquas Company of Ohio in its operation. The Redpath Chautauquas Company of Ohio, while an organization separate and distinct from the Redpath Lyceum Bureau, secures all of the first three classes of its attractions referred to through the Lyceum Bureau as such talent being under contract with the Lyceum Bureau for services for a definite time or at least for not less than a specified number of weeks or months. In other words, the time and services of the talent referred to are at the command of and subject to the orders of the Redpath Lyceum Bureau. The Redpath Lyceum Bureau is responsible to the talent for the payment of the sum contracted to be paid for services according to the particular terms of the contract. In the operation of its business affairs the Redpath Lyceum Bureau co-operates with the various chautauqua companies throughout the country, of which the Redpath Chautauquas Company of Ohio is one, by assigning for specified times such of its attractions as may be agreed upon for particular territory. While, as stated before, the talent is under contract with the Redpath Lyceum Bureau and must look to it for payment for services, in practical operation for reasons of convenience payment for services rendered is at times made direct to the talent by local committees or by the Redpath Chautauquas Company of Ohio, as the case may be, but all of such payments are made pursuant to the contract existing between the talent and the Redpath Lyceum Bureau according to such terms as may be agreed upon. The services rendered by the talent contracted for by the Redpath Chautauquas Company of Ohio, so far as I have been able to ascertain, are of such a nature as to be wholly outside of the control of the chautauquas company, except insofar as the time and place of rendering such services may be designated. In fact it is possible under the arrangements made between the Redpath Lyceum Bureau, the Redpath Chautauquas Company of Ohio, and the so-called talent that one person or attraction may be working one day for the Redpath Chautauquas Company of Ohio, and the next day under a separate contract for another chautauqua company in other territory, returning the following day to the Redpath Chautauquas Company of Ohio to fill another engagement, but at all times such talent or attraction sustains uninterrupted contractual relations with the Redpath Lyceum Bureau referred to above.

In practice the talent of the first three classes referred to as used by the Redpath Chautauquas Company of Ohio is part of the organization of the Redpath Lyceum Bureau loaned or assigned to the Redpath Chautauquas Company of Ohio for a particular purpose under a separate contract and at no time during the continuation of the contract with the Redpath Chautauquas Company of Ohio does the contractual relation existing between the talent and the Redpath Lyceum Bureau come to an end.

The purpose of the workmen's compensation law is to compensate injured employes and the dependents of killed employes, so that it must follow that by the provisions of the law contained in section 1465-61, paragraph 2, G. C., supra, "every person in the service of any person" is meant every person in the service as an employe of any person.

Waiving the question of the status of talent as independent contractors, it is my opinion that talent of the first three classes referred to as used by the Redpath Chautauquas Company of Ohio under the conditions stipulated are not to be considered as employes of the Redpath Chautauquas Company of Ohio, and their salaries or compensation are not to be taken into consideration in computing the amount of premium to be paid by the Redpath Chautauquas Company of Ohio under the workmen's compensation law.

As to the fourth class enumerated differentiation may be made between those persons employed direct by the Redpath Chautauquas Company of Ohio for a regular or continuous period and those persons only casually employed for special engagements, it being my opinion proper to include the salaries of the first branch of the fourth class referred to as being employes of the Redpath Chautauquas Company direct and independent of the Redpath Lyceum Bureau, which controls the first three classes of talent. Taking the view that the first three classes of talent are not employes of the Redpath Chautauquas Company of Ohio, it is wholly immaterial whether they are workmen or operatives as defined in section 14 of the Workmen's Compensation Law, supra.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1865.

JUSTICE OF PEACE—SPEEDING OF AUTOMOBILES—WHEN PLEA OF GUILTY TO CHARGE OF VIOLATING SECTION 12604 G. C. IS MADE BEFORE JUSTICE OF PEACE HE IS WITHOUT JURISDICTION TO RENDER FINAL JUDGMENT—EXCEPTION—HOW FINES ILLEGALLY PAID UNDER SECTION 12604 G. C. CAN BE RECOVERED.

When a plea of guilty is made before a justice of the peace to a charge of violating the provisions of section 12604 *G. C., said justice is without jurisdiction to render a final judgment therein unless the defendant in a writing subscribed by him waives the right of trial by jury and submits to be tried by said justice as provided by section* 13511 *G. C. The provisions of section* 13510 *G. C. in respect to the jurisdiction conferred upon justices in cases where a complaint is filed by an injured party are not applicable to prosecutions under said section* 12604, *supra, for the reason that violations of said last named section are not in the class of misdemeanors in the commission of which there may be an injured party as contemplated by said section* 13510, *supra.*

When fines are collected by a justice of the peace under section 12604 *G. C. without having jurisdiction as above defined, and are paid by said justice into the county treasury, the parties so paying said fines are the only persons who may recover said money from said treasury.*

COLUMBUS, OHIO, August 19, 1916.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of August 14, 1916, as follows:

> "1st—Upon a plea of guilty may a justice of the peace assess a fine and enforce the collection thereof against a person charged with violating the provisions of section 12604 G. C.? (See Secs. 12626 to 12628 and Secs. 13510 and 13511 G. C., and O. S. Vol. 51 page 24.)
>
> "2nd—If he has no such authority what finding should be made relative to fines that have thus been collected and paid into the county treasury and those which yet remain in the hands of the justice?"

Section 12604 G. C. provides the maximum rate of speed at which a motor cycle or motor vehicle shall be operated in various sections of a municipality and on roads outside thereof, and provides a fine of not more than twenty-five dollars

($25.00) for the first offense and not less than twenty-five dollars ($25.00) nor more than fifty dollars ($50.00) for a second violation of the rate of speed so fixed.

Section 13423 G. C., as amended 103 O. L. 539, specifies certain criminal matters in which justices of the peace, police judges and mayors of cities and villages have final jurisdiction within their respective counties.

It is provided in section 1464 G. C. that justices of the peace shall have final jurisdiction in matters involving a violation of the fish and game laws.

The offense of operating a motor cycle or motor vehicle at a greater speed than that provided by section 12604 supra is not included in the cases specified in either section 13423 supra or section 1464 supra, nor in any other section conferring final jurisdiction upon justices of the peace.

The jurisdiction conferred upon a justice of the peace to render final judgment in other cases of misdemeanor is found in sections 13510 and 13511 G. C. It is provided in the former section that when a person charged with a misdemeanor upon complaint of the party injured enters a plea of guilty thereto a magistrate shall sentence him to such punishment as he may deem proper; but if the complaint is not made by the party injured and the accused pleads guilty, such magistrate shall require the accused to enter into a recognizance to appear at the proper court, as is provided when there is no plea of guilty.

What is meant in this section by the term "party injured" is defined by the court in the case of Hanaghan v. State, 51 O. S. page 24, wherein the court said:

> "If every citizen of the state, or member of the community where the offense is committed, is included in those descriptive words, this proceeding in error is without merit. But it is evident they were not used in the statute in that sense. They refer, we think, to the person who suffers some particular injury from the commission of the offense, either in his person, property, or reputation, as distinguished from that which results to the general public, or local community."

It is apparent that the offense of driving a motor vehicle at an unlawful rate of speed is not in the class of misdemeanors in the commission of which there may be an "injured party" in the sense as above defined by the supreme court. It follows, therefore, that when a complaint is made under this section before a justice of the peace, he has no jurisdiction upon a plea of guilty to impose the penalty of the law, but is required, as is provided in said section 13510, supra, to order the defendant to enter into a recognizance for his appearance at another court, unless said defendant, upon entering his plea of guilty, should in writing waive the right of a trial by jury and submit to be tried by the magistrate, as provided in section 13511 G. C.

Without quoting in full the provisions of said last named section, it is sufficient to say that in cases of misdemeanor it permits the accused to waive, in a writing subscribed by him and filed before or during the examination, the right of trial by jury and to submit to be tried by the magistrate. When the accused complies with these provisions of said section 13511, the justice of the peace is invested with jurisdiction to render final judgment.

The foregoing observations furnish the answer to your first inquiry.

You then ask if a justice has no authority to render final judgment and assess a fine under the provisions of section 12604 G. C., what finding should be made relative to fines that have been collected and paid into the county treasury and those which yet remain in the hands of the justice.

In answer to this inquiry I must advise that if any fines have been collected

in cases wherein the facts, as above set forth, were not present to confer jurisdiction upon a justice of the peace and such fines have been turned into the county treasury, they should remain there unless the party from whom they were collected feels impelled to complain. The money so paid by the justices into the county treasury is not public money, within the contemplation of section 286 G. C., as amended in 106 O. L. 507, in that it requires any findings by your examiners. If fines have been paid into the county treasury, which were collected under said section 12604 supra, without authority of law, the parties from whom such fines were collected must proceed to recover the same, and they are the only persons who may recover the same.

As to such fines as have not yet been turned into the county treasury by the justice but still remain in his possession, the justice should proceed to return said money to the parties entitled to the same and should then proceed in the case according to law and recognize the defendants to the proper court.

Reference is also made in your inquiry to the provisions of sections 12626 and 12628 G. C. These sections provide as follows:

> "Sec. 16226. A person taken into custody, because of the violation of any provision of this subdivision of this chapter, shall forthwith be taken before a magistrate or justice of the peace in a city, village or county, and be entitled to an immediate hearing. If such hearing cannot be had, he shall be released from custody on giving his personal undertaking to appear in answer for such violation at such time or place as shall then be indicated, secured by a deposit of a sum equal to the maximum fine for the offense with which he is charged; or, in lieu thereof, if he be the owner, by leaving the motor vehicle. If the person so taken is not the owner, he can leave the motor vehicle with a written consent given at the time by the owner, who must be present, with such judicial officer.
>
> "Sec. 12627. If a judicial officer is not accessible, the accused under the next preceding section shall forthwith be released from custody by giving his name and address to the officer making the arrest and depositing with such officer a sum equal to the maximum fine for the offense for which such arrest is made or instead, if he is the owner, by leaving the motor vehicle. If the accused is not the owner, he can leave the motor vehicle with a written consent given at the time by the owner who must be present.
>
> "Sec. 12628. The officer making the arrest as provided in section twelve thousand six hundred and twenty-six, shall give a receipt in writing for such sum or vehicle deposited and notify such person to appear before the most accessible magistrate, naming him, specifying the date, place and hour. In case such undertaking with security or deposit shall not be made by an owner or other person taken into custody, the provisions of law in reference to bail in cases of misdemeanor shall apply."

Without discussing the provisions of these sections in detail it is sufficient to say that while they may indicate an intention on the part of the legislature to confer upon magistrates or justices of the peace final jurisdiction to hear and dispose of complaints under said section 12604 supra, yet in my judgment they are not sufficient to accomplish that purpose and do not confer such final jurisdiction.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1866.

APPROVAL, RESOLUTIONS FOR CERTAIN ROAD IMPROVEMENTS IN CARROLL, COSHOCTON, HANCOCK, DEFIANCE AND SENECA CUNTIES.

COLUMBUS, OHIO, August 22, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communications of August 17 and August 19, 1916, transmitting to me for examination final resolutions relating to the following road improvements:

"Carroll County—Sec. 'A,' Minerva-Sandyville road, Pet. No. 2142, I. C. H. No. 369.

"Coshocton County—Sec. 'A,' Walhonding-Newark road, Pet. No. 356, I. C. H. No. 411.

"Hancock County—Sec. 'D,' Findlay-Bowling Green road, Pet. No. 2427, I. C. H. No. 220.

"Hancock County—Sec. 'D,' Findlay-Bowling Green road, Pet. No. 2427, I. C. H. No. 220.

"Hancock County—Sec. 'D,' Findlay-Bowling Green road, Pet. No. 2427, I. C. H. No. 220.

"Hancock County—Sec. 'D,' Findlay-Bowling Green road, Pet. No. 2427, I. C. H. No. 220.

"Defiance County—Sec. 'D,' Hicksville-Defiance road, Pet. No. 2281, I. C. H. No. 420.

"Seneca County—Sec. 'O,' Lima-Sandusky road, Pet. No. 2919, I. C. H. No. 22."

I find these resolutions to be in regular form and am therefore returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1867.

MUNICIPAL CORPORATION—EXCAVATION OF MATERIALS FOR STREET IMPROVEMENT—INTERPRETATION OF CONTRACT MADE BY MUNICIPALITY AND CONTRACTOR FOR DISPOSING AND HAULING AWAY DIRT SO EXCAVATED.

When a municipality reserves all material excavated from a street in the course of its improvement and the contract provides that said material shall be placed upon the premises of abutting lot owners and on intersecting streets, which provision of the contract was imposed upon the contractor as a part of his duty under said contract, and thereafter said lot owners or other property owners pay said contractor for hauling dirt excavated from said street to their premises, the only claim said municipality may have against the parties, other than abutting lot owners, is the value of the material so hauled.

If said material was hauled by said contractors without the knowledge or direction of the municipality and in violation of the provisions of said contract, both the contractor and the person receiving such material, if he was not an abutting lot owner, may be held to account to the municipality for its value if it has any value.

COLUMBUS, OHIO, August 22, 1916.

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

GENTLEMEN:—I have your letter of July 14, 1916, as follows:

"During the course of the Springfield street improvement, sundry payments were made to the contractors by property owners within the village for earth, stone, or other excavated materials or for the delivery of the same to such points as may have been designated by said property owners.

"One instance of same is that of $50.00 paid by the St. Paris village school district, for which a bill was submitted by the contractors, for '500 loads of dirt hauled from Springfield street to school yard.'

"In other cases of such payments made by property owners within the village, checks were submitted showing said payments were made 'for dirt' made available by reason of street improvement excavation; receipts were exhibited, given by the agent of the contractors, acknowledging payments 'for dirt'; and in other instances wherein no receipts are held and purpose of payment is not written upon the face of the check made to the contractors, makers thereof have stated that such payments were made for stone or dirt; and finally in certain cases wherein no receipts were given or none preserved, and payments made to contractors in currency, statements were made under oath, by property owners that said payments were made for earth from the said street excavation.

"Doubt was expressed in certain cases whether such payments to contractors have been made for earth and excavated material, or for services of the contractors in delivering same to their premises as designated.

"Question 1. Under contract provisions (see specifications, page 3 of the enclosed data) does title to any and all excavated materials vest in the corporation in the sense that payments as described above made to contractors are recoverable to the village treasury?

"Question 2. Under said contract, is the contractor entitled to receive and retain compensation from property owners for the delivery of such materials to certain designated points, or must such delivery be considered only a proper disposition of the same by direction of the engineer as expressly provided by the terms of the contract."

The provisions of the contract to which you refer in your foregoing inquiries are as follows:

> "The council reserves the right to cross walk stones or paving block, curb stones, gravel, crushed stone, sewer pipe, earth or other valuable material after it has been taken up by the contractor who is to use care in handling the same so as not to break or waste them and shall carefully and neatly pile them at such points on intersecting streets or abutting lots as the engineer may direct."

By the foregoing provisions of said contract title to all the material described therein taken up and excavated by said contractors from said street, is retained by the municipality. Any appropriation of said material by the contractors in violation of the terms of said contract, or by the contractors and private parties, other than abutting lot owners, would render the party so appropriating said material liable to account to said municipality for the value thereof. If the contractors or any property owner aforesaid therefore appropriated any dirt or other material excavated by the contractors and the latter hauled it upon the property of said individuals, both the contractors and said individuals receiving said dirt must account to the municipality for its value, if it has any value. This value might or might not be the amount received by the contractors from said individuals for hauling said material. However, what the individuals saw fit to pay and what the contractors agreed to accept under such circumstances is no concern of the municipality. The money thus received by the contractors from said individuals is not public money within the meaning of section 286 G. C. as amended 106 O. L. 509, and does not represent the measure of loss to the municipality. The responsibility, under such circumstances, of the contractors and said property owners arises from a misappropriation of public property and the measure of such responsibility is the value of the property so taken.

It follows, therefore, that if the contractors hauled material upon abutting lots under the direction of the engineer and the owners of said lots, either voluntarily or by inducement of the contractors, paid the latter for such hauling, such transaction is solely one for adjustment between said lot owners and contractors, and one in which the village has no interest. Upon the other hand if material excavated by the contractors was taken by them without the knowledge of the municipality and without any direction by the engineer and placed upon the property of individual owners, other than abutting owners, the latter and the contractors must be held liable to compensate the municipality for the value of such material so taken.

In addition to the facts submitted in your inquiry I have learned from other sources that the engineer in charge of such improvement for the municipality, and under the provisions of the contract above quoted, ordered and directed the contractors to place and pile the material so excavated either upon abutting lots or upon intersecting streets at points within two hundred feet of the street under improvement. This direction of the engineer appears to be in accordance with the usual practice of engineers under such circumstances. It is not understood that the provisions of the contract above quoted and like provisions in other contracts of a similar character contemplate that the material excavated shall be hauled from the improvement to a point at any great distance therefrom. The purpose of this provision of the contract is to take care of at least a part of the material so excavated temporarily so that it may thereafter be removed to such points or places as the municipality may determine to be proper. The requirement in said contract that the contractors "shall carefully and neatly pile" indicates that it was not intended that such disposition should be a permanent one.

It is further claimed in reference to the actual facts involved in the improvement in question that great difficulty was experienced by the municipality in disposing of the material excavated from said Springfield street, and that the village

was unable to procure the necessary teams to remove said material, after the same had been placed upon intersecting streets under the direction of the engineer, to the points of its final disposition. It is therefore a serious question to be considered, if the above facts are true, whether, in the event said contractors disposed of said material in an unauthorized manner, it can be shown that the village actually sustained any loss thereby, or in other words, whether such material was of any value to the village under the surrounding circumstances of the case.

Referring now to your first inquiry: In view of the above considerations I must advise that no payments such as described in your inquiry are recoverable from the contractors by the village, but if there was an unlawful appropriation of any material as above described by the contractors and private property owners, other than abutting owners, the village is entitled to recover from them the value of the material so appropriated.

In answer to your second inquiry, in view of what has already been said, the payment by property owners to the contractors for the hauling of such material is a matter for adjustment between them and must depend, as between them, upon the particular circumstances of each case.

In order that my conclusions in this matter may be perfectly plain I hold:

1. If any material, paid for by either private individuals or the school district named in your inquiry, was hauled by order of the engineer under the provisions of the contract, the transaction is one for adjustment between the parties so paying said contractors and the contractors.

2. If material was hauled by said contractors without the knowledge or direction of the engineer in charge and in violation of the provisions of said contract, both the contractors and the person receiving such material, if he was not an abutting lot owner, may be held to account to the municipality for its value, if it has any value.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1868.

AMERICAN FLAG ON HANDKERCHIEFS—MANUFACTURE FOR SALE OR HAVING SAME IN POSSESSION FOR PURPOSE OF SALE—VIOLATION OF SECTION 12396 G. C.

The manufacture for sale, or the having in possession for the purpose of sale, of handkerchiefs on which is placed the American flag, is a violation of section 12396 *G. C.*

COLUMBUS, OHIO, August 22, 1916.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—You have requested my opinion regarding sections 12396, 12397 and 12398 G. C., which prohibit certain uses of the flag of the United States or the state of Ohio. The particular state of facts in which I understand you are interested is expressed in two paragraphs of a letter from Wilson Bros., Chicago, Ill., as follows:

> "We have been offering for sale handkerchiefs with different kinds of embroidery, using the American flag in connection with designs representing ships, guns, etc., and in some instances with the word 'preparedness' under the flag.
>
> "These handkerchiefs were not in any way to be used as advertisements."

Section 12396 G. C. provides as follows:

> "Whoever prints, paints or places a word, figure, mark, picture or de-

sign, upon a flag, standard, color or ensign of the United States, or the state of Ohio, or causes it to be done, or exposes, or causes to be exposed, such flag, standard, color or ensign upon which is printed, painted or placed, or to which is attached or appended a word, figure, mark, picture or design, or manufactures or has in possession an article of merchandise upon which is placed or attached a representation of such flag, standard, color or ensign, or publicly mutilates, defiles, defaces or casts contempt upon such flag, standard, color or ensign, shall be fined not more than one hundred dollars, or imprisoned not more than thirty days, or both."

One of the express prohibitions contained in this section is the manufacture, or having in possession, an article of merchandise on which is placed or attached a representation of such flag, standard, color or ensign. If the flag used by Wilson Bros. comes within the definition of "flag" contained in section 12397 G. C., and the use which they make of it does not come within the exceptions of section 12398 G. C., there can be no question that the same is a violation of said section 12396 G. C.

Section 12397 G. C. Defines the words "flag, standard color or ensign," as follows:

"The words 'flag,' 'standard,' 'color' or 'ensign,' as used in the next preceding section, shall include any flag, standard, color or ensign or a picture or representation thereof, made of or represented on any substance, and purporting to be a flag, standard, color or ensign of the United States, or the state of Ohio, or a picture or representation thereof, upon which shall be shown the colors, the stars and the stripes in any number thereof, or which might appear to represent a flag, standard, color or ensign of the United States or state of Ohio."

If the flag used by Wilson Bros. contains the colors red, white and blue and the stars and stripes in any number, it is within the definition.

The only exceptions to section 12396 G. C. are contained in section 12398 G. C. as follows:

"The next two preceding sections shall not apply to an act permitted by the statutes of the United States or by the United States army and navy regulations, nor shall they apply to a newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant, or commission of appointment to office, society lodge or emblem, ornamental picture, or stationery for use in correspondence, on which shall be printed, painted or placed said flag disconnected from any advertisement."

Congress has not legislated with reference to the question here under consideration save in the matter of the use of the flag in trade marks, etc., sought to be registered and the reference to regulations of the army and navy undoubtedly refers to the rules of the army and navy prescribing the form of various flags used therein, some of which contain printed matter, such as recruiting flags, advertising flags, and emblems of particular divisions of the army and navy. I am advised by the judge advocate general of the war department, Washington, D. C., that their rules contain no permission for the use of the flag in the manner here under consideration.

Under their own statement of facts it is clear that the use of the flag by Wilson Bros. does not come within any of the further exceptions in said section, but that the flag is placed on the handkerchiefs solely for the purpose of making them more salable.

Under section 12396 G. C., supra, the question of whether or not the use of the flag is one for advertising purposes is immaterial, for that section contains no

such limitation. It is merely a prohibition against the use of the flag on any article of merchandise, and the only reference in any of these sections to advertising is that contained in section 12398, and it is there merely a limitation upon the exceptions.

I am therefore of opinion that the manufacture for sale of handkerchiefs, containing the American flag with the colors and the stars and stripes, in connection with designs representing ships, guns, etc., or in connection with the word "preparedness" is a violation of section 12396 G. C., supra, and subjects the manufacturer, or any one having such handkerchiefs in possession, to prosecution thereunder.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1869.

STATE MEDICAL BOARD—EXAMINING NURSES AND CHIEF EXAMINER—SUCH POSITIONS NOT SUBJECT TO PROVISIONS OF CIVIL SERVICE LAW.

Persons appointed to positions and offices under the provisions of the civil service act, which became effective July 1, 1914, 103 *O. L.* 698, *in which a definite term is fixed by statute, may serve only for the term so fixed by statute.*

The positions of examining nurses, including that of chief examiner, provided for by section 1295-1 *G. C., as enacted in* 106 *O. L.* 191, *are not subject to the provisions of the civil service law, requiring a competitive examination of applicants therefor.*

COLUMBUS, OHIO, August 22, 1916.

The State Civil Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your letter of August 2, 1916, submitting the following statement and inquiry:

> "The act regulating the practice of nursing in the state of Ohio provides that:
>
> "'Within sixty days after this act becomes operative, the state medical board shall employ a secretary, entrance examiner, and three nurses; said three nurses with the secretary of the state medical board shall constitute a nurses' examining committee, this committee to be chosen from ten nominations made by the Ohio Association of Graduate Nurses. The secretary of the state medical board shall be the secretary and executive officer of the committee. One nurse shall be employed for one year, one for two years, and one for three years, and thereafter as the term of one nurse expires, a successor shall be employed in the manner hereinbefore specified, for a term of three years. One of the nurses so employed shall be designated as chief examiner. The secretary shall have the power to administer oaths. Each person so employed shall file with the secretary an affidavit that she is a resident of Ohio, a graduate of a recognized training school for nurses and, in addition thereto, shall have had not less than five years' experience in nursing.'
>
> "In July, 1915, Miss Anna Johnson took a competitive examination for public health nurse, and stood No. 3 on the list. Following the taking effect of the law in August, 1915, Miss Johnson was appointed a member of the nurses' examining committee for a term of one year, and was designated chief examiner, as provided by law. The state medical board had claimed exempt from the classified service three positions, as provided under section 486-8 of the civil service law, so that Miss Johnson was appointed to the position of chief examiner from the eligible list, and was considered in the classified service.

"At a meeting of the state medical board on July 5, 1916, Miss Johnson was re-appointed a member of the nurses' examining committee for a term of three years, but one member of that committee who had never taken the nurses' examination was designated as chief examiner. Now Miss Johnson has written the civil service commission to know what her rights are under the civil service law.

"Inasmuch as the law creating the Nurses' examining committee became effective prior to the civil service law, and since this position is not claimed as one of the exemptions by the state medical board, it appears to us that the position must be in the classified service.

"Is not section 1 of this law inconsistent with the provisions of the civil service law? Since the civil service law provides that all positions in the classified service shall be free, open to all, and competitive, can the civil service commission limit the applicants for this position to the ten nominations made by the Ohio Association of Graduate Nurses, or can the civil service commission lawfully confine the competitors to the three persons appointed as members of the nurses' examining committee?

"We will appreciate an early reply for the reason that the state medical board has requested that we conduct a competitive examination to create an eligible list for the position of chief examiner."

The statute quoted in your foregoing letter is section 1295-1 G. C., and is found in 106 O. L. 191, being section 1 of "an act to regulate the practice of nursing in the state of Ohio," which act became effective on the 2nd day of August, 1915. It appears from the records of the state medical board that by virtue of the provisions of said section aforesaid, said board on the 4th day of August, 1915, appointed three nurses from a list of ten nominations made by the Ohio Association of Graduate Nurses, which list included the person named in your inquiry, who was appointed for the term of one year and designated as chief examiner. Said person so appointed assumed the duties of her said position on August 16, 1915. Her appointment, therefore, was made while the civil service law, which became operative January 1, 1914, was still in effect (103 O. L. 698), as the present civil service law did not become operative until August 31, 1915. Under the authority of the recent case of McNamara v. State Civil Service Commission, the law which was in force at the time the appointment was made for a definite term must be held to control the tenure of office of the person so appointed.

In an exhaustive opinion reported in volume II, at page 1664 of the Attorney-General's Report for the year 1914, my predecessor, Hon. Timothy S. Hogan, held that a statute fixing a definite term for a position in the classified civil service, under the provisions of said act of 1914, was not repealed by said act, and that the term so fixed by statute controlled the tenure of such person in such position in said service. This opinion followed the decision of the superior court of Cincinnati in the case of State ex rel. v. Schneller, 15 N. P., n. s., 438.

I concur in the conclusions of my predecessor in this respect, and therefore advise that at the expiration of the term of one year, for which the person named in your inquiry was appointed, her tenure in said position of chief examiner will end.

The foregoing observations are based upon the assumption that the position of chief examiner of nurses was properly designated as being one within the competitive classified service and that the appointment of said person from an eligible list was in all respects in accordance with and required by statutory law. However, this brings us to a consideration of your inquiry as to whether the provisions of said section 1295-1, aforesaid, are not in conflict with the requirements of the civil service law to the effect that examinations for positions in the classified service shall be public, competitive and free for all. See section 486-10 G. C.,

106 O. L. 406. As before observed, under the provisions of said section 1295-1, supra, the appointment of three nurses is to be made from a list of ten nominations, which are selected by the Ohio Association of Graduate Nurses. Manifestly, then, the provisions of this statute and those of the civil service law, above noted, are hopelessly conflicting if the positions of said nurses, and particularly that of chief examiner, are properly in the classified service under the civil service law.

The requirement that there shall be a test by a competitive examination of the qualifications of all applicants for appointments and promotions in the civil service of the state is subject to both the constitutional and statutory limitation that such competitive examination shall control when it is practicable to ascertain an applicant's merit and fitness in this manner. It would seem to be a necessary inference that in the case under consideration the legislature had declared that the merit and fitness of persons appointed to the positions of examining nurses, including that of chief examiner, should not be determined by a competitive examination because it is specifically provided that such nurses, to be eligible for appointment, shall be graduates of a recognized training school for nurses, shall have had not less than five years experience in nursing and shall be chosen from a list of ten nominations made by the Ohio Association of Graduate Nurses and finally, it is only from the list of three thus appointed that the nurse designated as chief examiner may be chosen. It must also be noted that the law under consideration was enacted while the civil service act of 1914 was in full force and operation, and that the provisions of said act of 1914, in respect to the requirement that examinations for positions in the classified service shall be public, competitive and free for all, were identical with those of the present law, as was also the provision that the competitive class shall include all positions for which it is practicable to determine the merit and fitness of applicants by competitive examination. See section 486-10 G. C., 103 O. L. 406, and paragraph one of subdivision (b) of section 486-8 G. C., 103 O. L. 406.

It is clear, therefore, that the legislature, with full knowledge of the requirements of said act of 1914 as to positions in the classified service and the freedom of competition provided in examinations therefor, declared that the positions in question, with the qualifications it placed upon them, should not be subject to the civil service law in regard to positions in the classified service.

By reason of these considerations and the principle of law that a general statute, treating a matter in general terms and not expressly contradicting the provisions of a prior special statute, is not to be considered as intended to effect a more particular and specific provision of an earlier special act unless it is absolutely necessary to so construe it in that manner. (Fostick v. Village, 14th O. S. 472.) I am of the opinion that the positions of examining nurses, including that of chief examiner, provided for in section 1295-1 supra, are not within the operation of the civil service law. This conclusion is reached not only because of the impracticability of testing the qualifications of said nurses by competitive examination, in view of the provisions of said section 1295-1 supra, but it is supported by the further fact that the requirements of said section in themselves subject all appointees to a test as thorough, effective and satisfactory as could be afforded by a competitive examination.

I therefore advise that the positions of examining nurses, including that of chief eraminer, appointed under the provisions of section 1295-1 G. C., as enacted in 106 O. L. 191, are not within the operation of the civil service law, and that the only qualifications that may be required for appointment to such positions are those specially provided for in said section. Respectfully,

EDWARD C. TURNER,
Attorney-General.

1870.

APPROVAL, SALE OF CANAL LANDS IN ROSS AND LICKING COUNTIES.

COLUMBUS, OHIO, August 22, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—With yours under date of August 15, 1916, you submit transcripts of the proceedings in reference thereto, together with resolutions authorizing the sale of canal lands as follows:

"To L. B. James, Chillicothe, Ohio, a tract of abandoned Ohio Canal in the city of Chillicothe---------- $50.00
"To Ruth Felumlee, Newark, Ohio, a tract of the abandoned Ohio canal in Madison township, Licking county, Ohio---------- 180.00
"To Orville Kiger, Newark, Ohio, a tract of the abandoned Ohio canal in Madison township, Licking county, Ohio---------- 500.00."

Having examined the transcripts of the proceedings and resolutions above mentioned, I find said proceedings to have been in conformity to law and the resolutions regular in form and am therefore returning the same to you with my endorsement of said resolutions in duplicate.

Respectfully
EDWARD C TURNER
Attorney-General.

1871.

INDEPENDENT COUNTY AGRICULTURAL SOCIETY—WHEN ENTITLED TO PER CAPITA ALLOWANCE FROM COUNTY TREASURY—KINSMAN STOCK AND AGRICULTURAL SOCIETY NOT ENTITLED TO SAID ALLOWANCE.

An agricultural society, organized under section 9911 *G. C., which held annual fairs prior to the year* 1915, *and which held an annual exhibition in* 1915, *is not "an independent county agricultural society" within the meaning of section* 9880-1 *G. C.* (106 *O. L.* 273) *such as to entitle it to the per capita allowance from the county treasury, provided for in section* 9880 *G. C., nor could such society, by reorganizing in December,* 1915, *pursuant to the provisions of sections* 9880 *and* 9880-1 *G. C., bring itself under favor of said sections for the purpose of securing such allowance.*

COLUMBUS, OHIO, August 22, 1916.

HON. ARCHER L. PHELPS, *Prosecuting Attorney, Warren, Ohio.*

Dear Sir:—Your letter of July 10, 1916, is as follows:

"On the 19th day of March, 1888, The Kinsman Stock and Agricultural Association of the township of Kinsman, this county, was incorporated under the general corporation laws of Ohio. Since that date this association has maintained this agricultural association in Kinsman township, giving an annual agricultural exhibition. During this period, this society

was not entitled to the $800.00 from the county, to which county agricultural societies were entitled under the provisions of section 9880 G. C.

"On May 5, 1915, the general assembly passed section 9880-1, supplemental to section 9880 of the General Code, found in 105-106 Ohio Laws 273. The effect of this supplemental section is under certain conditions to make the provisions of section 9880 with respect to the payments therein authorized, applicable to independent agricultural societies, that had held annual fairs for agricultural advancement, previous to January 1, 1915, and which said independent society had held an annual exhibition.

"In December, 1915, the persons interested in The Kinsman Stock and Agricultural Association reorganized, under the provisions of section 9880-1 of the General Code, which new agricultural association has not yet held an annual exhibition. After such reorganization they made application to the state board of agriculture and secured a certificate from the president of the state board, attested by the secretary, that the laws of Ohio and the rules of the board had been complied with, thereby under the provisions of said section 9880-1, entitling said reorganized society to the payment of $800.00 from the county treasury. This certificate has been presented for payment, and the county auditor has called my attention to the situation, and has demanded an opinion as to whether or not the county is liable for this payment.

"A careful examination of section 9880-1 specifies two conditions which must exist before the independent agricultural society is entitled to this certificate from the state board of agriculture: First, that said independent agricultural society has held annual fairs for agricultural advancement, previous to January 1, 1915. Second, that such independent agricultural society has held an annual exhibition and has complied with certain other conditions.

"As to the first condition, the present agricultural society, organized under section 9880-1, has never held an annual exhibition. The old corporation, The Kinsman Stock and Agricultural Association did hold an annual exhibition every year since its organization, however, the old association, organized under the general corporation laws of the state was never entitled to this payment from the county treasury, and even since the passage of section 9880-1, if not existing, in my opinion would not now be entitled to the payment for the reason that section 9880-1 is supplemental to section 9880 and must be read in pari materia, and the organization which is given the right to the payment from the county treasury is an agricultural society, organized in accordance with the terms of this statute.

"As to the second condition, the agricultural society which is now demanding payment of $800.00 from the county treasury, upon the certificate of the president and secretary of the state board of agriculture, has not yet held an annual exhibition, and under the express terms of section 9880-1 is not entitled to this payment until after it has held such an exhibition. Further, in order to entitle an independent agricultural society to the certificate granted to this society, it must not only be made to appear that such annual exhibition has been held, but that such society had held such annual exhibitions prior to January 1, 1915, which the present society can never do.

"We have had in this county for a great many years a county society known as The Trumbull County Agricultural Association, which holds annual exhibitions, and owns well equipped fair grounds.

"In my opinion the new independent agricultural society, organized in December, 1915, under the provisions of section 9880 and 9880-1, is not

entitled, under the provisions of these sections, to any payment from the county treasury, and was not entitled to the certificate to that effect, issued by the state board of agriculture, for the two reasons above stated.

"Owing to the fact that the state board of agriculture has issued this certificate which has lead the officers of the new agricultural society to believe that it is entitled to this payment, I will appreciate your opinion upon the questions: First, can the new society, not having held annual exhibitions prior to January 1, 1915, at any time in the future qualify so as to be entitled to this payment? Second, under the foregoing state of facts is this new society entitled to the payment of the certificate from the state board of agriculture, which it now holds?

"For your assistance in determining these questions I herewith enclose a copy of the articles of incorporation of the old Kinsman Stock and Agricultural Association."

In response to my request for additional information I have your letter of August 1st, enclosing certified copy of the articles of incorporation of "The Kinsman Fair Association," filed in the office of the secretary of state December 17, 1915. The articles of incorporation of "The Kinsman Stock and Agricultural Association," organized March 19, 1888, provide:

"First: The name of said corporation shall be The Kinsman Stock and Agricultural Association.

"Second: Said corporation shall be located and its principal business transacted at Kinsman, in Trumbull County, Ohio.

"Third: The purpose for which said corporation is formed is for the promotion and development of the horse, cattle and general agricultural interests of said township of Kinsman and the surrounding neighborhood."

The articles of incorporation of The Kinsman Fair Association hereinbefore referred to, provide:

"First: The name of said corporation shall be The Kinsman Fair Association.

"Second: Said corporation is to be located at Kinsman in Trumbull County, Ohio, and its principal business there transacted.

"Third: Said corporation is formed for the purpose of improvement in agriculture, horticulture, live stock and domestic manufacturies."

Upon investigation in the office of the board of agriculture of Ohio I find that the official report for the year 1915, as filed with said board and purporting to be the official report of The Kinsman Stock and Agricultural Association, shows the name of said organization as "The Kinsman Stock and Agricultural Company," the date of organization March 19, 1888, and the number of members forty-two.

In view of this report, and of the purpose for which said company was organized, as set forth in item 3 of its articles of incorporation, it is evident that said company was organized for the advancement of the agricultural interests primarily in Kinsman Township, Trumbull County, the entries, however, being open to adjoining townships, and that said company was doubtless organized pursuant to the provisions of section 9911 G. C., as enacted February 11, 1877, and as still in force, which provisions are as follows:

"When any number of persons of a township form a society for the promotion of agriculture in such township, and under their hands and seals

make a certificate, and acknowledge it before a justice of the peace, in which shall be specified the name of the society, the objects of its formation, and the township in which it shall be located, and file it in the office of the secretary of state, such society shall be deemed a body corporate, with succession, and with power to sue and be sued, defend and be defended, and contract and be contracted with, may make and use a common seal, and the same alter at pleasure, and may purchase and hold in fee simple, or rent or lease such real estate as may be required as a site for holding fairs, not exceeding forty acres, and establish all necessary rules and regulations for the management of such fairs and the legitimate business of the society."

In view of the foregoing it seems clear that while The Kinsman Stock and Agricultural Company has held annual fairs since the time of its organization in 1888, said company was never a county or district agricultural society within the meaning of section 9880 G. C., which provides:

"When thirty or more persons, residents of a county, or of a district embracing one or more counties, organize themselves into an agricultural society, which adopts a constitution and by-laws, selects the usual and proper officers, and otherwise conducts its affairs in conformity to law and the rules of the state board of agriculture, and when such county or district society has held an annual exhibition in accordance with the three following sections, and made proper report to the state board, then, upon presentation to the county auditor, of a certificate from the president of the state board attested by the secretary thereof, that the laws of the state and the rules of the board have been complied with, the county auditor of each county wherein such agricultural societies are organized, annually shall draw an order on the treasurer of the county in favor of the president of the county or district agricultural society for a sum equal to two cents to each inhabitant thereof, on the basis of the last previous national census. The total amount of such order shall not in any county exceed eight hundred dollars, and the treasurer of the county shall pay it."

This section was originally enacted February 28, 1846, and its provisions, in so far as your inquiry is concerned, have not been materially changed by subsequent amendments.

It necessarily follows that in so far as the provisions of said section 9880 G. C. are concerned, said company was never entitled to the aid from the county provided for in the latter part of said section.

The act of the general assembly (106 O. L. 273) known as amended senate bill No. 52, entitled "An act to supplement section 9880 by the addition of a supplemental section to be known as section 9880-1 of the General Code relative to independent county agricultural societies," provides as follows:

"When thirty or more persons, residents of a county or of contiguous counties not to exceed three, are organized into an independent agricultural society that has held annual fairs for agricultural advancement previous to January first, 1915, in a county wherein is located a county agricultural society, and when such independent society has held an annual exhibition in accordance with the three following sections, and made proper report to the state board, then, upon presentation to the county auditor of a certificate from the president of the state board attested by the secretary thereof, that the laws of Ohio and the rules of the board have been complied with, the county auditor of the county, if the fair board be residents of one county,

shall draw an order on the treasurer of the county in favor of the president of the independent agricultural society for a sum equal to the amount paid to the county fair and the treasurer shall pay said order. If the fair board of the independent agricultural society be residents of more than one county, the auditors of such counties shall draw orders on their respective treasurers for their proportionate share of an amount equal to an average amount paid to the several county fair boards to be divided according to population of the counties according to the last federal census. The treasurer or treasurers shall pay such order or orders from the county funds."

As observed by you, this section, being supplemental to section 9880 G. C., must be read in connection with said latter section. The evident intention of the legislature, in the enactment of said supplemental section, was to extend the scope of section 9880 G. C. by giving to an independent agricultural society, other than the one theretofore officially recognized as the county agricultural society, and as such, entitled to county aid under provision of the latter part of section 9880 G. C., the right to receive from the county treasurer a sum equal to that paid to said officially recognized county society, providing said independent county society complies with the provisions of said statutes, has held annual fairs prior to January 1, 1915, and has held an annual exhibition in accordance with the provisions of sections 9881, 9882 and 9883 of the General Code, at the time of making its report to the state board of agriculture and at the time of making its demand upon the county treasurer, holds the certificate from said board as required by said section 9880-1 G. C., showing that the laws of Ohio and the rules of the state board of agriculture have been complied with.

From the official report above referred to, it appears that The Kinsman Stock and Agricultural Company held its annual fair in August, 1915. From your statement of facts, however, it appears that said company was never officially recognized as the county agricultural society within the meaning of section 9880 G. C., and in view of what has already been said, it seems clear that said company could not have been so recognized, even if the Trumbull County Agricultural Society were not in existence, which latter organization I am informed is the officially recognized agricultural society of Trumbull county, and in view of the provisions of section 9880-1 G. C., read in connection with the provisions of section 9880 G. C., I do not think it could be said that The Kinsman Stock and Agricultural Company, if still in existence, would now be an independent county agricultural society within the meaning of section 9880-1 G. C., such as to entitle it to the aid therein provided.

It was evidently the intention of the members of The Kinsman Stock and Agricultural Company, in reorganizing in December, 1915, by filing new articles of incorporation with the secretary of state, and in changing the name and purpose of the organization, as above set forth, to thereby bring themselves under favor of said sections 9880 and 9880-1 G. C. The official report as filed with the state board of agriculture is signed by D. H. McLean, as president, and H. D. Fobes, as secretary, respectively, of The Kinsman Stock and Agricultural Company, and the affidavit of said officers thereto attached is made under date of January 11, 1916. This report purports to be the report of The Kinsman Stock and Agricultural Company and no reference is made to the re-organization in December, 1915.

The certificate of the state board of agriculture was issued on the assumption that The Kinsman Stock and Agriculture Company was still in existence; that said company was an independent agricultural society within the meaning of section 9880-1 G. C., and that the report of said company, as filed with said state board, shows said company to be qualified to receive the said certificate. If the fact of reorganization had been brought to the attention of the board of agriculture, as it should have been, said certificate in all probability would not have been issued.

In view of the foregoing provisions of the statutes and the facts presented, I am compelled to conclude, for reasons already given, that The Kinsman Stock and Agricultural Company was never a county agricultural society within the meaning of section 9880 G. C., nor an independent county agricultural society within the meaning of section 9880-1 G. C., such as to entitle it to the certificate from the board of agriculture, that the new organization known as The Kinsman Fair Association, not having held annual fairs prior to January 1, 1915, and not having held an annual exhibition at the time the aforesaid report was filed, could not qualify under provision of said section 9880-1 G. C. for the purpose of receiving the aid provided for in said section and that the conditions of said section make it impossible for said The Kinsman Fair Association to qualify at any time in the future for the purpose of receiving said aid.

Your questions must, therefore, be answered in the negative.

I am addressing a letter to the board of agriculture enclosing a copy of this opinion, and advising said board to reconsider its action in issuing the aforesaid certificate.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1872.

PROSECUTING ATTORNEY—WHEN AN ALLOWANCE UNDER PROVISIONS OF SECTION 3004 G. C. MAY BE EXPENDED IN EMPLOYMENT OF PERSON TO PROCURE EVIDENCE AGAINST VIOLATORS OF THE LAW REGULATING SPEED OF MOTOR VEHICLES.

The allowance made to a prosecuting attorney under the provisions of section 3004 *G. C. may be expended in the employment of a person or persons to procure evidence against violators of the law regulating the speed of motor vehicles, said evidence to be used before a grand jury or in the prosecution of said offenders if no secret service officer has been appointed by said prosecuting attorney under the provisions of section* 2915-1 *G. C., as amended in* 103 *O. L.*, 501. *If such secret service officer has been appointed, said expenditure aforesaid may not be made unless the services of such persons are reasonably necessary in addition to the services of said secret service officer.*

COLUMBUS, OHIO, August 22, 1916.

HON. JOSEPH T. MICKLETHWAIT, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—I have your letter of August 1, 1916, as follows:

> "Several deaths, due to excessive speeding by drivers of automobiles on the highways of this county, have occurred during the past few weeks. Unfortunately, owing to the particular construction of these highways, and because of the many sharp curves and steep grades on most of the roads in this section of the state, automobile speeding will always be attended with most serious effects, often resulting in loss of life.
>
> "Speeding here is not general. However, there is such abuse in driving that a great number of our people are afraid to venture out on the roads, especially in the evenings and on Sundays. As far as my observation goes the law is being enforced in the city and villages, but it is not observed in the county. Something, if possible, should be done to correct this abuse.

"I am not sure if the prosecuting attorney, acting under section 3004, has the necessary power and authority to employ and pay regularly a suitable person to detect and apprehend violations of the state law against excessive speeding on the roads of this county outside the city and villages, and am, therefore, writing you for your opinion in this matter."

Section 3004 G. C., to which you refer in your foregoing letter, insofar as its provisions are pertinent to your inquiry is as follows:

"There shall be allowed annually to the prosecuting attorney in addition to his salary, and to the allowance provided by section 2914, an amount equal to one-half the official salary, to provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice, not otherwise provided for. Upon the order of the prosecuting attorney the county auditor shall draw his warrant on the county treasurer, payable to the prosecuting attorney, or such other person as the order designates, for such amount as the order requires, not exceeding the amount provided for herein, and to be paid out of the general fund of the county."

This statute in plain terms authorizes an allowance in addition to that provided by section 2914 of an amount equal to one-half of the salary of the prosecuting attorney for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice in matters not otherwise provided for.

If conditions obtain in your county in respect to the speeding of automobiles on country roads, such as you describe in your letter, it is manifest that some means should be adopted to end the same. Therefore, if in your judgment it is necessary to have the services of some person to procure evidence against such violators for your use before a grand jury, and in the prosecution of such offenders, I am of the opinion that such expenditure is warranted, unless you have availed yourself of your privilege to appoint and have appointed a secret service officer, as provided by section 2915-1 G. C., as amended in 103 O. L., page 501, which provides as follows:

"The prosecuting attorney may appoint a secret service officer, whose duty it shall be to aid him in the collection and discovery of evidence to be used in the trial of criminal cases and matters of a criminal nature. Such appointment shall be made for such term as the prosecuting attorney may deem advisable, and subject to termination at any time by such prosecuting attorney. The compensation of said officer shall be fixed by the judge of the court of common pleas of the county in which the appointment is made, or, if there be more than one judge, by the judges of such court in such county in joint session, and shall not be less than one hundred and twenty-five dollars per month for the time actually occupied in such service, nor more than one-half of the official salary of the prosecuting attorney for a year, payable monthly, out of the county fund, upon the warrant of the county auditor."

If you have made an appointment under the foregoing statute of a secret service officer, then it is the duty of such officer so appointed to render you the services specified in your inquiry; and as section 3004 G. C., aforesaid, has the limitation therein that expenses incurred under its authority shall be in matters not otherwise provided for, such limitation would preclude such expenditure of money allowed under its provisions for the performance of duties and services which the law requires of the secret service officer. The provisions of said section 2915-1 G. C., aforesaid, are permissive, and if no secret service officer has been appointed thereunder then the limitation aforesaid in said section 3004 aforesaid will not apply. Further, it might become necessary

that a secret service officer should have some assistance, or his entire time be required in other matters, in which event the limitation aforesaid of section 3004 will not apply.

I must advise, therefore, in answer to your inquiry, that you may properly use the money allowed under the provisions of said section 3004 G. C., supra, in the employment of a person or persons to procure evidence against violators of the laws regulating the speed of motor vehicles upon country roads for your use before a grand jury and in the prosecution of such offenders if you have not appointed a secret service officer under the authority of section 2915-1 G. C. If, however, you now have at your command the services of a secret service officer, such expenditure of money allowed under section 3004 G. C., supra, may not be made, unless the services of such persons are reasonably necessary in addition to the services of secret service officer.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1873.

ROADS AND HIGHWAYS—CONSTRUCTION OF SWITCH ACROSS INTER-COUNTY HIGHWAY BY INTERURBAN ELECTRIC RAILWAY COMPANY—WHAT AGREEMENT BETWEEN STATE HIGHWAY COMMISSIONER AND RAILWAY COMPANY SHOULD CONTAIN.

When there is presented to the state highway commissioner an application by an interurban electric railway company for authority to construct a switch across an inter-county highway, together with the written consent of the owners of more than one-half of the feet front of the lots and lands abutting on that part of the highway where such switch is proposed to be constructed; the state highway commissioner is authorized to agree with the company as to the terms of occupancy, and the agreement should impose upon the company all of the duties and liabilities prescribed by sections 6956 and 7479 G. C. and should contain provisions protecting the public from any liability for damages and requiring reconstruction at any time that the same may be required by the state highway commissioner or other public authority hereafter vested with the control of the highway in question.

COLUMBUS, OHIO, August 23, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of July 13, 1916, which communication reads as follows:

> "This department is in receipt of a letter from Mr. Lon O. Shank, Dayton, Ohio, representing Mr. C. E. Haines of that city, in which application is made for permission from this department to construct a commercial siding across a portion of inter-county highway No. 62 from the tracks of the Ohio Electric Railway Company.
>
> "I am attaching hereto a copy of Mr. Shank's letter, together with the original sketch sunmitted by him showing the location of the proposed siding, which is situated near Fort McKinley, Ohio. I assume that the request contemplates a surface grade crossing.
>
> "I am uncertain as to my authority in the matter and would respectfully request that you advise me as to what procedure I may properly follow in response to Mr. Shank's letter."

The copy of Mr. Shank's letter attached to your communication reads as follows:

"Pursuant to our conversation of the 8th instant, in your office, I am hereby making application for permission to cross the proposed brick highway known as the Salem pike, with a single track switch at the point known and designated as Fort McKinley and sitauted on the Dayton & Union City division of the Ohio Electric Railway, about six miles northwest of Dayton, the exact point being designated on the map and drawing attached hereto.

"The proposed switch will require about fifty feet of track construction in the proposed brick paving, the cost and maintenance of which it is understood will be assumed by the applicant.

"The applicant further proposes to erect a substantial building on the property at this point in which he will engage in the business of dealing in coal, lime, feed, building material, etc.

"It is estimated that one hundred cars approximately will be delivered on this track the first year.

"The owner of the property and the one for whom this permit is sought is C. E. Haines, R. F. D. No. 10, Dayton, Ohio."

Supplementing your communication of July 13th, you wrote me on July 20th, as follows:

"Permit me to supplement my letter to you of July 13th, relative to an application received from Mr. Lon O. Shank, of Dayton, Ohio, for permission to construct a commercial siding across a portion of inter-county highway No. 62, from the tracks of the Ohio Electric Railway Company.

"I am submitting a copy of another letter from Mr. Shank on the subject which it occurs to me you should have."

The second letter addressed to you by Mr. Shank reads as follows:

"In reviewing the copy of my letter to you under date of the 11th instant I note that in the fifth paragraph I referred to the applicant as C. E. Haines.

"Mr. Haines is the owner of the property which would be entered by this siding if granted, but the point which I want to make clear is, and one which we fully understand to be required by law, that the application for this franchise will come from the transportation company, which is the Ohio Electric Railway.

"Mr. Brenner, one of the county commissioners, advised me this morning that his office had not as yet heard from you relative to this proposed improvement, and inasmuch as Mr. Haines has his plans and specifications drawn for his building, he is very anxious to begin construction, but does not want to do anything toward the work until action has been taken by you and the local board."

A consideration of this matter involves an examination of a number of the sections of the General Code. Section 9100 G. C. reads as follows:

"Street railways, with single or double tracks, side-tracks and turnouts, may be constructed or extended within or without, or partly within and partly without, any municipal corporation. Offices, depots, and other necessary buildings therefor, also may be constructed."

Section 9101 G. C. reads as follows:

> "The right to construct or extend such railway within or beyond the limits of a municipal corporation, may be granted only by its council, by ordinance; the right to construct such railway without the limits of a municipal corporation may be granted only by the county commissioners, by an order entered on their journal."

Section 9101 G. C., in so far as it provides that the right to construct street railways, without the limits of a municipal corporation, may be granted only by the county commissioners by an order entered on their journal, must be construed in the light of certain other statutory provisions which will be later considered.

Section 9105 G. C. reads as follows:

> "No such grant shall be made until there is produced to council, or the commissioners, as the case may be, the written consent of the owners of more than one-half of the feet front of the lots and lands abutting on the street or public way, along which it is proposed to construct such railway or extension thereof; and the provisions of all ordinances of the council relating thereto, have in all respects been complied with, whether the railway proposed is an extension of an old or the granting of a new route."

In the case of Harner v. Railway Co., 29 Ohio Law Bulletin 387, 11 O. D. R. 807, it was held that the consent of the abutting property owners is necessary to the construction of new switches or the extension of pre-existing ones. This section, in so far as it requires the production to the county commissioners of the written consent of the owners of more than one-half of the feet front of the lots and lands abutting on the street or public way along which it is proposed to construct a railway or extension thereof, must also be considered in the light of other legislative enactments affecting, in the case of inter-county highways, the public authority to whom the written consent of the owners is to be produced.

Section 9113 G. C. reads as follows:

> "Council, or the commissioners, as the case may be, may fix the terms and conditions upon which such railways may be constructed, operated, extended and consolidated."

Section 9117 G. C. reads as follows:

> "Companies incorporated under section eighty-six hundred and twenty-five for such purpose, may construct, maintain and operate electric street railroads, or street railroads using other than animal power as a motive power, for the transportation of passengers, packages, express matter, United States mail, baggage and freight upon highways in this state outside of municipalities, or upon private rights of ways."

Section 9118 G. C. reads as follows:

> "Such companies may occupy and use for their tracks, cars, necessary fixtures and appliances, the public highways outside of cities and villages with the consent of the public authorities in charge of or controlling such highways, and with the written consent of the majority, measured by the front foot, of the property holders abutting on each of such highways."

Section 9118-1 G. C., considered in connection with other statutory provisions, and especially in connection with the provisions of the statutes transferring from

county commissioners to the state highway commissioner the management and control of inter-county highways, practically determines the answer to the question now under consideration. The section in question reads as follows:

> "Whenever it is deemed necessary by a majority of the directors of any such railway company to cross the streets, avenues, alleys, ways, or any part thereof, of any municipality, or any public highway outside of a municipality, whether the same be under the control of public authorities or a private company, or a person or persons, the council of such municipality, or the public officers or authorities owning or having charge of such highways outside of municipalities, shall have power to agree with such company as to the manner and mode of such crossing and the compensation to be paid therefor; if the parties fail to agree, such company may file its petition in the common pleas court of the county in which the proposed crossing is situated, and in such cause if the crossing be within a municipality, such municipality shall be defendant; if the crossing be outside a municipality, the public authorities owning or having charge of such highway shall be defendants. Summons shall be served and the rule days and the rights of the defendant to plead shall be the same as in civil actions in such court. Such petition shall set forth the action of the company declaring the necessity for crossing the highway, and the inability of the company to agree with the council or other public officers or authorities owning or having charge of said highway; and the court of common pleas thereupon shall have jurisdiction of the parties and of the subject matter of the petition, and may proceed to examine the matter offered by evidence, by reference to a master commissioner or otherwise, and upon the final hearing of said cause the court shall enter its decree fixing the manner and mode of such crossing and the compensation, if any, to be paid therefor by the company, and upon compliance with the terms of said decree the company shall have the right to construct and maintain said crossing in accordance with the order of said cause."

A reference to the sketch of the proposed switch shows that it is in effect a crossing of the highway. The tracks of the Ohio Electric Railway Company are located on one side of the public highway and the property which it is desired to reach by means of the proposed switch is located upon the other side of the highway.

The inter-county highway system of the state has been placed under the jurisdiction of the state highway department, and county commissioners are not now authorized to construct, improve, maintain or repair inter-county highways without first submitting to the state highway department their plans and specifications for the proposed work and securing the approval of such plans and specifications by the chief highway engineer. See section 1203 G. C. and the related sections.

Section 7479 G. C., which should also be considered, reads as follows:

> "No franchise or grant to any street railway, interurban railway or other railway shall hereafter be granted by the state highway commissioner, by the board of county commissioners or by the council of any municipality, unless such franchise or grant shall provide that such company shall thereafter, when required by the proper authorities in charge of such road or street, make such changes in its grade and method of construction as shall be necessary to conform to any improvement thereafter made of such street or road. The type of construction used by such company shall be approved in the first instance by the state highway commissioner if such road is under jurisdiction of the state; by the engineer of a municipality if such improvement is within the bounds of such municipality, or, by the county highway superintendent

in the case of other roads, and shall also be approved by the proper authorities having jurisdiction over such street or road."

Section 137 of the Cass highway law, section 6956 G. C., reads as follows:

"Any person, firm or corporation operating a railway for the transportation of passengers, freight or express, crossing any street or road, shall improve, maintain and repair that portion of the highway at such crossing and lying between the outside ends of the ties, and also that portion lying between the tracks in the case of two or more tracks, and the cost and expense of this improvement, maintenance and repair shall be borne by said individual, firm or corporation. Such improvement, maintenance or repair shall be made whenever in the opinion of the authorities having charge of such road the public necessity requires, and shall be made in accordance with plans and specifications approved by the county surveyor.

"In case the said person, firm or corporation operating said railway fails to improve, maintain or repair the same as required by the proper authorities, as provided in this section, then such authorities shall proceed to improve, maintain and repair the same, and the cost thereof shall be charged against said property and collected in the manner hereinafter provided. Whenever a road or street is improved where a street or interurban or other railroad or railway lies within the improved portion of the roadway, such railroad or railway grade shall in all respects be changed to meet the approval of the county surveyor unless otherwise provided for in the grant or franchise, by virtue of which such railway operates on or occupies said highway, and costs of such change of grade be paid by such company under the law or by the terms of its franchise or grant, shall be a lien upon the property of such company, and the proper authorities may provide for the payment of the amount chargeable against said company under the law or by the terms of its franchise or grant, in installments as in the case of other property owners, and such installments shall bear interest as in other cases, and the board of county commissioners or other authorities may issue bonds in anticipation of the collection of said installments."

In view of the foregoing and other related provisions, I advise you that under the facts presented by your inquiry and the attached communications you should first have before you an application from the Ohio Electric Railway Company for permission to construct the proposed switch in and along the inter-county highway in question. There should also be produced to you by the company the written consent of the owners of more than one-half of the feet front of the lots and lands abutting on that part of the highway where such switch is proposed to be constructed. When the application of the company and the written consent of such owners are filed with you, you will be authorized to agree with the company as to the terms of occupancy and the agreement should impose upon the company all of the duties and liabilities prescribed by sections 6956 and 7479 G. C. and the other related sections referred to above, and should contain further provisions designed to protect the public from any liability for damages and fixing the liability of the company for any and all damages resulting to third persons by reason of the construction and operation of the switch and enjoining upon the company the duty of altering or reconstructing the switch and changing the type of construction at any time as may be required by you or by any other public authority hereafter vested with the control of the highway in question. When you have before you the proper application and written consent of owners, I will be very glad to prepare for you a proper form of agree ment

between you and the company or if the company desires to submit a proposed form of agreement I will be very glad to examine the same and advise you as to its sufficiency.

I am returning herewith the original sketch submitted by Mr. Shank.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1874.

ADULT PERSON OF FEEBLE MIND—IF PUBLIC CHARGE MAY BE ADMITTED TO INSTITUTION FOR FEEBLE MINDED YOUTH— SECTIONS 1901 AND 1902 G. C. CONSTRUED.

An adult person of feeble mind, who is a public charge, may be admitted to the custodial department of the institution for feeble-minded youth under the provisions of and in accordance with the formalities prescribed by section 1901 *G. C., but an adult person of feeble mind who is not a public char e may only be admitted to said institution as provided by section* 1902 *G. C. as amended* 103 *O. L* 245.

COLUMBUS, OHIO, August 23, 1916.

HON. CHARLES F. ADAMS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I have your letter of August 18, 1916, as follows:

> "In Wellington township of this county, there is a woman by the name of Myers, who is an imbecile, and the authorities of that township insist that she be taken to the Lorain county infirmary. The superintendent insists that having been in the condition in which she now is for many years, and with no chance of any improvement, she should not be placed in the infirmary, but should be placed in an institution for the feeble minded elsewhere.
>
> "Your opinion as to the proper place where this woman can be cared for is desired and a prompt reply will be greatly appreciated."

The only state institution to which the person named in your inquiry may be committed is the institution for feeble minded youth, the provisions for which are found in sections 1891 to 1904 G. C. inclusive. It is provided by section 1901 G. C. that:

> "The trustees shall receive as inmates of the custodial department, feeble minded children, residents of this state, under the age of fifteen years, who are incapable of receiving instruction in the common schools of the state, and adults of the same class, over this age, who are public charges.* * *"

It is provided by the succeeding section, 1902 G. C., as amended 103 O. L. 245, that:

> "Feeble minded persons of such inoffensive habits as to make them proper subjects for classification and discipline in the institution may be admitted, on pursuing the same course of legal commitment as governs admission to the state hospital for the insane."

In an opinion of this department reported in Vol. II of the Attorney-General's Report for 1911-1912, at page 981, my predecessor, Hon. Timothy S. Hogan, in commenting upon the provisions of the foregoing section made the following observations:

> "The trustees are empowered to accept without legal commitment persons over the age of fifteen years, incapable of receiving instruction in the common schools, who are public charges. For such admission the formalities prescribed in section 1901 are sufficient."

It would seem from the statement made in your letter that the person whose case is under consideration is now a public charge. If this is true the provisions of said section 1901 would govern in her case, and her commitment to said institution may be made under said section. If, however, she is not a public charge, then the provisions of section 1902 will apply, and in this connection I again quote from the opinion above cited as follows:

> "But the trustees neither have authority, nor may they be compelled to admit into the custodial department persons over the age of fifteen years who are not public charges, and who are not sent to the institution upon formal commitment. That is to say, the trustees may not receive adults who are not public charges upon mere application papers indorsed by the probate judge. Such persons must be received, if at all, only after affidavit is filed with the probate judge, witnesses are subpoenaed, a hearing is had, and a certificate signed by two medical witnesses duly qualified, to the effect that the subject of the inquest is feeble minded and of inoffensive habits."

I concur in this interpretation of the law, and if the party named in your inquiry is not a public charge then the proceedings to have her committed to said institution must be had under the provisions of said section 1902 aforesaid. In the event that the trustees of said institution will not receive said party, or some obstacle is found by the probate court which will prevent her commitment, and she is a public charge, the only remaining place in which she may be cared for is the county infirmary.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1875.

ROADS AND HIGHWAYS—PERPENDICULAR WASH BANK MORE THAN EIGHT FEET IN HEIGHT—DUTY OF GUARD RAIL PROTECTION RESTS UPON COUNTY COMMISSIONERS—SECTION 7563 G. C. CONSTRUED.

Under section 7563 G. C. any perpendicular bank more than eight feet in height, having an immediate connection with a public highway, or adjacent thereto, and in an unprotected condition, should be protected by suitable guard rails erected by the board of county commissioners, and this duty rests upon the county commissioners without reference to whether such bank was produced by erosion, and also extends to banks not exactly perpendicular, if such banks are so nearly perpendicular that they could not be regarded as sloping in character.

COLUMBUS, OHIO, August 26, 1916.

HON. OTHO W. KENNEDY, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—I have your communication of August 16, 1916, which communication reads as follows:

> "I wish to call your attention to section 7563 G. C., and ask for your opinion concerning the meaning of the following therein, to wit:
>
> " 'All perpendicular wash banks more than eight feet in height.'
>
> "What is a wash bank, and does any steep bank more than eight feet in height, adjacent to a public highway, require protection by suitable guard rails? Suppose that a bank thus adjacent to a public highway in a county is more than eight feet in height, but not strictly perpendicular. Does such a bank require protection by suitable guard rails on behalf of the county commissioners?"

Section 7563 G. C., referred to by you, reads as follows:

> "The board of county commissioners shall erect, or cause to be erected and maintained, where not already done, one or more guard rails on each end of a county bridge, viaduct or culvert more than five feet high. They shall also erect or cause to be erected, where not already done, one or more guard rails on each side of every approach to a county bridge, viaduct or culvert if the approach or embankment is more than six feet high. They shall also protect, by suitable guard rails, all perpendicular wash banks more than eight feet in height, where such banks have an immediate connection with a public highway, or are adjacent thereto, in an unprotected condition, but in such cities and villages as by law receive part of the bridge fund levied therein, such guard rails shall be erected by the municipality."

So far as I have been able to ascertain, the term "wash bank" has no technical meaning. It is probable that by the use of this term the legislature intended to refer to banks resulting from the erosive affect of running water. In the construction of a statute it is always necessary, however, to keep in mind the mischief sought to be remedied. A perpendicular bank having an immediate connection with a public highway, or adjacent thereto, would be none the less dangerous if produced by some means other than erosion. A bank inclining slightly from the perpendicular would be none the less dangerous to travelers passing in its vicinity by reason of the fact that it was not exactly perpendicular.

While the legislature has used the word "perpendicular," and has referred in terms only to "wash banks," yet the spirit of the statute controls the letter, and I think that is within the intention of a statute is as much within the statute as if it were within the letter.

It is, therefore, my opinion, in answer to your question, that under the section in question any perpendicular bank more than eight feet in height, having an immediate connection with a public highway, or adjacent thereto, and in an unprotected condition, should be protected by suitable guard rails erected by the board of county commissioners, and that this duty rests upon the county commissioners without reference to whether such bank was produced by erosion, and also extends to banks not exactly perpendicular, if such banks are so nearly perpendicular that they could not be regarded as sloping in character, and therefore possess all the elements of danger existing in the case of a perpendicular bank. Aside from this section the duty rests upon county commissioners to keep in a safe condition for travel the improved roads under their control, and in the discharge of this duty it might and indeed would, under proper circumstances, be necessary for the commissioners to protect by suitable guard rails even those banks which might properly be regarded as sloping in character.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1876.

ROADS AND HIGHWAYS—JOINT COUNTY ROAD—PETITIONERS NOT AUTHORIZED TO SPECIFY DIFFERENT METHODS OF ASSESSMENTS FOR OWNERS' PORTION IN DIFFERENT COUNTIES.

Where a petition is presented asking for the construction of a joint county road, the petitioners are not authorized to specify one method of assessment as to the owners' portion in one county and another and different method of assessment as to the owners' portion in the other county.

COLUMBUS, OHIO, August 26, 1916.

HON. B. A. MYERS, *Prosecuting Attorney, Celina, Ohio.*

DEAR SIR:—I have your communication of August 21, 1916, which communication reads as follows:

> "The boards of county commissioners of Van Wert county and Mercer county have requested that I submit to you the following questions for answer.
>
> "A petition has been presented to the joint board of county commissioners, asking for the improvement of the county line road between Mercer county and Van Wert county, Ohio. The petition has written in it two different methods of payment. The Mercer county people ask that they pay their portion under one method and the Van Wert county people ask that they pay their portion under another and different method on a county line road, in one and the same petition.
>
> "Can they use one method in one county and another and different method in the other county, referring to the portion of the cost of the road which is to be paid by the land owners?"

The question presented by your communication was considered by this department in opinion No. 1441, rendered to Hon. Franklin J. Stalter, prosecuting attorney of Wyandot county, and Hon. Donald F. Melhorn, prosecuting attorney of Hardin county, on March 30, 1916, in which opinion it was held that the respective proportions of the cost and expense of a joint county road, payable by each county, must be raised by the same method in each county, which method is to be set forth in the petition, when the board is acting upon a petition, and is to be determined by the board when acting without a petition.

I am enclosing for your consideration a copy of the opinion in question and advise you, in answer to your inquiry, that where a petition is presented asking for the construction of a joint county road, the petitioners are not authorized to specify one method of assessment as to the owners' portion in one county and another and different method of assessment as to the owners' portion in the other county.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1877.

BOARD OF EMBALMING EXAMINERS—WHEN MEMBER ASSUMES OFFICE—COMPENSATION—WHEN SECRETARY ASSUMES OFFICE —SPECIAL MEETINGS—PURPOSE—PROSECUTIONS FOR VIOLATIONS OF EMBALMING LAWS—MEMBERS NOT COMPENSATED FOR SERVICES.

A member of the board of embalming examiners is entitled to assume the office on the first day of July following his appointment, and his acts are valid even though he does not take the oath of office until a later date, but he cannot draw compensation except for services performed after he takes the oath of office.

The time when the secretary of the board shall assume his office and draw compensation, is a matter proper to be regulated by the board, subject only to the terms of the appropriation bill.

Special meetings may be held by the board to prepare questions for examinations, if necessary, and the members may receive compensation therefor.

No special duty is placed on members of the board in connection with prosecutions for violations of the laws, regulating embalming, and they cannot be compensated for such services, save in the way of witness fees and mileage when called as witnesses.

COLUMBUS, OHIO, August 26, 1916.

The Ohio State Board of Embalming Examiners, Columbus, Ohio.

GENTLEMEN:—You have requested my opinion upon the following questions:

"(1) When does a member of this board take hold, at the time of his appointment by the governor or when he is sworn in by this board? When does he draw his compensation?"

Section 1336, G. C. provides in part as follows:

"Each year the governor shall appoint one member of the state board of embalming examiners, who shall serve for a term of three years from the first day of July following his appointment."

Under this section a member of the board of embalming examiners is entitled to assume his office on the first day of July following his appointment by the governor.

You then inquire from what date does he draw his compensation, whether from the time of his appointment by the governor or when he is sworn in by the board. There is no special provision of statutory law requiring a member of your board to take an oath of office, but being an officer, section 7 of article XV of the constitution of Ohio and section 2 of the General Code are applicable and they provide:

Sec. 7 of Art. XV of constitution:

> "Every person chosen or appointed to any office under this state, before entering upon the discharge of its duties, shall take an oath or affirmation to support the constitution of the United States and of this state, and also an oath of office."

Sec. 2 of General Code:

> "Each person chosen or appointed to an office under the constitution or laws of the state, and each deputy or clerk of such officer, shall take an oath of office before entering upon the discharge of his duties."

Both the foregoing constitutional and statutory provisions require that a member of your board shall take an oath of office before assuming the duties of his position, and until this is done his title to his office is not complete. While there are no provisions of law which would work a forfeiture of said office in the event that he failed to take said oath within a certain specified time, yet if he assumes to act without taking such oath, his acts are merely those of a *de facto* officer and, while valid as to third parties, they do not entitle him to any compensation. In other words, as a *de facto* officer he can not himself acquire a right to compensation and maintain an action therefor. Mechum on Public Officers, section 331.

This question was before the court in the case of State ex rel. Cronin v. Eshelby, 2 C. C. 468, in which it was held that:

> "An officer to be entitled to the salary of an office must have qualified thereto in the manner provided by law."

The court in this case said:

> "We have thought it necessary to only consider the two elements in this case; first, as to whether or not this party was entitled to recover anything, never having qualified for the office. In order to qualify himself under the law it would be necessary for him to give bond and take oath of office. This he did not do."

Under the authority of the foregoing case I therefore held, in answer to your inquiry in reference to compensation, that the member named may not draw compensation except for services performed after he qualifies by taking the oath of office as above required.

Your second question is as follows:

> "(2) When a new secretary is elected by the board when does he take hold and draw his compensation, on and after his election or when he turns over the books to his successor?"

Section 1338 G. C. provides in part as follows:

> "The state board of embalming examiners shall meet at least once each year at such time and place as it directs, but at least fifteen days' notice thereof shall be given. It shall organize by the election of a president and a secretary from its members. * * * The secretary shall serve during the pleasure of the board, and shall perform the duties of secretary and treasurer. The board may adopt such rules and by-laws for its government as it deems proper * * *."

Section 1339 G. C. provides in part as follows:

> "* * * The secretary shall receive such salary as the board directs, and his necessary traveling expenses incurred in the discharge of his official duties. * * *"

The matter of when the secretary shall assume his office and the time of the payment of his compensation is, therefore, a matter to be regulated by your board, so long as such payments are made in accordance with the appropriation bill by which the money is provided.

> "(3) Is it lawful for the board to draw compensation for special meetings to prepare questions for examinations?"

Section 1341 G. C. provides in part as follows:

> "For use in the examination of persons who desire to engage in the practice of embalming and the preparation and disposal of the dead in this state, the state board of embalming examiners shall prepare a list of questions on the following subjects:
> (Then follows a list of subjects upon which an applicant shall be examined.)

Section 1338 G. C. supra recognizes the right of the board to hold more than one meeting in a year, and if it is necessary to have a special meeting of the board to perform the duty placed upon the board by section 1341 G. C. supra, the members will be entitled to the compensation fixed by section 1339 G. C., above quoted. The question of the necessity for such a meeting is one concerning which I would not be able to advise without a complete statement of facts. Sufficient to say that it must appear that a real necessity for such a special meeting exists, and that the duty imposed upon the board cannot be performed without such a meeting.

> "(4) If an embalmer violates the provisions of the embalming statute, whose duty is it to prosecute him, and if a member of the board is compelled to attend the trial, will he be allowed any compensation for his expenses and time?"

No specific duty is placed upon your board or its members to cause prosecutions for violations of the law regulating the embalming of bodies and the preparation thereof for burial, and section 1339 G. C. supra only provides for compensation to members of your board during the meetings of the board and mileage at the rate of three cents per mile for each mile of travel in attendance upon such meetings. Prosecutions for such violations, therefore, rest with the local authorities, and the members of your

board could only be called upon to appear in such prosecutions in the capacity of witnesses, and would be entitled to receive only the usual witness fees and mileage provided for by law in criminal cases.

Respectfully
EDWARD C. TURNER,
Attorney-General.

1878.

COUNTY BOARD OF EDUCATION—QUESTION OF CENTRALIZATION OF SCHOOLS AND ISSUANCE OF BONDS TO PURCHASE SITE AND ERECT SCHOOL BUILDING, SUBMITTED TO ELECTORS OF RURAL SCHOOL DISTRICT—CANNOT TRANSFER TERRITORY TO ANOTHER DISTRICT FOR PERIOD OF THREE YEARS.

After the questions of centralization of schools and issuance of bonds to purchase a site and erect a school building have been submitted to the electors of a rural school district, pursuant to the provisions of sections 4726 *G. C.*, 104 *O. L.* 139, *and section* 7625 *G. C., the county board of education may not, pursuant to the provisions of section* 4696 *G. C., or section* 4692 *G. C.*, 106 *O. L.* 397, *within the period of three years from such centralization, transfer territory from such rural school district to an adjoining exempted village school district, or city school district, or to another county school district.*

COLUMBUS, OHIO, August 26, 1916.

HON. JOS. T. DOAN, *Prosecuting Attorney, Wilmington, Ohio.*

DEAR SIR:—Yours under date of August 16, 1916, is as follows:

"I received the following communication from the county board of education of Clinton county, Ohio, viz.:

" 'The following resolution was adopted by the county board of education in regular session August 7, 1916;

" 'Be it resolved by the Clinton county board of education in regular session, that the county attorney for Clinton county be requested to obtain an opinion from the state attorney-general, in the matter of the transfer of certain territory from the Jefferson township school district to the Midland village school district.

" 'Be it further resolved, that a copy of the county attorney's request be furnished the county board of education to put on file and become a part of the records of said board.'

"By way of explanation, the question of centralizing the Jefferson township schools and the question of issuing bonds for the purchase of a site and the erection and furnishing of a school house are both submitted to vote and carried, afterward a petition requesting a transfer of part of the territory to Midland village school district was presented and the transfer ordered by the county board and later another petition asking for transfer to the Midland village school district was presented and it was also ordered by the county board.

"In view of your opinion No. 1299, dated February 28, 1916, directed to Hon. Frank B. Pearson, I am of the opinion that the county board is without authority to make such transfer."

I concur in your opinion above expressed. Opinion No. 1299 of this department, under date of February 28, 1916, directed to Hon. Frank B. Pearson, to which you refer, held that:

> "Where the board of education of a county school district, acting under authority of section 4692 G. C., as amended 106 O. L. 397, transfers a part or all of a school district of the county school district to an adjoining district of said county school district and the board of ducation of the local school district, as enlarged by said transfer of territory, acting under authority of section 4726 G. C., as amended 104 O. L. 139, and section 7625 G. C., submits to the electors of said local district the questions of centralizing the schools of said district and of issuing bonds of said district for the purposes authorized by the provisions of said sections 4726 and 7625 of the General Code, and said local board of education, by virtue of the authority conferred upon it by a vote of the electors of said district in favor of said centralization and bond issue, proceeds to take the necessary steps to centralize said schools, said county board of education and the board of education of an adjoining exempted village school district, or city school district, or another county school district, may not, after said centralization proceedings have been commenced and before the same are completed, act jointly, under provision of section 4696 G. C. as amended in 106 O. L. 397, on a petition of the electors of said territory or part thereof, transferred as aforesaid, filed with said county board of education under provision of said section 4694 G. C. as amended, and praying for the transfer of said territory, or part thereof, to said adjoining exempted village school district or city or county school district."

While the proceedings for centralization do not appear from your statement of facts to have advanced so far as the proceedings for centralization had in the case under consideration in the opinion above referred to, the proceedings for centralization in the present case have advanced equally as far as shown by the statement of facts in the case of Fulks et al. v. Wright, 72 O. S. 547, referred to in the above mentioned opinion.

I am therefore of opinion, in answer to your inquiry, that after the questions of centralization and issuance of bonds to purchase a site and erect and furnish a school building have been submitted to the electors of a rural school district, pursuant to the provisions of sections 4726 (as amended in 104 O. L. 139) and 7625 G. C., the county board of education may not, pursuant to the provision of section 4694 G. C., or section 4692 G. C., 106 O. L. 397, within the period of three years from such centralization, transfer territory from such rural school district to an adjoining exempted village school district or city school district, or to another county school district.

Respectfuly,

EDWARD C. TURNER,

Attorney-General.

1879.

SUPERINTENDENT OF PUBLIC WORKS—MAY APPOINT COMMISSIONERS PURSUANT TO SECTIONS 455 AND 457 G. C.—NO APPROPRIATION AVAILABLE AT PRESENT TIME TO PAY THEIR COMPENSATION.

The superintendent of public works may appoint commissioners pursuant to the provisions of sections 455 *and* 457 *G. C.*, 103 *O. L.* 125, *notwithstanding that at the time of such appointment there is no appropriation available for the payment of their per diem compensation and mileage provided by section* 460 *G. C.*, 103 *O. L.* 126.

The compensation and mileage so provided may not be paid, however, until specific appropriation therefor is made by the legislature.

COLUMBUS, OHIO, August 26, 1916.

HON. FRANK R. Fauver, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—Yours under date of August 12, 1916, is as follows:

> "This department is in receipt of numerous claims for damages resulting from overflow by reason of breaches in the canals and extreme high waters in the reservoirs.
>
> "The statutes provide for the appointment of a commission to determine the merits of such claims, but unfortunately no appropriations are available for such purposes.
>
> "I would like an opinion as to whether or not we can appoint such a commission and return their expenses along with their report to the general assembly."

Section 455 G. C., 103 O. L. 125, provides as follows:

> "When private property is injured by break, leakage or overflow of a canal, slack water, pool, reservoir or other public work, or by the insufficiency or by the filling up of a culvert thereof, or by the washing away of earth caused by a dam under the control of the superintendent of public works, the owner of such property shall apply in writing to the superintendent of public works for damages within one year from the occurrence of the injury, but no such application shall be received after such period."

Section 457 G. C., 103 O. L. 125, in so far as pertinent to your inquiry, provides as follows:

> "Upon the filing of such application the superintendent of public works may appoint three disinterested persons as commissioners to consider the claim."

The duties and authority of such commissioners with respect to such claims are prescribed in sections 458 and 459 of the General Code as amended in the same act.

Section 460 G. C. as amended in 103 O. L. 116, in so far as pertinent to your inquiry, provides as follows:

> "Each commissioner shall receive five dollars for each day of service, and mileage at the rate of two cents per mile when actually engaged in the service

> of the state. The costs incurred by the commissioner shall be paid after the presentation of their award and report, upon the approval of the superintendent of public works, from moneys appropriated for the maintenance of the canals, but if the damages awarded do not exceed the costs of the hearing no payment of such damages shall be made. If no damages are awarded the complainant shall pay the costs of the hearing."

It will be noted that the authority conferred by section 457 G. C. supra, upon the superintendent of public works to appoint the commissioners therein named, is conditioned only upon the filing of an application for damages, as provided by section 455 G. C. supra.

You state in your inquiry that no appropriations are available for the payment of the commissioners appointed pursuant to said section 457 G. C. supra. In this statement I concur. Upon an examination of house bill No. 701, 106 O. L. 666, I find no appropriation made for the maintenance of the canals of the state within the meaning of that phrase as found in section 460 G. C. supra, other than the appropriations for specific improvements named and definitely described therein, which said appropriations may not be used for purposes other than those specifically prescribed, and hence are not applicable to the payment of the costs incurred by the commissioners in the performance of their duties under section 457 G. C. et seq.

While by virtue of the provisions of section 22 of article II of the constitution of Ohio, that

> "No money shall be drawn from the treasury, except in pursuance of a specific appropriation made by law, and no appropriation shall be made for a longer period than two years."

no payment of the cost incurred by the commissioners appointed by the superintendent of public works, pursuant to the above mentioned statutes, may be paid from the state treasury. As above stated, the authority of the state superintendent of public works to appoint such commissioners, and their authority to perform the duties and exercise the power imposed and conferred upon them by law, is not in any way limited by or conditioned upon the authority to pay their compensation and mileage, or the costs incurred by such commissioners in the performance of their duties.

If, then, claims are regularly filed pursuant to section 455 G. C. supra, it is entirely within the authority of the superintendent of public works to appoint commissioners, as provided in section 457 G. C. supra, and equally within the authority of the commissioners so appointed to perform all the duties upon them imposed by law, pursuant to such appointment, notwithstanding the absence of authority for the payment of the costs incurred by such commissioners or their compensation and mileage from the state treasury.

If such commissioners are so appointed, and pursuant thereto perform the duties imposed upon them by law, the costs by them incurred and their per diem compensation and mileage may not be paid from the state treasury, however, until appropriation is made therefor by the legislature.

Whether the phrase "costs incurred by the commissioner (s)," and the phrase "costs of the hearing," as found in section 460 G. C. supra, include the per diem compensation and mileage of the commissioners, is not altogether clear. A determination of this question is not, however, necessary to an answer to the question here under consideration.

I fail to find any provision for the payment of the costs incurred by the commissioners, or the compensation and mileage of the commissioners, if the same be not included in such costs, other than that of section 460 G. C. supra, and there being no appropriation therefor, as above stated, neither the per diem and mileage of the commis-

sioners nor any costs by them incurred may be paid from the state treasury until appropriation therefor is made by the legislature.

Separate appropriations were made in 104 O. L. 220, for the payment of the compensation and expenses of appraisers for services rendered in 1913. This would indicate a legislative interpretation of the term "costs" which would not include the compensation and mileage of the commissioners. It is also a recognition of the authority to appoint such commissioners in the absence of an appropriation for the payment of their compensation and mileage.

The conclusion above reached is in accord with an opinion of my predecessor Hon. Timothy S. Hogan, addressed to Hon. John I. Miller, superintendent of public works, found at page 427 of the report of the attorney-general for the year 1913, in which it was held:

> "Under section 457, and following, General Code, the damages awarded by the commission to ascertain damages resulting from the overflow and breaches in canal banks, and also the expenses of such commission, are to be paid from moneys specifically appropriated for that purpose. Such appropriation may be made after the damages are awarded and the services have been performed. Such moneys may not be paid from any other fund."

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1880.

TAXES AND TAXATION—COUNTY BOARD OF REVISION—NO AUTHORITY FOR PAYMENT OF FEES TO WITNESSES CALLED BY SUCH BOARD—BOARD OF EDUCATION OF SCHOOL DISTRICT MAY CONTRACT WITH BOARD OF ANOTHER DISTRICT FOR ADMISSION OF ITS PUPILS—BOARD MAY ASSIGN SUCH PUPILS TO ATTEND SCHOOL—COMPULSORY EDUCATION LAWS—WHEN PUPILS SUBJECT THERETO.

There is no authority for the payment of fees to witnesses called by the county board of revision, pursuant to the provisions of section 5596 *G. C.*, 106 *O. L.* 257.

The board of education of one township rural school district may contract with the board of education of another township rural school district for the admission of pupils of the former district into the schools of the latter district and when such contract is made the board of education of the former district may assign pupils therein to the schools of the latter district and compel the attendance of the pupils so assigned, who are subject to the compulsory education laws, to the schools to which they are assigned subject to the rights of such pupils under the provisions of section 7735 *G. C.*

COLUMBUS, OHIO, August 26, 1916.

HON. JOHN M. MARKLEY, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:—Yours under date of August 15, 1916, is as follows:

> "I wish that you would kindly give me an opinion upon the following questions:
>
> "First. A complaint has been filed against John E. Lyons by Robert Taylor with reference to the amount of personal property listed by the said

John E. Lyons, in Brown county, Ohio, and the same is set for hearing before the board of revision for Monday, August 21, 1916. It will be necessary to compel the attendance of witnesses at the hearing. The law seems to be silent with reference to the fees paid to such witnesses for their attendance. Kindly advise me as to what fees and mileage, if any, such witnesses will be entitled to.

"Second. There are certain persons of school age, residing in the Clark township school district, Brown county, Ohio, who live about two and a quarter miles from the nearest school in said school district. Of course the board of education is compelled to provide transportation for these pupils who reside more than two miles. The nearest other school to these pupils is in the Lewis township school district of Brown county, Ohio, and is about one and seven-eighth miles from the residence of said pupils. Can the board of education of Clark township school district contract with the board of education of Lewis township to admit these pupils to the Lewis township school, and can they compel the pupils to attend such school in Lewis township?"

In reference to the power of the board of revision to call and examine witnesses, section 5596 G. C., 106 O. L. 257, provides as follows:

"The county board of revision shall in all respects be governed by the laws respecting the valuation of real and personal property and shall make no change of any valuation except in accordance with such laws. The county board of revision may call persons before it and examine them under oath as their own or other's property, moneys, credits and investments to be placed on the tax list and duplicate for taxation, or the value thereof. If a person notified to appear before the board refuses or neglects to appear at the time required, or appearing, refuses to be sworn or answer any question put to him by the board or by its order, the chairman of the board shall make complaints thereof, in writing to the probate judge of the county, who shall proceed against such person in like manner as is provided for in the last subdivision of chapter three, title one, part second, of the General Code."

The payment of witness fees and costs are matters subject wholly to statutory control. A careful examination of the statutes fails to disclose any provision for the payment of fees of witnesses called before the county board of revision, and in the absence of such statutory authority therefore I am of opinion that witnesses called under authority of the above quoted section are not entitled to witness fees.

Your second question involves a consideration of section 7734 G. C., which provides as follows:

"The board of any district may contract with the board of another district for the admission of pupils into any school in such other district on terms agreed upon by such board. The expense so incurred shall be paid out of the school funds of the district sending such pupils."

In opinion No. 742, addressed to the bureau of inspection and supervision of public offices, under date of August 19, 1915, found at page 1558 of the Opinions of the Attorney-General for the year 1915, it was held, under the provision of this section, that:

"The board of education of a school district may lawfully contract with the board of education of another school district for the admission of its

pupils into one or more of the schools of such other district and the amount of tuition for such attendance may be fixed by the terms of said contract."

Boards of education are required by section 7644 G. C. to establish such elementary schools as are necessary to provide for the free education of all the youth of school age within the district under its control. By section 7690 G. C. the board of education is given the management and control of all the public schools in the district. Section 7684 G. C. provides as follows:

"Boards of education may make such an assignment of the youth of their respective districts to the schools established by them as in their opinion best will promote the interests of education in their districts."

Since the board of education is authorized to contract with the board of education of another district for the admission of pupils into the schools of such other district, I am inclined to the view that when such contract is entered into by a board of education the school of such other district becomes "established" within the meaning of sections 7644 and 7684 G. C., and the board of education is duly authorized to make assignment of pupils within its district thereto by the last mentioned section. Pupils subject to the compulsory school attendance statute may be compelled to attend the schools to which they are assigned, except when such pupil lives more than one and one-half miles from the school to which he is assigned, in which case such pupil may attend a nearer school in the same district, or, if there be no nearer therein, then a nearer school in another district in all grades separate below the high school, under the provision of section 7735 G. C.

I am therefore of opinion, in answer to your second question, that the board of education of a township rural school district may contract with the board of education of another such school district for the admission of the pupils of the former into the schools of the latter school district and may compel pupils, subject to the compulsory attendance statute, to attend the schools, when properly assigned thereto of the district so contracted with, if such pupils live within one and one-half miles of such school, or do not live nearer to another school, when the distance to the school to which they are assigned is more than one and one-half miles. If the pupil who is not subject to the compulsory attendance statute chooses to attend school, he may attend the school only to which he is assigned, unless he lives more than one and one-half miles therefrom, in which case such pupil may, under the provisions of said section 7735 G. C., attend any other nearer school in his district or if there de none, any other school in another district.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1881.

CANAL LANDS—STATE'S LIABILITY FOR NEGLIGENCE WHEN CANALS OVERFLOW ON PRIVATE PROPERTY—DAMAGES—WHEN ALLOWED AND WHEN NOT ALLOWED.

Where by reason of negligence of the officers or agents of the state in the construction and maintenance of a canal into which the natural drainage of adjacent lands has been diverted by the officers or agents of the state, a break, leakage or overflow of the canal results from such natural drainage causing injury to private property which could not have been avoided by the exercise of ordinary care on the part of the owner, such state of facts would from a proper basis for the allowance of damages to such property owner under the provisions of section 459 *G. C.*, 103 *O. L.* 126.

Injury to private property resulting from the overflow of natural streams into the canal, and then on to such property, is not a proper basis for the allowance of damages under section 459 *G. C.*, 103 *O. L.* 126, *unless the overflow of the natural water course originally was caused by negligence of the officers or agents of the state in the construction or maintenance of the canal, and the injury could not have been avoided by the ecercise of ordinary care on the part of the property owner.*

Injury to private property resulting from water discharged from artificial drainage by owners of adjacent lands into a canal of the state, without the consent or authority of the state, its officers or agents, breaking or leaking from or overflowing the canal does not form a proper basis for the allowance of damages under section 459 *G. C.*, 103 *O. L.* 126.

COLUMBUS, OHIO, August 26, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—Yours under date of August 12, 1916, is as follows:

"The seventy-ninth general assembly abandoned that portion of the Ohio canal between Trinway in Muskingum county and the Ohio river in Scioto county, also the Hocking canal between Carroll in Licking county and Nelsonville in Hocking county, likewise the Columbus feeder between Columbus and Lockbourne in Franklin county.

"The feed from pools above the dam in the streams, and from reservoirs, has been cut off so that no water now flows through these canals, except the natural drainage from adjacent lands, and occasionally when natural streams overflow into the canals.

"Adjacent land owners very frequently ditch their lands so that large quantities of water flow into the canal, and in time of floods the canal banks are often broken and adjacent lands flooded, which results in damage claims.

"We would appreciate your opinion as to whether or not the state is liable for damages under these conditions.

"Hoping to have an early reply, fixing the status of the state as to these claims, I am, * * *."

Since the state may not be sued its liability for damage to private property resulting from the maintenance and operation of the canals must be determined from the statutory provisions for the payment of claims of property owners for such damages. In respect to such claims, sections 455 and 459 of the General Code (103 O. L. 125-126) provide as follows:

"Section 455. When private property is injured by a break, leakage, or overflow of a canal, slack water, pool, reservoir or other public work, or

by the insufficiency or by the filling up of a culvert thereof, or by the washing away of earth caused by a dam under the control of the superintendent of public works, the owner of such property shall apply in writing to the superintendent of public works for damages, within one year from the occurrence of the injury, but no such application shall be received after such period.

"Section 459. The commissioners shall examine the canal, reservoir, culvert, dam or other work where such injury occurred and the property injured, and hear testimony offered by the applicant and in behalf of the state. If they are of the opinion that the injury resulted from defective construction of any part of the public works, which might have been avoided by the use of ordinary skill or care, or resulted from the want of proper care on the part of the officers or agents of the state in maintaining or repairing the construction of any part of the public works, and that the accident was unavoidable by the use of ordinary care on the part of the applicant, they shall award him such damages as they deem just. The commissioners shall make their decision in writing, subscribe and deliver it to the superintendent of public works, together with the subpoena issued by them, their records and a statement of the number of days they were engaged in the discharge of their duties."

Provision is made in section 457 of the General Code (103 O. L. 125) for the appointment of the commissioners referred to in section 459 of the General Code by the superintendent of public works.

Section 461 of the General Code (103 O. L. 127) provides as follows:

"The superintendent of public works shall cause each decision of the commissioners upon an application for damages to be recorded in the book kept for that purpose. The award of the commissioners, together with all records pertaining thereto, shall be submitted to the general assembly at its next regular session. Payments of compensation for damages so awarded shall be made from moneys specifically appropriated for that purpose."

So, if damage to private property results from a break, leakage or overflow of the canal, or from the insufficiency or by the filling up of a culvert thereof, occasioned by defective construction which might have been avoided by the use of ordinary skill or care, or from the want of proper care on the part of the officers or agents of the state in repairing or maintaining such canal, and such damage was unavoidable by the use of ordinary care on the part of the owner of the damaged property, the commissioners are authorized to award the owner of such property such damages as they deem just.

The facts stated in your inquiry are very limited and general. When reference is made to the natural drainage from adjacent land I infer that it is meant water which has been diverted by the state or its officers or agents from the natural water courses into the canal by reason of its construction and maintenance. In such case the state, in diverting water from the natural water course into the canal, would assume the responsibility of using ordinary care in providing for the restraint of such water so as to protect private property from all injury therefrom which would not have resulted from such water flowing in its natural course. That is to say, it would be the duty of the state to use ordinary care to safeguard private property from injury by water diverted by the state, its officers or agents from its natural course to the extent of that amount of water which might be ordinarily anticipated to flow in or from such natural water course in time of ordinary storms, freshets, and a failure on the part of the officers or agents of the state to exercise such ordinary care in the construction or maintenance and repair of any canal into which they have diverted the water from

a natural water course would constitute such negligence as would form a proper basis for an award of just damages by the commissioners to the owner of private property injured by reason of any break, leakage or overflow of such diverted water from the canal.

On the contrary, if a natural water course has been so diverted by the officers or agents of the state as to discharge into a canal, and by reason of such extraordinary freshets or rainfall as in the exercise of good judgment and care could not be anticipated, and a break, leakage or overflow of the canal resulted, the same could not be attributed to any failure to exercise proper care on the part of the officers or agents of the state, and would not, therefore, form a proper basis for an award of damages resulting therefrom.

It is stated that in certain cases adjacent land owners discharge the artificial drainage from their land into the abandoned canals referred to, causing the same in times of heavy rain fall or floods to overflow. I am informed by Mr. R. E. Booton, of your department, that this action on the part of adjacent land owners is wholly without leave or right granted to them by the state, its officers or agents. The discharge of such artificial drainage into the canal is therefore a trespass on the land and on the right of the state, and not an act for which the state, its officers or agents may be held responsible. If the injury to private property results from the water discharged from such artificial drainage overflowing the canal, it cannot be said that such injury is in consequence of the failure of the officers or agents of the state to exercise that ordinary care which would constitute a basis for an award for damages under the provisions of section 459 of the General Code supra.

Where natural watercourses, which are not diverted by the state, its officers or agents, into the canal, in time of flood, overflow their banks and into the canal and then overflow the canal, doing injury to private property, such state of fact would not constitute a proper basis for the allowance of damages unless the natural water course was caused to overflow its banks by the negligence of the officers or agents of the state in the construction or maintenance of the canal and such injury could not have been avoided by the exercise of ordinary care on the part of the property owner.

The application of the general principles herein discussed must be determined from the facts in each particular case and such application would be subject to modification by any material fact not herein considered.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1882.

MASSILLON STATE HOSPITAL—APPROVAL, CONTRACT FOR CONSTRUCTION OF COTTAGE No. 4.

COLUMBUS, OHIO, August 29, 1916.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—Messers. Richards, McCarty and Bulford, architects for your board for construction of cottage number four at the Massillon State Hospital, have submitted a contract for the construction of said cottage, duly entered into on the 7th day of August, 1916, between your board and The Cullen & Vaughan Company, an Ohio corporation, together with a bond securing the completion of the contract, and also copy of the minutes of your board, of August 7th, 1916, awarding the contract to said The Cullen & Vaughan Company.

It appears from the minutes submitted that your board has determined to exercise alternate No. 7, specified in the specifications and excepted the excavation, your board having itself made such excavation.

I have carefully examined the contract and bond and find the same to be in all respects in compliance with the law and have therefore approved the same and caused the same to be this day filed in the office of the auditor of state.

I am herewith returning the other papers submitted.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1883.

APPROVAL, RESOLUTIONS FOR IMPROVEMENT OF ROADS IN COLUMBIANA, HANCOCK, VINTON AND WYANDOT COUNTES.

COLUMBUS, OHIO, August 29, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of August 28, 1916, transmitting to me for examination final resolutions relating to the following road improvements.

"Columbiana county—Section 'D,' Lisbon-Canton Southern road, Pet. No. 2194, I. C. H. No. 368.

"Hancock county—Section 'A,' Findlay-Kenton road, Pet. No. 2428, I. C. H. No. 221.

"Vinton county—Section 'G,' McArthur-Athens road, Pet. No. 3039, I. C. H. No. 160.

"Vinton county—Section 'G,' McArthur-Logan road, Pet. No. 3040, I. C. H. No. 397.

"Wyandot county—Section 'A,' Kenton-Upper Sandusky road, Pet No. 3116, I. C. H. No. 229."

I find these resolutions to be in regular form, and am, therefore, returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1884.

APPROVAL, ABSTRACT OF TITLE TO REAL ESTATE ON WHICH IS LOCATED WYANDOTTE BUILDING, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, August 29, 1916.

State Board of Public Buildings, Columbus, Ohio.

GENTLEMEN:—At your request I have examined the abstract of title to the following described real estate:

"Situate in the county of Franklin, in the state of Ohio, and in the city of Columbus, being lots numbers one (1), two (2) and three (3), of Ridgeway and Crosby's subdivision of inlot number two hundred and seventy-three (273) in said city, as said lots are numbered and delineated upon the recorded plat thereof of record in deed book No. 13, page 239, recorder's office, Franklin county, Ohio."

From such examination I am of the opinion that said abstract shows a good and merchantable title in The Wyandotte Office Building Company, subject to the following exceptions:

1st. There are a few minor defects in the early history of the title which I deem unimportant and perfectly safe to waive.

2nd. The taxes for the year 1916 which are as yet undetermined.

3rd. No examination made for city assessments.

4th. No examination made in the United States circuit or district courts.

5th. Subject to the rights of the parties in possession not shown of record.

By this objection I mean not only short term tenants but also the location of the building in reference to the lot lines, which latter point can be determined only by surveys.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1885.

OFFICES COMPATIBLE—CLERK OR DEPUTY IN OFFICE OF COUNTY AUDITOR—DEPUTY SEALER OF WEIGHTS AND MEASURES.

Neither the position of a clerk in the office of a county auditor, nor that of a deputy in said office, is incompatible with the office of deputy sealer of weights and measures, and a person holding the position of deputy sealer of weights and measures may also hold either of the foregoing positions if it is physically possible for him to perform the duties of both.

COLUMBUS, OHIO, August 30, 1916.

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

GENTLEMEN:—Your letter of June 27th, asking my opinion received, and is as follows:

"Can the deputy sealer of weights and measures, appointed under section 2622 General Code, also be a clerk in the office of the county auditor, and work as such at times when not employed as such deputy sealer of weights and measures? In other words, would such positions be incompatible?"

Section 2615 G. C. provides as follows:

"By virtue of his office the county auditor shall be county sealer of weights and measures, and shall be responsible for the preservation of the copies of the original standards delivered to his office. It shall be the duty of the county auditor to see that all state laws relating to weights and measures be strictly enforced throughout his county, and to assist generally in the prosecution of all violations of such laws."

Section 2622 G. C. provides as follows:

> "Each county sealer of weights and measures shall appoint by writing under his hand and seal, a deputy who shall compare weights and measures wherever the same are used or maintained for use within his county, or which are brought to the office of the county sealer for that purpose, with the copies of the original standards in the possession of the county sealer, who shall receive a salary fixed by the county commissioners to be paid by the county, which salary shall be instead of all fees or charges otherwise allowed by law. Such deputy shall also be employed by the county sealer to assist in the prosecution of all violations of laws relating to weights and measures."

There is no statutory requirement that a deputy sealer of weights and measures shall devote his entire time to his duties, as such deputy, and there is nothing in the provisions fixing his duties as such deputy which gives him any control or supervision over the clerks in the office of the county auditor.

Section 2981 G. C. provides in part as follows:

> "Such officers may appoint or employ necessary deputies,assistants, clerks, bookkeepers or other employes for their respective offices, fix their compensation and discharge them."

By this section the county auditor is given considerable latitude in the employment of clerks, subject, of course, to the civil service law and to the appropriation made by the county commissioners for the compensation of such clerks. A clerk in the office of the county auditor has no official duty to perform in connection with the work of the deputy sealer of weights and measures, and I know of no reason why a deputy sealer of weights and measures could not be employed as a clerk in the office of the county auditor and receive compensation therefor, provided it is physically possible for him to perform such work without interfering with his duties as deputy sealer of weights and measures. I am therefore of the opinion that a deputy sealer of weights and measures, appointed under section 2622 G. C., may also be employed as a clerk in the office of the county auditor and work at such time when not employed as such deputy sealer of weights and measures and that such positions would not be incompatible.

You also verbally inquire whether the same rule applies to a deputy county auditor, and without any extended discussion of the reasons, you are advised that these two positions are not incompatible, and may be held by the same person if the volume of work in each is such as to enable one person to perform the duties of both.

The enforcement of the county weights and measures law is specifically placed upon the county auditor, as county sealer, and upon the deputy sealer as such, and the duties are in no way especially related to other duties of the county auditor or of deputy county auditors. I am unable to see how in practice there could be any conflict between the duties of the two positions, and it is my opinion that the offices of deputy county auditor and deputy sealer of weights and measures are not incompatible and may be held by the same person, if it is physically possible for one person to perform the duties of both.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1886.

WORKMAN'S COMPENSATION ACT—WHEN ALLOWANCE OF COMPENSATION UNDER TWO DIFFERENT SECTIONS MAY BE MADE AT SAME TIME TO INJURED EMPLOYE—COMPENSATION FOR TEMPORARY TOTAL DISABILITY—SECTION 1465-79 G. C.—AMOUNT FOR SPECIFIC INJURIES—SECTION 1465-80 G. C.

Where an employe sustains an injury in the course of his employment, which results in the loss of a part or the whole of a member, he shall be awarded compensation for the period of his temporary total disability as provided in section 32 of the Ohio compensation act or section 1465-79 G. C., 103 O. L., 72 et seq., in addition to the amount of compensation provided for specific injuries in the schedule contained in section 33 of the act, or section 1465-80 G. C.

COLUMBUS, OHIO, August 31, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter under date of August 23, 1916, in which you request an opinion with reference to the allowance of compensation under sections 31, 32 and 33 of the Workmen's compensation law of Ohio, or section 1465-78 1465-79 and 1465-80 of the General Code (103 O. L. 72 et seq.), the letter being as follows:

> "We would like to have your opinion as to whether the compensation provided for specific injuries enumerated in the schedule in section 33 of the workmen's compensation act is payable in addition to the compensation provided for temporary total disability by section 32 of said act or whether the amount carried in said schedule includes the amount payable under section 32 for temporary total disability.
>
> "To illustrate, an employe suffers the loss of the index or first finger of one of his hands as a result of which he is totally disabled for a period of three weeks, at the end of which time he is able to resume work. The schedule in section 33, defining partial disability, provides compensation 'for the loss of the first finger, commonly called the index finger, 66⅔ per cent. of the average weekly wages during 35 weeks.' Is such employe entitled to compensation for total disability under section 32 for the period of such total disability, exclusive of the first week, and, in addition thereto, the amount of compensation provided by the schedule contained in section 33?
>
> "We have before us your opinion rendered January 20, 1916, relative to the construction of section 33, which does not seem to us to fully answer the question hereinbefore submitted."

Section 31 of the workmen's compensation law,section 1465-78, G. C., is as follows:

> "No compensation shall be allowed for the first week after the injury is received, except the disbursements hereinafter authorized for medical, nurse and hospital services and medicines, and for funeral expenses."

Section 32 of the workmen's compensation law, section 1465-79 G. C., is as follows:

> "In case of temporary disability, the employe shall receive sixty-six and two-thirds per cent. of his average weekly wages so long as such disability is total, not to exceed a maximum of twelve dollars per week, and not

less than a minimum of five dollars per week, unless the employe's wages shall be less than five dollars per week, in which event he shall receive compensation equal to his full wages, but in no case to continue for more than six years from the date of the injury, or to exceed three thousand seven hundred and fifty dollars."

Section 33 of the workmen's compensation law, section 1465-80 G. C., is as follows:

"In case of injury resulting in partial disability, the employe shall receive sixty-six and two-thirds per cent. of the impairment of his earning capacity during the continuance thereof, not to exceed a maximum of twelve dollars per week, or a greater sum in the aggregate than thirty-seven hundred and fifty dollars. In cases included in the following schedule, the disability in each case shall be deemed to continue for the period specified and the compensation so paid for such injury shall be as specified herein, to wit:" (Here follows a schedule of specific amounts to be paid in case the injured employe has lost a part of or a whole member.)"

Section 31 supra, provides that no compensation shall be allowed for the first week after the injury, except disbursements for medical, nurse and hospital services and medicines and funeral expenses, and need not be considered in answering your question.

The question submitted in your letter, in short, is as to whether an employe that loses a part of, or the whole of, a member, is entitled to compensation for a temporary disability in addition to the amount specified in the schedule of section 33 for the loss of a part or all of a member. The schedule in section 33 provides that in the cases enumerated in the schedule compensation shall be paid for a specified period. It would seem from this schedule that for an injury resulting in a partial disability compensation could not be paid for less period than that provided in the schedule. The compensation provided for in the schedule must be paid notwithstanding there is a temporary disability occurring from the same injury. The compensation as fixed by the schedule is a certain sum fixed by law for the loss of a member, and for the reason that the loss deprives the employe of the use of that member for the remainder of his life, and puts the employe under a handicap resulting from such loss, which might be difficult to estimate, and for this reason it seems that the legislature determined that the compensation for the loss of certain members shall be as specified in the schedule. The amounts so specified are given to the employe on the theory that the loss of a member is worth a certain specified amount, and the payment of compensation to an employe as specified in the schedule is supposed to make him whole for the loss of the member.

Section 32 supra, provides that in case of temporary disability the employe shall receive 66⅔ per cent. of the average weekly wage so long as such disability is total not, however, to exceed a maximum of $12.00 per week, nor less than a minimum of $5.00 per week, unless the employe's wages are less than $5.00 per week, and then he shall receive compensation equal to his full wages, but in no case to continue for more than six years, nor exceed in amount $3,750.00.

When an employe sustains an injury resulting in the loss of a part of, or the whole of, a member, he at the same time sustains a temporary disability, and compensation should be awarded for a temporary disability according to section 32 supra.

Section 33 supra, provides for the payment of compensation for a partial disability. It provides that the injured employe shall receive 66⅔ per cent .of the impairment of his earning capacity during the continuance thereof, not, however, to exceed more than $3,750.00, and for certain specified injuries named in the schedule, which is part of section 33, he shall receive 66⅔ per cent. of his average weekly wages for a

specified number of weeks. There is nothing in section 33 which provides that the compensation awarded according to the schedule for a loss of part of, or the whole of, a member, shall be exclusive compensation for a temporary disability caused by the loss of the member.

The New York compensation act contains a schedule somewhat similar to that contained in section 33 of the Ohio act. The New York supreme court, appellate division, second department, on May 12, 1916, in the case of Wagner v. The American Brewing Company, 158 N. Y. supplement, p. 1043, in the first branch of the syllabus said:

> "Under the workmen's compensation law (consolidated laws, chapter 67) the employer or his insurer is to provide compensation for all personal injuries that involve permanent or temporary disability, whether total or partial, the schedule of section 15 enumerating particular injuries not being exclusive."

The question submitted in your letter is almost identical with the one which arose under the workmen's compensation law of the state of New Jersey. The New Jersey law in section 2, clause (a), provides compensation for injuries producing temporary disability, and in clause (b) provides for disability total in character and permanent in character. Clause (c) provides for disability total in character but permanent in quality, and it is further provided in this section and clause that in cases included in its schedule that the compensation "shall be that named in the schedule."

In the case of The Nitram Company v. Creigh, reported in 86 Atl., 435, compensation was awarded for temporary disability, to which was added the period specified in the schedule for a partial disability. The employer objected to the award; the case was taken to the supreme court of that state, and the award was sustained. The syllabus of the case is as follows:

> "Where a servant employed under the workmen's compensation law got his fingers smashed, and some of them were amputated, and such injury produced temporary disability partially due to an infection preventing him from going to work, damages were properly allowed both under class 'A' concerning temporary disability and class 'C' providing for disability partial in character, but permanent in quality, even though the damages would exceed the maximum recovered under class 'B' relating to total and permanent disability."

In another case in New Jersey, the case of Bonaldi v. Hamburg-American line 36 N. J. L. J., 32, an employe losing a leg was awarded the specific indemnity fixed therefor by the statute and was also allowed compensation during the actual disability.

A similar ruling was made in Loughman v. Home Brewing Company, 36 N. J. L. J., 113, where the injury was a Potts fracture attended by permanent total disability compensation was awarded not only for permanent total disability but also for temporary disability.

In Holt v. Wood Brothers, the Illinois industrial board on April 1, 1914, held that where an employe has lost all the fingers of the left hand leaving the palm of the hand and the thumb complete, and he also lost his first, second and third fingers of the right hand, an award was made of $8.00 per week for 150 weeks for the loss of the use of the left hand, and $8.00 per week for 85 weeks for the loss of the fingers of the right hand, and $96.00 for the temporary total incapacity.

Therefore, in answer to your question as to whether compensation for temporary disability can be paid to an employe who sustains an injury which results in the loss of a member for which compensation is provided in the schedule to section 33 of the act, I am of the opinion that compensation should also be paid for the temporary

disability as provided in section 32 in addition to the allowances specified in the schedule of section 33 of the workmen's compensation act, supra.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1887.

BOARD OF EDUCATION—AUTHORIZED TO ERECT STABLES FOR SHELTER OF VEHICLES, HORSES AND CONVEYANCES OF PUPILS WHO DRIVE TO SCHOOL.

Boards of education are authorized, under the provisions of section 7620 G. C., where the same is necessary for the convenience of pupils who drive to school, to erect a stable for the shelter and protection of the vehicles, horses and conveyances of such pupils.

COLUMBUS, OHIO, August 31, 1916.

HON. DEAN E. STANLEY, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—In your communication under date of August 25, 1916, you make the following inquiry:

> "May boards of education use funds in their hands for the purpose of erecting a stable for the accommodation of such of their pupils as drive to school?"

I am unaware of any statutory provision which makes specific mention of the erection or construction of a stable for the purpose mentioned in your inquiry, or for any other purpose. It is provided, however, by section 7620 G. C. that:

> "The board of education of a district may build, enlarge, prepare and furnish the necessary school houses, purchase or lease sites therefor, or rights of way thereto, or purchase or lease real estate to be used as playgrounds for children, or rent suitable school houses, provide the necessary apparatus and make all other necessary provisions for the schools under its control. It also shall provide fuel for schools, build and keep in good repair fences inclosing such school houses, when deemed desirable plant shade and ornamental trees on the school grounds, and make all other provisions necessary for the convenience and prosperity of the schools within the subdistricts."

In view of the comprehensive language of the above section, and the character of its specific provisions, I am inclined to conclude that it was the legislative intent, in the enactment of this section, to confer upon boards of education a wide discretion in the determination of the character of provisions for the schools under its control and other provisions necessary for the convenience and prosperity of the schools within its district and that such section should be given a liberal construction to the end that its purposes may be fully carried out.

Under authority of the provisions of the above quoted section, which were then found in section 3987 of the Revised Statutes, my predecessor, Hon. Wade H. Ellis, held in an opinion to Hon. Edward B. Follett, prosecuting attorney of Washington county, found at page 249 of the Report of the Attorney-General for the year 1907, that:

"Boards of education may construct such foot bridges over creeks and other streams as are deemed necessary for the *'convenience'* of the public schools under the authority conferred by section 3987 Revised Statutes."

My predecessor, Hon. Timothy S. Hogan, also held in an opinion under date of February 13, 1914, addressed to Hon. Ben A. Bickley, prosecuting attorney, and found at page 247 of the Report of the Attorney-General for that year, that:

"Where a township district school house is located upon a private road, other lawful means for securing a necessary and convenient approach to the school house being absent, it is proper for the board of education to provide for the construction of a bridge on this road, under the provisions of section 7620, General Code."

I have no hesitancy in reaching the conclusion that where by reason of centralization of the schools authorized by law or the location thereof it is reasonably necessary, or adds substantially to the convenience of pupils that they drive to school, the construction of a stable for the shelter and protection of the conveniences of such pupils is a provision for the convenience and prosperity of the schools to which such pupils are assigned within the meaning and purpose of section 7620 G. C. supra.

I am therefore of opinion, in answer to your question, that where the same is necessary for the convenience of the pupils who are assigned to the schools of a district that a stable be erected for the shelter and protection of their conveyances, it is within the power of the board of education to construct such stable, shed or shelter, as in their judgment will provide for the convenience of the pupils of such school.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1888.

ROADS AND HIGHWAYS—RIGHT TO COMPEL RAILWAY TRACKS TO BE MOVED—OBSTRUCTIONS IN HIGHWAYS—PROCEDURE — WHAT NOTICE TO RAILROAD COMPANY SHOULD CONTAIN.

Where the state highway commissioner, under authority of section 7204 G. C., desires to secure the removal and relocation of railway tracks, which tracks constitute an obstruction in a highway, the first step to be taken is to notify the company owning such tracks and direct it to remove the obstruction. The notice should describe the highway obstructed, and in case the tracks are to be moved to the side of the road, should set forth the exact line outside of which the tracks are to be relocated.

COLUMBUS, OHIO, August 31, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of August 11, 1916, transmitting to me a copy of your letter to Mr. J. H. Sundmaker, chief engineer of the Ohio Electric Railway Company, dated May 1, 1916, a copy of his answer dated May 12, 1916, a copy of your reply dated May 15, 1916, and a copy of a letter from division engineer R. N. Waid, dated August 8, 1916. This correspondence relates to the removal of the Ohio Electric Railway Company's equipment from the roadway now being constructed by your department on section "M" of the national road in Licking county. In your letter

of May 1st, to Mr. Sundmaker, you refer to certain negotiations looking toward the shifting of the line of the roadway being constructed by your department, the object of such negotiations being to avoid the necessity of shifting the tracks of the company and it appears that nothing tangible has resulted from these negotiations. You advised Mr. Sundmaker that the contractor has done considerable work on lines originally laid out for the proposed improvement and it also appears that certain property and track equipment of the Ohio Electric Railway Company will stand upon or occupy a portion of the highway as the same will eventually be constructed. In this letter you notify Mr. Sundmaker, on behalf of the Ohio Electric Railway Company, to move such obstructions as will permit the completion of the construction of the highway, as provided for in your plans for the improvement, and you advise Mr. Sundmaker that the chief highway engineer is ready to designate all railway property that will interfere with the construction of the road in question and also to designate the points at which such property may be located beyond the limits of your proposed work so as not to interfere with the use and maintenance of the highway. Mr. Sundmaker, in his reply to this communication under date of May 12th, discusses the possibility of shifting the roadway to the north to prevent interference with the road bed of the company and states that the company has been unable to reach a satisfactory agreement with the contractor which would permit of working out the matter in that manner. Mr. Sundmaker also refers to the franchise rights of the company and states that the entire matter has been submitted to its attorneys. He says that if advised by its attorneys the company will proceed to relocate its tracks, but expresses the hope that such relocation may prove to be unnecessary.

Your reply to Mr. Sundmaker, under date of May 15, 1916, merely refers to your position in the matter and advises him that in the event of the failure of the company to move its tracks, you will find it necessary to refer the matter to this department. Mr. Waid's letter, under date of August 8, 1916, advises you that the company has made no move to get its poles or tracks out of the way and that it will be possible for the contractor to place his macadam without anything being moved but that when the road is completed the company's pole line will be in the edge of the macadam and its tracks so close to the road that there will not be room for any berme and ditch at some points.

You state that in addition to the demand of your department that the Ohio Electric Railway Company remove these obstructions, the county commissioners of Licking county made a similar written request under date of May 2, 1916, that it is apparent that the company intends to take no voluntary action in the premises and that you are referring the matter to this department with the request that I take the necessary steps to require the railway company to comply with your demands.

The pertinent section of the General Code is section 161 of the Cass highway law, section 7204 G. C., which section was fully discussed in opinion No. 855 of this department, rendered to you on September 22, 1915, and found at page 1822 of the Opinions of the Attorney-General for that year. The section in question reads as follows:

> "It shall be the duty of the owners or occupants of lands situated along the highways to remove all obstructions within the bounds of the highways which have been placed there either by themselves or their agents, or with their consent. It shall be the duty of all telephone, telegraph, steam or electric railway, or other electrical companies, oil, gas, water or public service companies of any kind, to remove their poles and wires, connected therewith, or any tracks, switches, spurs, or oil, gas or water pipes, mains, conduits or other objects when the same, in the opinion of the county highway superintendent, constitute obstructions in the highway or interfere with the

construction, improvement, maintenance or repair of the highway or use thereof, by the traveling public, subject, however, to the rights of any such company to be or remain in such highway, by virtue of any grant or franchise to said company. If, in the opinion of the county highway superintendent such companies have obstructed said highway, said highway superintendent shall forthwith notify the county commissioners who shall cause notice to be served on said owner, occupant or company, directing the removal of said obstructions and if said owner, occupant or company shall not within five days proceed to remove said obstruction and complete the same within a reasonable time, the county highway superintendent, upon order of the county commissioner may remove said obstructions. The expense thereby incurred shall be paid in the first instance out of money levied and collected and available for highway purposes, and the amount thereof shall be certified to the proper officials to be placed upon the tax duplicate against the property of such owner, occupant or company, as provided by law, to be collected as other taxes, and the proper fund shall be reimbursed out of the money so collected, or the cost of removing such obstructions may be collected from the owner, occupant or company by civil action by the county commissioners or township trustees.

"All such persons, firms or corporations shall be required to reconstruct or relocate their properties or any part thereof upon such public highway, upon the order of the proper authorities if in the opinion of such authorities the same constitute an obstruction in such public highway."

It will be unnecessary to again discuss the force and effect of this section. The second paragraph thereof is especially applicable to the situation, which now presents itself, and since this highway is being improved by your department, it is manifest that your department is the proper authority to make an order for the relocation of the tracks of the company, which order must, of course, be based upon a finding that the tracks as at present located constitute an obstruction in the highway. You have already made such a finding and have communicated the same and also your order in the premises to the chief engineer of the company, but before taking any other or further actions in the premises, it is my view that a more formal and definite order should be prepared and served upon the company. I will be glad to prepare this order upon being furnished with the necessary information. I will need to know the exact points in the highway between which it is necessary to relocate the tracks of the company and the exact line outside of which such tracks must be relocated in order to permit of the completion of the improvement projected by you. The description of the tracks, the relocation of which is required, and the description of the line outside of which the same must be relocated should be so complete and definite as to admit of no misunderstanding and to fully advise the company as to exactly what action is required of it in the premises.

It is my view that after this notice is prepared, it should, in order to avoid any question, be served personally upon the president of the company or upon the vice-president, in case the president cannot be found. If you will kindly furnish me with the necessary information, the order will be promptly prepared and forwarded to you.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1889.

BOARD OF EDUCATION—AUTHORIZATION TO RE-ESTABLISH SUSPENDED SCHOOL—MUST FIND TWELVE OR MORE PUPILS QUALIFIED WHO ARE ENROLLED IN ATTENDANCE AT SOME SCHOOL.

To authorize the re-establishment of a school which has been suspended under the provisions of section 7730 G. C., 106 O. L. 396, there must be found in such district twelve or more pupils who are qualified under section 7681 G. C., 106 O. L. 489, to attend school and who are enrolled as in attendance at some school.

COLUMBUS, OHIO, August 31, 1916.

HON. FORREST G. LONG, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR:—Yours under date of August 15, 1916, is as follows:

"I would be pleased to have your opinion on the following:

"First. A certain school in one of our rural districts was duly suspended under authority of section 7730 of the General Code of Ohio, about two or three months ago. Said school or suspended district now has within its boundaries more than twelve pupils of lawful school age. May the board under authority of section 7730 of the General Code now re-establish such school, or must said board wait until the pupils of said suspended district have first enrolled in some other school? In other words, does the word enrollment as used in the latter part of said section strictly mean that said pupils must first have their names entered on the enrollment book of some school, or does said term 'enrollment' only mean that said pupils shall reside within said district?

"Second. Section 7811 of the General Code provides how a county board of school examiners shall be constituted. Where said section refers to a district superintendent, does it mean also a superintendent over a special supervision district as is provided in section 4740 of the General Code? In other words, may a superintendent over a special supervision district as is provided in section 4740 of the General Code be appointed on said board of school examiners as a district superintendent?

"I would be very glad indeed if I could have an early reply on these two questions, as the rights of certain persons here will be much affected by your opinion."

Section 7730 G. C. as amended 106 O. L. 396, to which you refer, provides as follows:

"The board of education of any rural or village school district may suspend any or all schools in any rural or village school district. Upon such suspension the board in such village school district may provide, and in such rural school district shall provide for the conveyance of pupils attending such schools, to a public school in the rural or village district, or to a public school in another district. When the average daily attendance of any school for the preceding year has been below ten, such school shall be suspended and the pupils transferred to another school or schools when directed to do so by the county board of education. No school of any rural district shall be suspended until ten days' notice has been given by the board of education of such district. Such notice shall be posted in five conspicuous places within such village or rural school district; provided, however, that any suspended

> school as herein provided, may be re-established by the suspending authority upon its own initiative, or upon a petition asking for re-establishment, signed by a majority of the voters of the suspended district, at any time the school enrollment of the said suspended district shows twelve or more pupils of lawful school age."

Referring to the phrase "at any time the school enrollment of the said suspended district shows twelve or more pupils of lawful school age," it is said in opinion No. 827 of this department, addressed to Hon. Frank B. Grove, prosecuting attorney, found at page 1754 of the Opinions of the Attorney-General for the year 1915, that:

> "The above phrase means, when taken in connection with the latter provision of section 7730 G. C. * * * that any suspended school may be re-established in the manner provided in said section whenever the number of pupils, who, under the provisions of section 7681 G. C. as amended in 106 O. L. 489, are qualified to attend the schools in the suspended district when the same is re-established, and who are enrolled in another school or schools to which they have been transferred by order of the board of education, is twelve or more."

It is thus held that before a pupil who is qualified to attend school in a suspended district, under the provisions of section 7681 G. C., 106 O. L. 489, may be counted in determining whether or not "the school enrollment of the said suspended district shows twelve or more pupils of lawful school age," such pupil must be enrolled as a pupil in some school. There seems ample reason for so limiting the power to re-establish the suspended school. A case may readily be imagined in which the number of pupils in a district, who are qualified to attend schools under the provision of section 7681 G. C. supra, is in excess of twelve and at the same time the number of such pupils who are subject to the compulsory education laws and may be compelled to attend school is much below twelve. If those pupils who reside in such district, who are not subject to compulsory attendance, do not choose to attend the schools so re-established, the attendance thereof, would, of necessity, be less than twelve and the reason for re-establishment of such school therefore fails.

A careful examination of the provisions of said section 7730, as amended, discloses the manifest purpose of the legislature that schools shall not be maintained when the average attendance thereof falls below ten, and it can hardly be said that the board of education would be warranted in assuming that the attendance of a re-established school would be twelve or more, in the absence of such number of pupils within such district who are subject to compulsory attendance, although there is such number of pupils qualified within the provisions of section 7681 G. C. supra, who, if they choose to attend school, might make the average daily attendance in excess of twelve.If, however, there are twelve or more pupils residing in the district in which a school has been suspended, under the provisions of section 7730 G. C., who are enrolled in another district, such enrollment would, it would seem, afford sufficient evidence of the probable attendance of such suspended school when re-established to warrant such re-establishment and such attendance as is contemplated by the provisions of said section 7730.

I am therefore of opinion, in answer to your first question, that to authorize the re-establishment of a school which has been suspended under the provisions of section 7730 G. C. supra, there must be found in such district twelve pupils who are qualified, under section 7681 G. C., 106 O. L. 489, to attend school, and who are enrolled as in attendance at some school.

Your second question is fully answered in opinion No. 1861, addressed to Hon.

Frank B. Pearson, superintendent of public instruction, under date of August 19, 1916, copy of which is herewith enclosed for your information.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1890.

TRUST COMPANIES—"MUNICIPAL BONDS"—BONDS OF MAGISTERIAL DISTRICT OF WEST VIRGINIA NOT BONDS OF MUNICIPALITY WITHIN MEANING OF THAT TERM AS USED IN SECTION 9778 G. C.

Bonds of a magisterial district of West Virginia are not bonds of a municipality within the meaning of that term as used in section 9778 G. C.

COLUMBUS, OHIO, September 1, 1916.

HON. R. W. ARCHER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—In your letter of August 23rd you enclose a communication from The Tillotson & Wolcott Company of Cleveland, Ohio, requesting your opinion as to whether bonds of magisterial districts of West Virginia may be deposited with you as treasurer of state under provision of section 9778 G. C. for the purposes mentioned in said section, and you request my opinion on the question submitted to you.

The letter of The Tillotson & Wolcott Company reads as follows:

> "We wish to be advised whether the bonds of magisterial districts of West Virginia are eligible as deposits with you under the terms of section 9778 of the Code.
>
> "This section provides, as you know, for deposits by trust companies of certain specified amounts, either in cash or in bonds. The bonds that are eligible are described as follows: 'Bonds of the United States, or of this state, or any municipality or county therein, or in any other state, etc.'
>
> "In general, a magisterial district in West Virginia corresponds to a township in Ohio. The bonds of magisterial district are issued by the county, on behalf of the district, and are issued by the county officers. They are, of course, included within the general term 'municipal bonds.'
>
> "It occurs to us that probably you have already passed on this question, and if so, we should be glad to know what your ruling is. If there never has been a ruling, we would be obliged to you if you would submit the question to the attorney-general.
>
> "We enclose herewith one of our circulars, describing certain issues of these bonds for whatever value it may be to you."

The answer to the question submitted by you depends upon the answer to the question whether the bonds above referred to are bonds of a "municipality" within the meaning of that term as used in section 9778 G. C., which provides as follows:

> "No such corporation, either foreign or domestic, shall accept trusts which may be vested in, transferred or committed to it by an individual, or court, until its paid in capital is at least one hundred thousand dollars, and until such corporation has deposited with the treasurer of state in cash fifty

thousand dollars if its capital is two hundred thousand dollars or less, and one hundred thousand dollars if its capital is more than two hundred thousand dollars, except that, the full amount of such deposit by such corporation may be in bonds of the United States, or of this state, or any *municipality* or county therein, *or in any other state*, or in the first mortgage bonds of any railroad corporation that for five years last past paid dividends of at least three per cent. on its common stock."

It appears that in your letter addressed to The Tillotson & Wolcott Company on August 28th you questioned the authority of said company for its statement that the bonds in question "are, of course, included within the general term 'municipal bonds.' " You submit for my consideration the letter addressed to you by Mr. J. W. Tyler, office counsel of said company, under date of August 29th, in answer to your inquiry, which letter is in part as follows:

"Our authority for the statement is the fact that the term 'municipal bonds' as used in the every day course of business of investment bankers, includes all bonds issued by political subdivisions, or by municipal or quasi-municipal corporations as distinquished from private corporations; in other words, if you should ask any bond man if a magisterial bond, or a township bond, was a municipal bond, his answer would unhesitatingly be in the affirmative.

"If you will turn to Dillon's Work on Municipal Corporations, vol. II, chapter 20, you will notice that it is headed 'Municipal Bonds.' It will also be noted that the chapter deals with the bonds of cities, villages, counties, townships and districts,—all under this title. For instance: In section 880, on page 1352, is this sentence:'Municipal bonds in the usual form, containing words of negotiability, with coupons attached, are absolute, etc.' In the next section, 181, is found at the beginning, this language: 'Negotiable bonds of the kind here referred to,' (by which, of course, he means the municipal bonds spoken of in his preceding section) 'have been issued by municipal corporations proper * * * and by counties * * * and by organized townships * * * and by school districts.' The author does not mention 'magisterial districts,' by name, but they are the same as townships.

"Or, turn to Daniel on 'Negotiable Instruments,' vol. II, section 1518, with which chapter 48 opens: You will find this language,—'Municipal bonds constitute a vast portion of the wealth of the country, etc.' This section is followed by other sections defining municipal corporations, from which it is clear that the term 'municipal' is not confined to a city or village but includes all political subdivisions."

Again, turn to chapter 2 of Harris on 'Municipal Bonds': The first sentence reads as follows:"

" 'By the term "municipal bonds" is meant evidences of indebtedness, issued by cities, incorporated towns, counties, townships, school districts, and other public corporate bodies, negotiable in form, payable at a designated future time, bearing interest payable annually, or semi-annually, and usually having coupons attached evidencing the several installments of interest.' "

Upon an examination of the constitution and statutes of the state of West Virginia I find that the statement of Mr. Tyler that "in general, a magisterial district in West Virginia corresponds to a township in Ohio," and that "the bonds of magis-

terial districts are issued by the county on behalf of the district, and are issued by the county officers" is correct. The county officers referred to are the members of the county court which corresponds, generally speaking, to a board of county commissioners in this state and the authority of said officers to issue said bonds under the conditions prescribed by statute and for the purposes therein set forth, is clear. In view of the strict limitations under which said bonds are issued, the high character of this class of securities cannot be questioned. Moreover, in so far as the general use of the term "municipal bonds" is concerned, the force of the reasoning given and authorities cited by Mr. Tyler in support of the proposition that the bonds in question are included in said class, must be conceded.

It will be remembered, however, that in opinion No. 1314 of this department, rendered to you on March 3, 1916, I held that the provisions of section 9778 G. C. supra, authorizing you to accept bonds of municipalities or counties of another state in lieu of cash, should be strictly construed. While I was of the opinion that the road and bridge county warrants of Atascosa county, Texas, under consideration in said opinion, had many of the distinguishing characteristics of a bond and constituted valid obligations of said county, nevertheless I advised you that they were not bonds within the meaning of said section 9778 G. C.

In opinion No. 1778 of the department, rendered to you on June 28, 1916, you were advised that you are not authorized by provision of said section to accept legally issued bonds of a school district in this state. It is evident, however, that such bonds would be "municipal bonds" within the meaning of that term as above defined in the citations of Mr. Tyler.

In so far as the statutes of Ohio are concerned, the term "municipality" has a well defined meaning and its application in this state is clearly limited to cities and villages regularly incorporated in the manner provided by law. I do not think it can be said that the legislature, in enacting the provisions of said section 9778 G. C. intended to give to the term "municipality" the general meaning contended for by the representative of The Tillotson & Wolcott Company. It seems clear to my mind that the bonds of a municipality in this state, which may be deposited with you as treasurer of state, under provision of section 9778 G. C. are those of a city or village duly incorporated under the statutes of Ohio and of similar incorporations in another state. While the statutes of West Virginia provide for the incorporation of cities, towns and villages, no provision is made for the incorporation of a magisterial district as such.

I am of the opinion therefore, in answer to the question submitted by you, that you are not authorized by provision of said section 9778 G. C. to accept bonds of magisterial districts of West Virginia for the purposes mentioned in said section.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1891.

DISAPPROVAL, RESOLUTION FOR IMPROVEMENT OF OHIO RIVER IN SCIOTO COUNTY.

COLUMBUS, OHIO, September 1, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of August 29, 1916, transmitting to me for examination final resolution relating to the improvement of section "L" of the Ohio river road in Scioto county, petition No. 2903, I. C. H. No. 7.

I am returning this resolution without my approval, for the reason that the official seal of the county auditor is not attached to his certificate of available funds.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1892.

APPROVAL, RESOLUTIONS FOR ROAD IMPROVEMENTS IN GALLIA, GEAUGA, LAWRENCE, MERCER, PICKAWAY, PREBLE, PUTNAM, ROSS, SANDUSKY AND VINTON COUNTIES.

COLUMBUS, OHIO, September 1, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of August 29, 1916, transmitting to me for examination final resolutions relating to the following road improvements:

"Gallia County—Sec. 'G' Ohio river road, Pet. No. 2369, I. C. H. No. 7.

"Gallia County—Sec. 'D' Gallipolis-Ironton road, Pet. No. 2367, I. C. H. No. 405.

"Gallia County—Sec. 'E' Gallipolis-Jackson road, Pet. No. 2370, I. C. H. No. 399.

"Geauga County—Sec. 'H' Cleveland-Meadville road, Pet. No. 2376, I. C. H. No. 15.

"Lawrence County—Sec. 'D' Ironton-Miller road, Pet. No. 2567, I. C. H. No. 404.

"Mercer County—Sec. 'B' Celina-Wabash road, Pet. No. 2687, I. C. H. No. 264.

"Pickaway County—Sec. 'L' Cincinnati-Zanesville road, Pet. No. 2805, I. C. H. No. 10.

"Pickaway County—Sec. 'L' Cincinnati-Zanesville road, Pet. No. 2805, I. C. H. No. 10.

"Preble County—Sec. 'F' Dayton-Indianapolis road, Pet. No. 2835, I. C. H. No. 28.

"Putnam County—Sec. 'B' Findlay-Delphos road, Pet. No. 2854-T, I. C. H. No. 133.

"Putnam County—Sec. 'A' Findlay-Delphos road, Pet. No. 2854-T, I. C. H. No. 133.

"Ross County—Sec. 'O' Portsmouth-Columbus road, Pet. No. 2874, I. C. H. No. 5.

"Sandusky County—Sec. 'J' Lima-Sandusky road, Pet. No. 2889, I. C. H. No. 22.

"Vinton County—Sec. 'A' McArthur-Gallipolis road, Pet. No. 3041, I. C. H. No. 398,

"Vinton County—Sec. 'G' McArthur-Logan road, Pet. No. 3040, I. C. H. No. 397."

I find these resolutions to be in regular form and am, therefore, returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1893.

MUNICIPAL CORPORATION—REGULATION OF PUBLIC AND PRIVATE CEMETERIES.

By the provisions of section 3622 G. C. municipal corporations are authorized to regulate public and private cemeteries within their corporate limits and by the provisions of section 4157 G. C. may prohibit the interment of the dead within said limits. Therefore, the owner of a private lot situated within the corporate limits of a city who desires to use said lot for private burial purposes should first have the permission of the council of said city so to do.

COLUMBUS, OHIO, September 1, 1916.

HON. CHARLES F. ADAMS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I have a letter of the date of August 23, 1916, from Hon. Frank A. Stetson, assistant prosecuting attorney, as follows:

"Some days ago I talked by phone with your assistant, Mr. Ballard, concerning a matter in which a written opinion is desired. I restate the facts and inquiry, so that there may be no misunderstanding in the matter.

"I inclose a pencil sketch showing the location of the property concerning the use of which inquiry is made, the premises being marked with an 'X' on the sketch.

"The city of Elyria owns a cemetery within its boundaries. Adjoining this cemetery is a lot of land which has been purchased by an individual, to be used for private burial purposes. It is not a part of the Elyria cemetery, nor is it intended by conveyance or otherwise to be made a part thereof.

"My inquiry is: What, if anything, should be done or accomplished before the property may be used for private burial purposes by the person owning the legal title in fee simple to the premises?"

From the statements made by you and the pencil sketch attached to your letter, it appears that the owner of a certain lot abutting and adjoining a public cemetery owned by your city, both lot and cemetery being within the corporate limits of said city, desires to use said lot for private burial purposes. Said lot is not a part of said cemetery and is situate near the intersection of two streets, and is surrounded

on two sides by lots occupied for residence purposes. Many other lots so occupied are situate within the immediate vicinity of the lot in question.

You inquire what legal steps are necessary to enable the owner of said lot to use it for the purposes aforesaid. So far as I am able to ascertain, there are no specific statutory provisions governing the establishment and maintenance of a private cemetery under the circumstances aforesaid.

It is, however, provided in section 3616 G. C. that:

> "All municipal corporations shall have the general powers mentioned in this chapter, and council may provide by ordinance or resolution for the exercise and enforcement of them."

Among the powers thus delegated to all municipal corporations are those defined in section 3622 G. C., which provides as follows:

> "To provide public cemeteries and crematories for the burial or incineration of the dead and to regulate public and private cemeteries."

The power to regulate, so as aforesaid delegated to a municipal corporation, includes the power to determine the location of all cemeteries within the corporate limits, and if any doubt exists as to such control, it is dissipated by the delegation of further powers conferred upon such corporations in this respect, which are found in the provisions of section 4157 G. C., which provides as follows:

> "Council may prohibit the interment of the dead within the corporation limits, and for the purpose of making such prohibition effective may not only impose proper fines and penalties, but shall also have power to cause any body interred contrary thereto to be taken up and buried without the limits of the corporation."

In view of the foregoing provisions of the statutory law, it would seem to be at least a necessary precaution on the part of the owner of the lot in question, before he attempts to use such lot for burial purposes, to have the permission of the municipal authorities so to do, and an application for such permission should be made to council. In this connection it must also be noted that the owners and occupiers of the adjoining lots aforesaid, and also those living on lots situate within such distance of the lot in question as to be affected by its use as a cemetery or private burial place, may have objections to such use that might appeal to a court of equity and result in litigation which would prevent such use entirely. These questions, however, are matters which involve private rights, with which we have no concern in this opinion.

The above observations furnish as definite an answer as can be given to your inquiry.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1894.

INDUSTRIAL COMMISSION—APPROPRIATION MADE FOR DEFINITE NUMBER OF EMPLOYES CANNOT BE USED TO PAY COMPENSATION TO EMPLOYES IN EXCESS OF DEFINITE NUMBER.

An appropriation made for a definite number of employes cannot be used to pay compensation to employes in excess of the definite number.

COLUMBUS, OHIO, September 1, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of August 29th, to the following effect:

"Under the appropriation made for the industrial commission carried as 'Personal Service A-1 Salaries,' we have as of June 30, 1916, several thousand dollars unused balance caused through unavoidable delay in filling positions. A specific example is as follows:

"Under state insurance an appropriation was made by the legislature for five claim investigators (one of whom shall be a woman), $6,600.00

"This appropriation was divided as follows:

"Two male claim investigators at $1,200 each	$2,400.00
"One female claim investigator at $1,200	1,200.00
"Two male claim investigators at $1,500 each	3,000.0
"Total	$6,600.00

"On May 5, 1916, the industrial commission promoted P. T. Zimmerman, a $1,200 claim investigator, to a $1,500 salary as claim investigator, thus displacing John J. Adams, a provisional appointee, whose salary was $1,500 per year. Mr. Zimmerman's promotion became effective May 16, 1916, and the appointment of a claim investigator to succeed him at $1,200 a year did not become effective until July 1, 1916. The unused balance of the salary of one claim investigator from May 16 to June 30, 1916, both inclusive, was, therefore, $150.00.

"Miss Inez Morrow, a stenographer regularly employed by the commission at a salary of $900.00 per year, was promoted from the executive department to the actuarial department, effective August 1, 1916, at a salary of $1,080 per year, leaving an unused balance of the appropriation under 'Executive and General,' designated at 'Nine Clerks and Stenographers,' of $37.50 on August 16, 1916, her successor not having been appointed up to the last named date. All of the appropriation of $8,310 made for 'Nine Clerks and Stenographers' would be consumed during the year, provided all of the clerks and stenographers were employed all of the time.

"The industrial commission respectfully requests of you an opinion as to whether or not said unused balance of $150.00 is now available for use in the employment of an additional claim investigator, five being already employed, and whether or not the unused balance of $37.50, which was not used on account of the fact that no successor to Miss Morrow was appointed prior to August 16, 1916, is available for the employment of another clerk or stenographer in addition to the nine clerks and stenographers regularly appropriated for in the appropriation bill, and now employed by the commission."

The first appropriation to which you refer, to wit, the appropriation made for five claim investigators under state insurance, is found in house bill 701, 106 O. L. 696, as follows:

"5 claim investigators (one of whom shall be a woman), $6,600."

The other appropriation to which you refer, to wit, appropriation under executive and general, is found in house bill 701, 106 O. L. 695, as follows:

"9 clerks and stenographers, $8,310."

Section 9 of house bill No. 701, 106 O. L. 828, provides as follows:

"Each department, board or commission for which an appropriation is made in section 2 or 3 of this act for the payment of the salaries of a specified number of employes whose salaries are not fixed by law shall, within ten days after July 1, 1915, as to appropriation accounts created by section 2 of this act, and on or before July 1, 1916, as to such accounts created by section 3 of this act, and subject to the provisions of this section, apportion such appropriation account and assign to each position to which the same relates a specified amount or part thereof. Such department, board or commission shall file such apportionment, in writing, with the president of the board provided for in section 4 of this act, which board shall examine the same and see that the provisions of law and of this act are complied with in making such apportionment. Said board may change such apportionment in order to comply with such law or the provisions of this act, and when satisfied that the same is in all respects legal and in accordance with the provisions of this act, shall certify such apportionment, with any modification it may make, to the auditor of state, with the approval of a majority of its members endorsed thereon. Subject to the approval of said board, any department, board or commission may change the salary or compensation attached to any such position under its control. No department, board or commission may apportion or expend, nor may the board provided for in section 4 of this act permit to be apportioned or expended, the total amount of any such appropriation in the payment of salaries of a less number of assistants, clerks or employes from that specified in such an appropriation; but in the event that fewer than the specified number of assistants, clerks or other employes are paid from such total appropriation, such department, board or commission and the board shall assign to each vacant position to which such appropriation relates to a substantial salary, having regard to the grade of service."

The appropriations made in house bill No. 701 are subject to the provisions of section 9.

It appears that in pursuance of section 9 of said bill your board divided the first appropriation herein referred to, as appears in your letter, as follows:

"Two male claim investigators $1,200.00 each	$2,400.00
"One female claim investigator at $1,200.00	1,200.00
"Two male claim investigators at $1,500.00 each	3,000.00
Total	$6,600.00"

From the books of the auditor of state I find that your board divided the second appropriation, referred to in your letter, as follows:

"Appropriations for nine clerks and stenographers:

"Execptive Department		$8,310.00
"One stenographer	$1,050.00	
"One stenographer	900.00	
"One stenographer	900.00	
"One stenographer	900.00	
"One clerk	1,080.00	
"One clerk	1,020.00	
"One clerk	1,020.00	
"One clerk (vacancy)	600.00	
"One stenographer	840.00	
"		$8,310.00"

In view of the provisions of section 9 of house bill No. 701, which requires a division of a lump sum for various employes whose salaries are not fixed by law, into definite salaries, it would seem that the legislature intended that the division as made by the particular officer or board should stand the same as if it were a specific appropriation made for the particular position, and, in view of the fact that the number of positions are specified, I am of the opinion that a greater number than that specified cannot be employed and paid out of the particular appropriation, and if there is any balance left in the appropriation, it cannot be used to pay the salary of a position which would be in excess of the number specified in the appropriation bill.

I am of the opinion, therefore, that any unused balance in such an appropriation is not available for the employment of a clerk or stenographer in excess of the number specified in the appropriation bill.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1895.

CORPORATION—PURPOSE CLAUSE "FORMED FOR THE PURPOSE OF MANUFACTURING, BUYING, SELLING AND DEALING IN TYPEWRITERS OF ALL KINDS AND THE DOING OF ALL THINGS NECESSARY OR INCIDENTAL THERETO," NOT DUAL IN CHARACTER.

The purpose clause of a corporation "formed for the purpose of manufacturing, buying, selling and dealing in typewriters of all kinds and the doing of all things necessary or incidental thereto" is not dual in character.

COLUMBUS, OHIO, September 4, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of August 30, 1916, requesting my opinion as follows:

"We beg to submit to you the following purpose clause and kindly request your early opinion on the question as to whether or not the same is dual as to purpose:

"'Said corporation is formed for the purpose of manufacturing, buying, selling and dealing in typewriters of all kinds and the doing of all things necessary or incident thereto.'"

Section 8623 of the General Code, relative to the formation of corporations in Ohio, is as follows:

"Except for carrying on professional business a corporation may be formed for any purpose for which natural persons lawfully may associate themselves."

The supreme court of Ohio, in the case of State ex rel. v. Taylor, 55 O. S., 61, in construing the language of this section, used the following language at page 67 of the opinion:

"It will be noted that the word is 'purpose,' not 'purposes.' Its use implies a limitation. This limitation must have been by design. It is a most wise and reasonable one. We cannot assume that the General assembly would intentionally clothe corporations with capacity to unite all classes of business under one organization, as this would tend strongly to monopoly."

This expression of the court has been uniformly followed in Ohio, and has been cited and adhered to by my predecessors in office and by myself in several former opinions and rulings.

The question therefore arises, "Do the powers sought to be secured under the purpose clause presented, when viewed as a whole, constitute one purpose or several purposes?" The purpose clause in question creates or constitutes what might be called a typewriter company. It clearly evidences the desire of the incorporators to secure authority to produce and deal in the single product—typewriters.

The rule laid down in a former opinion of my predecessor in office that a corporation cannot be organized in Ohio to engage in both a general manufacturing business and a general merchandise business does not, in my opinion, apply to the situation here presented, and I therefore advise you that the purpose clause quoted in your letter is not dual in character.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1896.

SCHOOLS—MINIMUM LIMITATION ON NUMBER OF TEACHERS EMPLOYED IN SUPERVISION DISTRICT—SECTION 4738 G. C. HAS NO APPLICATION TO SEPARATE SUPERVISIONS CONTINUED UNDER SECTION 4740 G. C.—SAME APPLICATION TO SECTIONS AS AMENDED IN 106 OHIO LAWS—COUNTY BOARD OF EDUCATION WITHOUT AUTHORITY TO TRANSFER TERRITORY FROM SEPERATE DISTRICT CONTINUED UNDER SECTION 4740 G. C. THEN OR NOW.

The minimum limitation on the number of teachers employed in a supervision district provided in section 4738 *G. C.,* 104 *O. L.* 140, *had no application to separate supervision districts continued under the provisions of section* 4740 *G. C.,* 104 *O. L.* 141, *and the similar minimum limitation provided in section* 4738 *G. C.,* 106 *O. L.* 396, *has no application to separate districts continued under the provisions of section* 4740 *G. C.,* 106 *O. L.,* 439.

There was no authority in the county board of education to transfer territory from a separate supervision district continued under section 4740 *G. C.,* 104 *O. L.* 141, *and there is now no authority in the county board of education to transfer territory from a separate district continued under the provisions of section* 4740 *G. C.* 106 *O. L.* 439.

COLUMBUS, OHIO, September 5, 1916.

HON. ROBERT C. PATTERSON, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—In your letter under date of August 17, 1916, you submit for an opinion the questions following:

> "1. Is G. C. section 4740 (104 O. L. 141) to be construed with 4738 (104 O. L. 140), so as to limit the minimum of teachers to twenty?
>
> "2. If the minimum number of teachers prescribed by 4738 does not apply to 4740, is the county board of education authorized to reduce the number of teachers in a separate supervision district, that is complying with the provisions of 4740, thereby abolishing such supervision district?"

Section 4738 G. C., 104 O. L. 140, and section 4740 G. C., 104 O. L. 141, to which reference is made in your first inquiry, provided as follows:

> "Sec. 4738. The county board of education shall within thirty days after organizing divide the county school district into supervision districts, each to contain one or more village or rural school districts. The territory of such supervision districts shall be contiguous and compact. In the formation of the supervision districts consideration shall be given to the number of teachers employed, the amount of consolidation and centralization, the condition of the road and general topography. The territory in the different districts shall be as nearly equal as practicable and the number of teachers employed in any one supervision district shall not be less than twenty nor more than sixty.
>
> "The county board of education shall, upon application of three-fourths of the presidents of the village and rural district boards of the county, redistrict the county into supervision districts.
>
> "Sec. 4740. Any village or rural district or union of school districts for supervision purposes which already employs a superintendent and

which officially certifies by the clerk or clerks of the board of education on or before July 20, 1914, that it will employ a superintendent who gives at least one-half of his time in supervision, shall upon application to the county board of education be continued as a separate supervision district so long as the superintendent receives a salary of at least one thousand dollars and continues to give one-half of his time to supervision work. Such districts shall receive such portion of state aid for the payment of the salary of the district superintendent as is based on the ratio of the number of teachers employed to forty, multiplied by the fraction which represents that fraction of the regular school day which the superintendent gives to supervision. The county superintendent shall make no nomination of a district superintendent in such district until a vacancy in such superintendency occurs. After the first vacancy occurs in the superintendency of such a district all appointments shall be made on the nomination of the county superintendent in the manner provided in section 4739. A vacancy shall occur only when such superintendent resigns, dies or fails of re-election.

"Any school district or districts, having less than twenty teachers, isolated from the remainder of the county school district by supervision districts provided for in this section shall be joined for supervision purposes to one or more of such supervision districts, but the superintendent or superintendents already employed in such supervision district or districts shall be in charge of the enlarged supervision district or districts until a vacancy occurs."

An examination of the provisions of the foregoing sections of the statute will readily disclose that section 4738 G. C. conferred upon the county board of education general power to divide the county school district into supervision districts for the purpose of supervision of the schools of such districts by the district superintendents authorized to be appointed under the provisions of section 4739 G. C., 104 O. L. 140. There was thus provided the machinery for the general scheme of supervision of the schools of the county school district in connection with the county superintendent authorized to be appointed under the provisions of section 4744 G. C. 104 O. L. 142.

Section 4738 G. C. supra, standing alone, would place all the schools of the rural and village school districts of the county school districts under the authority of the county board of education to divide the same into supervision districts.

To the foregoing general scheme and authority for supervision of rural and village schools, section 4740 G. C., supra, operates as a plain and unambiguous exception. By force of the provisions of this latter section there was authorized to be continued, entirely separate from and independent of those supervision districts authorized to be created under section 4738 G. C., supra, in so far as supervision was concerned, a wholly distinct class of supervision districts.

If this authorization of two separate and distinct classes of supervision districts be borne in mind, I think it will be clearly observed that the provisions of section 4738 G. C., supra, have application only to that class of supervision districts created under its authority by the county boards of education, and that the limitations of the power to continue supervision districts, under section 4740 G. C., supra, was confined to those prescribed in that section.

I am therefore of opinion, in answer to your first question, that the provision of section 4738 G. C., 104 O. L. 140, relative to the minimum number of teachers employed in any supervision district established by the county board of education,

had no application to separate supervision districts continued under authority of section 4740 G. C. 104 O. L. 141. It appears that the manifest purpose of section 4740 G. C., supra, was to authorize the continuance of supervision districts which did not meet the conditions prescribed in said section 4738.

Sections 4738 and 4740 G. C., supra, were amended in 106 O. L., at pages 396 and 439, respectively. They, however, retained their same general character in that section 4738 continues to be confined in its application and to have reference only to supervision districts established by and under the jurisdiction of the county board of education, while section 4740 operates as an exception thereto, and is applicable to and governs exclusively the continuance of the separate districts therein specifically referred to.

Under the provisions of section 4740 G. C., 104 O. L. 141, supra, the sole conditions to the continuance of a separate supervision district, independent of the authority of the county board of education thereunder, were that the board of education of the village or rural district or union of school districts for supervision purposes already employed a superintendent, that such superintendent received a salary of at least $1,000.00, and that it was certified by the clerk or clerks of the board of education before July 20, 1914, that it would so employ a superintendent who would give at least one-half of his time to supervision work, and it was therein specifically prescribed that so long as the employment of the superintendent continued, as therein provided, such separate supervision district should continue.

It follows that if it were within the power of the county board of education to transfer one part of the territory from such separate supervision district, it would have been equally within its power to have transferred any number of parts thereof in like manner, until the whole of such separate supervision district would have been transferred to another district or districts.

A construction of any other provision of statute that would recognize in the county board of education authority to transfer from such separate supervision district a part of the territory thereof would render nugatory the provisions of section 4740 G. C., supra, for the continuance of such separate supervision district. It was certainly not contemplated that the specific provision for the continuance of a separate supervision district of section 4740 G. C. should be rendered wholly nugatory, and its manifest purpose totally defeated by any action of the county board of education in respect to the territory thereof, pursuant to section 4738 G. C., or 4736 or 4692 G. C., which latter sections confer upon the county board of education authority to transfer territory in certain cases, but which it is not deemed necessary to here quote.

Section 4740 G. C. was amended in 106 O. L. 439, to provide as follows:

> "Any village or rural school district or union of school districts for high school purposes which maintains a first grade high school and which employs a superintendent shall upon application to the county board of education before September 10, 1915, be continued as a separate district under the direct supervision of the county superintendent. Such district shall continue to be under the direct supervision of the county superintendent until the board of education of such district by resolution shall petition to become a part of a supervision district of the county school district. Such superintendents shall perform all the duties prescribed by law for a district superintendent, but shall teach such part of each day as the board of education of the district or districts may direct. Such districts

shall receive no state aid for the payment of the salaries of their superintendents, and the salaries shall be paid by the boards employing such superintendents."

While the above amendment changed substantially the character of separate districts authorized to be continued thereunder, it does not serve to confer upon the county board of education broader power in any way in respect to the supervision thereof than that conferred upon that board as to separate supervision districts prior to the amendment of said section. Section 4738 G. C. was also amended in 106 O. L. 396. It also retained its general character as applicable only to those supervision districts established thereunder by the county board of education.

I am therefore of opinion, in answer to your second question, that there was no authority in the county board of education, under the provisions of section 4738 G. C., 104 O. L. 140, to transfer territory from a separate supervision district continued as such under section 4740 G. C., 104 O. L. 141, and to thereby reduce the number of teachers employed in such separate supervision district, and that there is now no authority in the county board of education to transfer territory from a separate district authorized to continue as such under the provisions of said section 4740 G. C., 106 O. L. 439.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1897.

JUDGE OF COURT OF INSOLVENCY—NO AUTHORITY FOR COUNTY TO PAY COURT COSTS INCURRED BY SUCH JUDGE IN DEFENDING HIMSELF IN SUIT FOR WRIT OF PROHIBITION.

No authority of law for county to pay court costs incurred by insolvency judge in defending himself in a suit for writ of prohibition.

COLUMBUS, OHIO, September 5, 1916.

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

GENTLEMEN:—We are in receipt of your letter of August 26, which is as follows:

"We are sending you herewith letter from Hon. Smith Hickenlooper, assistant prosecuting attorney in Hamilton county, together with bill rendered to the county by Hon. Joseph B. Kelly, judge of the court of insolvency of that county, in which he asks reimbursement for certain costs in defending the jurisdiction of his court, and we would request your written opinion as to whether this bill may be paid.

"We ask that you inclose the bill with your opinion so that it may be returned to the files of Hamilton county."

Inclosed with your letter is a letter to you from Hon. Smith Hickenlooper, assistant prosecuting attorney of Hamilton county, under date of August 24th, to the following effect:

"Hon. Joseph B. Kelly, judge of the court of insolvency of Hamilton county, has filed a claim with the county commissioners in the sum of $112.90, being the expense of securing bill of exceptions, printing record and brief, filing fee in the supreme court and other court costs attendant upon defending a petition for a writ of prohibition, known as cause number 804 in the court of appeals of this county, and number 15223 in the supreme court. The facts are as follows:

"Early in 1916 a petition for a writ of prohibition was filed in the court of appeals in the case of state ex rel. Marie Gelner v. Joseph B. Kelly, judge of the insolvency court. This action raised the question of jurisdiction of the insolvency court to determine divorce proceedings pending in that court at the time the law establishing the court of domestic relations of Hamilton county went into effect. The court of appeals heard the case and decided against the existence of such jurisdiction. Thereupon Judge Kelly brought error proceedings to the supreme court where the judgment was reversed, the petition dismissed and judgment for the costs rendered against the relator. The county prosecutor was treated throughout as one of the counsel for the petitioner, and as such acknowledged the receipt of notice of filing of bill of exceptions, copies of briefs, records, etc., and was served with summons in error. In other words he was treated as in an adversary position. We enclose herewith the original claim which shows the cost of the bill of exceptions, brief and record to be $93.93; filing fee in supreme court, $5.00; and other court costs $13.97; making the total bill $112.90.

"The writer has been unable to find any statutory provision either expressly or impliedly authorizing the payment of such claim from the county treasury. But inasmuch as Judge Kelly had no personal interest whatever in the litigation which involved only the jurisdiction of the court and attacked the judge solely in his judicial capacity, it would seem rather unjust that the judge should personally bear the expense of defending the jurisdiction of his court. The relator against whom judgment for costs was rendered is without property subject to execution for the satisfaction of such judgment.

"We should like to find a way to reimburse Judge Kelly for his actual cash expenditures, but know of no authority for this unless the claim were paid from the prosecuting attorney's expense fund which scarcely seems applicable for expenditures not made by the prosecuting attorney, and arising from a matter in which the prosecuting attorney was treated as in an adversary position. In discussing the matter with Mr. Brotton he suggested that you might be willing to give us your opinion in the matter. If the allowance of the claim would receive the approval of your department, there is no disposition on the commissioners' part to be supertechnical."

In the statement of facts submitted by Mr. Hickenlooper, it appears that the county prosecutor was treated throughout as one of the counsel for the petitioner.

Section 3004 G. C., which provides an annual allowance to the prosecuting attorney in addition to his salary, makes such provision solely "for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice, not otherwise provided for."

The foregoing provision will not cover the payment of the costs out of such fund in the instant matter. I cannot find any other authority of law which would permit of the paying of the bill.

I fully appreciate that the action taken by Judge Kelly was to preserve the jurisdiction of his court in divorce proceedings, and that it was taken by him not on account of private interest, but solely on account of public interest. Nevertheless, not finding any provision of law by which the bill can be paid, I must advise you that in my opinion the said bill cannot be paid.

I am inclosing the bill which you submitted, in order that you may return the same to the files of Hamilton county.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1898.

BRIDGES AND CULVERTS—WHEN CONTRACT FOR BRIDGE IS REQUIRED TO BE LET AT COMPETITIVE BIDDING AND IS SO LET—NO AUTHORITY FOR CHANGING PLANS AFTER CONTRACT IS AWARDED.

Where a contract for a bridge is required to be let at competitive bidding and is so let, there is no authority for changing the plans and specifications after the contract is awarded.

COLUMBUS, OHIO, September 5, 1916.

HON. BENJAMIN A. BICKLEY, *Prosecuting Attorney, Hamilton, Ohio.*

DEAR SIR:—I acknowledge receipt of your inquiry under date of August 29, 1916, which inquiry reads as follows:

"As prosecuting attorney of Butler county, Ohio, I submit herewith for opinion and your advice the following proposition:

"The board of county commissioners of Butler county, Ohio, in March, 1916, determined to erect a bridge across the Miami river in the city of Hamilton, Butler county, Ohio, the cost of which exceeds $100,000. Said board of county commissioners had the county surveyor, who is also the county highway superintendent, prepare full and accurate plans showing all the necessary details of the work and materials required, with working plans suitable for the use of mechanics, so drawn as to be easily understood; accurate bills showing the amount of the different kinds of material necessary to construct said bridge; full and complete specifications of the work to be performed showing the manner and style to be done and a full and accurate estimate of each item of expense and the aggregate cost thereof.

"These plans were submitted to and approved by the state highway commissioner. They were also approved by the board consisting of the three commissioners, the county auditor, and county surveyor.

"The county commissioners then gave public notice of the time when and the place where sealed proposals would be received for performing the labor and furnishing the material necessary for the erection of said bridge, and stating that the contract based on such proposal would be awarded.

"Bids were received at the time and place stated and the contract awarded for the erection of said bridge.

"The plans and specifications of said bridge call for a re-enforced concrete railing and the contract awarded calls for a re-enforced concrete railing. The contractor is now engaged in the construction of said bridge in accordance with said plans and specifications and under his contract.

"Since the work has progressed, and at the present time it is about one-third completed, the county commissioners now believe and are fully convinced that said re-enforced concrete railing should be changed to a stone railing. Said stone railing would cost approximately $5,000 more than the re-enforced concrete railing provided for in the specifications. There is ample money in the fund unappropriated, and the same would be within the estimate made by the engineer to cover this additional cost if the county commissioners have any authority in law to make said change.

"We desire to know whether or not a change can be made in the plans and specifications of this work so as to authorize the county commissioners to change the rail from re-enforced concrete to stone, and if so, what procedure is necessary. Would the state highway commissioner have authority to order said change? Would he have to approve the new plan? If changed would there have to be a re-advertisement for bids and a new contract for that portion of the work? Or would the commissioners have authority to order this change and contract with the present contractor for the same?

"An early opinion upon these questions will be greatly appreciated as the commissioners desire to make this change if they have authority so to do under the law."

The statutory provisions relating to the construction of bridges by county commissioners are for the most part found in chapter I of title (IX) X, part first of the General Code of Ohio, and in the subdivision of said chapter relating to county building and bridges, being sections 2333 to 2361 inclusive. Under these sections competitive bidding is required when the estimated cost exceeds two hundred dollars, the form of advertisement to be made depending upon the amount involved. It is apparent that the change desired by the county commissioners cannot now be made unless the right of the public, created by section 2355 G. C., to have the work let to the person who offers to perform the labor and furnish the materials at the lowest price and gives good and sufficient bond for the faithful performance of the contract, in accordance with the plans and specifications, is preserved. There is and can be no claim that the present situation arises by reason of any casualty or other unforeseen contingency or that an emergency exists. The bridge can be completed according to the original plans and specifications and when so completed will be a useful structure and adapted to the purposes for which it is being built. The most that can be said is that the commissioners, after determining to follow one plan and after having let a contract to be performed in accordance therewith, have concluded that as to one feature of the work another and different plan should have been adopted.

It should first be observed that the contractor is entitled to complete the work according to the original plans and specifications and to receive therefor the agreed price. His rights under his contract cannot be violated by the county and if he were to refuse to accede to any change in plans or to agree to an omission of certain parts of the work in consideration of a reduction in compensation, there would be no necessity for a further discussion of the matter. I am satisfied, however, that even should the contractor agree to a change of plans and to the construction of another and more expensive railing in consideration of an increased compensation, or should he agree to waive his right to construct the railing and

to accept a reduced compensation with the idea that a separate contract might thereafter be let for the construction of the railing, there is no method by which such contract might be so made between the county and the contractor as to preserve the requirement of competitive bidding. It it were determined to at once make a contract with the present contractor, providing for the construction of a railing other than that called for by the specifications, there could of course be no competitive bidding, for the reason that the county would have to deal with the present contractor. If it were agreed between the county and the present contractor to cancel the contract, in so far as it relates to the railing, with the idea of advertising for bids for the construction of a stone railing and awarding the contract for such construction to the lowest bidder, then there would be no method of determining the reduction in compensation to be suffered by the present contractor by reason of his being excused from constructing a railing and preserving in such determination the element of competition. The state highway commissioner has no authority in the premises other than to approve or disapprove plans submitted to him as provided in section 1184 G. C., 106 O. L. 625, and that authority in this particular instance has been exhausted.

In view of the foregoing I advise you that under facts presented by your inquiry there is no statutory authority for a change in the plans and specifications for the bridge in question so as to permit the construction of a stone railing in the place of the concrete railing provided for by the original plans and specifications.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1899.

TAXES AND TAXATION—TAX LEVIES MADE BY TOWNSHIP TRUSTEES FOR ROAD PURPOSES UNDER AUTHORITY OF SECTIONS 1222, 3298-1, 3298-13, AND 3298-20 G. C., 106 O. L. 574 ET SEQ. ARE UPON ALL TAXABLE PROPERTY OF TOWNSHIP INCLUDING THAT WITHIN ANY INCORPORATED VILLAGE OR CITY THEREIN SITUATED—LEVY UNDER SECTION 3298-18 G. C. IS UPON TAXABLE PROPERTY OF SUCH TOWNSHIP OUTSIDE OF ANY INCORPORATED VILLAGE OR CITY SITUATED THEREIN—WHEN SUCH LEVIES ARE ILLEGAL—SEE OPINION NO. 1408, MARCH 22, 1916.

Tax levies made by township trustees for road purposes under authority of sections 1222, 3298-1, 3298-13 *and* 3298-20 *G. C., as said sections are amended by the act of the general assembly known as the Cass law,* 106 *O. L.* 574 *et seq. are upon all the taxable property of the township including that within any incorporated village or city therein situated, but a tax levy by township trustees under authority of and for the purposes mentioned in section* 3298-18 *G. C.,* 106 *O. L.* 647, *is upon the taxable property of such township outside of any incorporated village or city situated therein. See opinion No.* 1408 *of the department, rendered to the Bureau of Inspection and Supervision of Public Offices, March* 22, 1916.

If the trustees of a township, by resolution, levy a tax, which by the terms of said resolution is referable for authority to any of those sections of the statutes above stated, requiring that said levy be made on all of the taxable property of the township including that within any incorporated village or city situated therein, and it appears that by the further provision of said resolution said levy is made to apply only to the taxable property in the township outside of such incorporated village or city, said levy is illegal and may be enjoined as in conflict with section 2 of article XII of the constitution.

If, however, it should appear that the trustees of a township have, by resolution, made a levy for the construction, improvement, maintenance and repair of the roads of such township and no reference is made in said resolution to any one of the foregoing statutes for the authority for such levy and if said resolution provides that such levy shall only apply to the taxable property in the township outside of any incorporated village or city situated therein, said resolution should be construed as having been made under authority of said section 3298-18 *G. C. for the purpose mentioned in said statute.*

COLUMBUS, OHIO, September 5, 1916.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—In your letter of August 30th you request my opinion as follows:

> "The commission respectfully requests your written opinion upon the following questions:
>
> "What levies authorized by the law commonly known as the Cass road law to be made by township trustees are required to be levied against all of the taxable property of the township including incorporated villages and cities located in whole or in part therein; and what ones are required to be levied upon the property of the township exclusive of the property in incorporated villages and cities, wholly or partly therein?

"If the trustees of a township made a levy under one of the sections of the Cass law upon the taxable property of the township exclusive of the taxable property in incorporated villages or cities located wholly or partly therein, when the law under which the levy was made required the same to be levied upon the taxable property of the township including such property located in incorporated villages or cities wholly or partly within the township, would such action invalidate the levy so made?

"In a considerable number of counties in the state the commission is officially informed that levies made under the Cass law are not being levied upon the property of incorporated villages and cities located in the township. It would seem that the purpose of this omission is to avoid exceeding the maximum limit of fifteen mills in such cities and villages; hence the above questions."

Your first question has been answered in opinion No. 1408 of this department rendered to the Bureau of Inspection and Supervision of Public Offices under date of March 22, 1916.

All the sections of the act of the general assembly known as the Cass law, governing tax levies by township trustees for road purposes, as set forth in said opinion, are as follows:

Section 60 of the act (section 3298-1 G. C., 106 O. L. 589):

"The board of trustees of any township may levy and access upon the taxable property of such township a tax not exceeding three mills in any one year upon each dollar of taxable property therein for the purpose of improving, dragging, repairing or maintaining any public road or roads or part thereof. Such levy shall be in addition to the levy of two mills authorized by law for general township purposes, but subject to the limitation upon the combined maximum rate for all taxes now in force."

Section 72 of the act (section 3298-13 G. C., 106 O. L. 592):

"Levies for the payment of principal and interest on bonds issued under the provisions of this act, shall be in addition to the two mills authorized to be levied for general township purposes, but subject to the limitation on the combined maximum rate for all taxes now in force."

Section 215 of the act (section 1222 G. C., 106 O. L. 640):

"* * * For the purpose of providing a fund for the payment of the proportion of the cost and expense to be paid by the township or townships for the construction, improvement, maintenance or repair of highways under the provisions of this chapter, the township trustees are authorized to levy a tax, not exceeding two mills, upon all taxable property of the township in which such road improvement or some part thereof is situated; such levy shall be in addition to all other levies authorized by law for township purposes and shall be outside of the limitation of two mills for general township purposes, but subject, however, to limitation upon the combined maximum rate for all taxes now in force."

Section 239 of the act (section 3298-18 G. C., 106 O. L. 647):

"After the annual estimate for each township has been filed with the trustees of the township by the county highway superintendent, they may

increase or reduce the amount of any of the items contained in said estimate, and at their first meeting after said estimate is filed, they shall make their levies for the purposes set forth in the estimate upon all of the taxable property of the townships, not exceeding in the aggregate two mills in any one year upon each dollar of the valuation of such taxable property in said township, outside of any incorporated village or city. Such levies shall be in addition to all other levies authorized by law for township purposes, but subject, however, to the limitation upon the combined maximum rate for all taxes now in force. The amount levied to cover the estimate made for the construction, improvement, maintenance and repair of highways, shall be known as the township highway fund. The provisions of this section shall not prevent the expenditure of any portion of the regular levy of two mills for township purposes, but the levies herein provided for are in addition thereto. Such levy shall amount to at least twenty dollars for each mile of township road within such township."

Section 257 of the act (section 3298-20 G. C., 106 O. L. 653):

"The trustees of a township may levy a tax in such amount, as they determine, to purchase real property, containing suitable stone or gravel, and the necessary machinery for operating the same, when deemed necessary for the construction, improvement, or repair of the public roads within the township, to be under the control of the trustees or a person appointed by them. The question of levying such tax, for such purpose, and the amount asked therefor shall be submitted to the qualified electors of the township at a general election. Twenty days' notice thereof shall be previously given by posting in at least ten public places in the township. Such notice shall state specifically the amount to be raised. If a majority of all votes cast at such election are in favor of the proposition, the tax therein provided for shall be considered authorized. Such tax may be levied in addition to all other taxes for township purposes, but subject however to the limitation on the combined maximum rate for all taxes now in force."

In opinion No. 1408 of the department, above referred to, it was held that the tax levies provided for in all of the foregoing statutes except the one provided for in section 3298-18 G. C., supra, are to be made on all of the taxable property of the township including that within any municipal corporation or corporations therein situated and that the levy provided for in section 3298-18 G. C. is to be made on all taxable property of the township outside of any incorporated village or city therein situated.

In view of my holding in the aforesaid opinion I advise you in answer to your first question above stated that the foregoing sections of the General Code include all of the provisions of the Cass law governing tax levies by township trustees for road purposes; that all of the tax levies made by township trustees pursuant to the authority vested in them by said statutes with the exception of the levy authorized by the provision of section 3298-18 G. C., supra, are to be made on all of the taxable property of the township including that within any incorporated village or city therein situated and that the levy made under authority of said section 3298-18 G. C. is to be made on all of the taxable property of the township outside of any incorporated village or city therein situated.

In considering your second question it may be observed that, while the power of the legislature to provide that a part or all of a township shall be a taxing district for road purposes will not be questioned, the rule is well settled that in levying a tax for the construction, improvement, maintenance or repair of a road, all property within the taxing district must be taxed by a uniform rule according to its true value in money (see Bowles v. State, 37 O. S. 35). It necessarily follows that if the trustees of a township, by resolution, levy a tax which by the terms of said resolution is referable for authority to any of those sections of the statutes above set forth requiring that said levy be made on all of the taxable property of the township including that within any incorporated village or city situated therein, and it appears that by the further provision of said resolution said levy is made to apply only to the taxable property in the township outside of such incorporated village or city, said levy will be illegal and may be enjoined as in conflict with section 2 of article XII of the constitution upon which the above stated rule is based.

It will be observed, however, that section 3298-18 G. C. supra, as found in chapter 10 of the Cass road law, relating to general provisions, is general in its application and authorizes the trustees of a township to make an annual levy of not to exceed two mills in any one year upon each dollar of taxable property in the township outside of any incorporated village or city situated therein, in addition to the regular levy of two mills for township purposes; that said levy is made for the purpose of covering the estimate of the county highway superintendent filed with said township trustees, setting forth the needs of the township for such year for the construction, improvement, maintenance and repair of highways in said township, and is designated by said statute as "the township highway fund." Said section further provides that such levy shall amount to at least twenty dollars for each mile of township road within such township and I held in opinion No. 1408 of the department, hereinbefore referred to, that this latter provision of said statute is mandatory.

If, therefore, it should appear that the trustees of a township have, by resolution, made a levy for the construction, improvement, maintenance and repair of the roads of such township and no reference is made in said resolution to any one of the foregoing statutes for the authority for such levy, I am of the opinion that if said resolution provides that such levy shall only apply to the taxable property in the township outside of any incorporated village or city situated therein, said resolution should be construed as having been made under authority of said section 3298 G. C. for the purposes mentioned in said statute.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1900.

CORPORATION—PURPOSE CLAUSE DISAPPROVED—MORE THAN ONE MAIN PURPOSE—THE SECURITY REALTY INVESTMENT COMPANY.

Proposed amended purpose clause of The Security Realty Investment Company disapproved because it sets forth more than one main purpose.

COLUMBUS, OHIO, September 6, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of August 31, 1916, in which you request my opinion as follows:

> "We are herewith submitting certificate of amendment to the articles of incorporation of The Security Realty Investment Company, a check of $5.00, and a ten cent internal revenue stamp, and kindly request an early opinion on the question as to whether or not the proposed amendment has a duality of purpose."

The purpose clause which the The Security Realty Investment Company seeks to secure by its certificate of amendment is as follows:

> "For the purpose of buying, selling, leasing mortgaging and in general dealing in real estate in the state of Ohio and elsewhere throughout the United States and of lending money and securing same by real estate mortgage or personal security, subject, however, to the provisions of sections 8648 and 8649 of the General Code of Ohio, formerly section 3235 of the Revised Statutes of Ohio, said corporation to exist in accordance with such sections for the term of twenty-five (25) years from the date of its original incorporation."

The present purpose clause of the corporation, which it seeks by amendment to change, as set forth at page 124 of the record of corporations, No. 137, found in your office, is as follows:

> "Said corporation is formed for the purpose of dealing in real estate subject to the provisions of section 3235 of the revised statutes of Ohio and is to be created for the term of twenty-five years."

The amended purpose clause enumerates more in detail the powers of the corporation in connection with the real estate transactions, and adds the further power of "lending money and securing the same by real estate mortgage or personal security".

The corporation under its original purpose clause and also under its amended purpose clause, even though the last quoted language were omitted, would doubtless possess the incidental power in connection with its real estate transactions to loan money and take proper security for the same. In the amended purpose clause, however, the power to lend money and secure the same by real estate mortgage or personal security is not set forth as an incidental power, but as one of the main purposes of the corporation. If this is permissible, then the corporation would be authorized not only to engage in real estate transactions, but would possess the essential powers of collateral loan companies organized under sections 9857 et seq. of the General Code.

In the case of State ex rel. vs. Taylor, 55 O. S. 61, the supreme court of Ohio has held that an Ohio corporation organized under section 8623 of the General Code can have only one main purpose. I am, therefore, of the opinion that The Security Realty Investment Company, which is a corporation organized for the purpose of dealing in real estate, cannot secure the additional general authority by amendment of its articles of incorporation to loan money and secure the same by real estate or personal security, and I therefore advise you that you should not accept the proposed amendment in the form presented.

I herewith return the certificate of amendment to the articles of incorporation of The Security Realty Investment Company, the check for $5.00, and the ten cent internal revenue stamp, enclosed in your communication.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1901.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY MIDWAY VILLAGE SCHOOL DISTRICT, MADISON COUNTY, OHIO.

COLUMBUS, OHIO, September 6, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Midway Village School District of Madison County, Ohio, in the amount of $10,000, for the purpose of completing, enlarging, repairing and furnishing the school house in said district, being twenty bonds of five hundred dollars each."

I have examined the transcript of the proceedings of the board of education and other officers of Midway village school district relative to the above bond issue; also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of said school district.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1902.

CORPORATION—CANCELLATION OF CHARTERS BY TAX COMMISSION OF CERTAIN CORPORATIONS—HOW REINSTATED—WESTERN STAR PUBLISHING COMPANY—THE DAYTON CASTINGS COMPANY.

Upon certificate to the Secretary of State by the Tax Commission, under section 5517 G. C., the Secretary of State should correct his records in accordance therewith.

COLUMBUS, OHIO, September 6, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Under date of September 1st you submitted to me the following:

"We are herewith submitting copy of the order of the tax commission of Ohio relative to the reinstatements of the Western Star Publishing Company and The Dayton Castings Company, and would like an early opinion on the question as to whether or not the secretary of state has the authority to file the same, and also strike from the records the entry cancelling the corporate authority of the above stated corporations without a certificate from the tax commission, certifying that all taxes, fees and penalties have been paid, together with a fee of $100 as provided for under section 5511 of the General Code."

The orders for reinstatement referred to are as follows:

"It appearing that The Western Star Publishing Company, a domestic corporation, was certified to the secretary of state by this commission on April 11, 1916 with the instruction to cancel its articles of incorporation for the reason that the said company failed to comply with the law in the matter of filing annual reports as a domestic corporation and paying fees thereon, as provided for in section 5509 G. C.; and it further appearing that said company was misinformed by the treasurer of state as to the matter of filing its reports and that the action of this commission in certifying the company for cancellation was erroneous; it is therefore ordered that the entry made by the secretary of state cancelling the articles of incorporation of said company be stricken from the margin of the corporation records and from the list of companies certified for cancellation and that this commission correct its permanent records accordingly.

"The vote upon this motion resulted: Mr. Boyle, aye; Mr. McGiffert, aye; Mr. Peckinpaugh, aye.

"It appearing that The Dayton Castings Company, a domestic corporation, was certified to the secretary of state by this commission on April 11, 1916 with the instruction to cancel its articles of incorporation for the reason that the said company failed to comply with the law in the matter of filing annual reports as a domestic corporation and paying fees, as provided for in section 5509 G. C.; and it further appearing that said company failed to receive blanks or notice of delinquency and believing that all reports were filed to date and the fees due thereon paid, and that the action of this commission in certifying the company for cancellation was erroneous; it is therefore ordered that the entry made by the secretary of state cancelling the articles of incorporation of said company be stricken from the margin of the corporation records and from the list of companies certified for cancellation, and that this commission correct its permanent records accordingly.

"The vote upon this motion resulted: Mr. Boyle, aye; Mr. McGiffert, aye."

The action of the commission in cancelling the articles of incorporation was under the provisions of section 5509 G. C. Said section provides as follows:

"If a corporation, wherever organized, required by the provisions of this act, to file any report or returns or to pay any tax or fee, either as a public utility or as a corporation, organized under the laws of this state, for profit or as a foreign corporation for profit doing business in this state and owning or using a part or all of its capital or plant in this state, or as a sleeping car, freight line or equipment company, fails or neglects to make any such report or return or to pay any such tax or fee for ninety

days after the time prescribed in this act for making such report or return or for paying such tax or fee, the commission shall certify such fact to the secretary of state. The secretary of state shall thereupon cancel the articles of incorporation of any such corporation which is organized under the laws of this state, by appropriate entry upon the margin of the record thereof, or cancel the certificate of authority of any such foreign corporation to do business in this state by proper entry. Thereupon all the powers, privileges and franchises conferred upon such corporations, by such articles of incorporation or by such certificate of authority, shall cease and determine. The secretary of state shall immediately notify such domestic or foreign corporation of the action taken by him."

Section 5517 of the General Code provides in part as follows:

"Any bank, public utility or corporation may be heard by the commission upon the question as to the correctness of any determination, finding or order of the commission after the same has been made. Application to the commission for a review of any determination, finding or order by it made, must be filed within sixty days after the passage of this act, or within sixty days from the date of the certification thereof by the commission to the proper officer. The commission, upon such application, may make such correction in its determination, finding or order, as it may deem proper, and its decision in the matter shall be final. Such correction shall be certified to the proper official, who shall correct his records and duplicates in accordance therewith. * * *"

Both the certificate of cancellation of The Western Star Publishing Company and that of The Dayton Castings Company contain the finding by the commission that the action thereof in certifying the company for cancellation was erroneous.

Since section 5517 G. C. provides that the decision of the commission in any matter shall be final, and that upon certification of correction the officer shall correct his records, there does not seem to be any doubt about the power of the commission in making the certification referred to. The commission having made the certification I assume that the application for the review of the action of the commission in originally certifying the above companies for cancellation was filed within the time prescribed in section 5517 G. C.

Specifically answering the question submitted I am of the opinion that upon the certificate of the tax commission under section 5517 G. C. you should correct your records in accordance with said section, the provisions of section 5511 G. C. not applying in such case.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1903.

ROADS AND HIGHWAYS—TOWNSHIP HIGHWAY SUPERINTENDENT IS PUBLIC OFFICER—PERSON NOT POSSESSED OF QUALIFICATIONS OF ELECTOR MAY NOT BE APPOINTED TO SUCH OFFICE.

A township highway superintendent is a public officer, and a person not possessed of the qualifications of an elector may not, therefore, be appointed to such office.

COLUMBUS, OHIO, September 6, 1916.

HON. JOHN M. MARKLEY, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:—I have your communication of August 29, 1916, which communication reads as follows:

> "In October of 1915 one, Thomas Barker, moved to Eagle township, Brown county, Ohio, from the state of Kentucky, and purchased a farm in said Eagle township with the intention of making the same his permanent residence. In June of 1916 the trustees of Eagle township appointed the said Thomas Barker as township highway superintendent of one of the three road districts in said township. As Mr. Barker had not resided in this state a sufficient length of time to acquire the qualifications of an elector, the question has been raised that he cannot serve as such township highway superintendent. The matter has just been called to my attention, and I find that he has served since his appointment but has never drawn any pay.
>
> "Although there seems to be no statutory qualification for one to serve as township highway superintendent, yet if it should be held to be a public office Mr. Barker would be prohibited from serving by article XV, section 4 of the Constitution of the state of Ohio.
>
> "Kindly advise me as soon as possible whether or not Mr. Barker can hold the position of township highway superintendent of Eagle township, Brown county, Ohio, and if your opinion thereon should be in the negative also kindly advise me if the trustees would be authorized to pay him for the services he has already performed."

Section 4 of article XV of the Constitution of Ohio, referred to by you, reads in part as follows:

> "No person shall be elected or appointed to any office in this state unless possessed of the qualification of an elector. * * *"

As suggested by you, the answer to your inquiry depends upon the question of whether a township highway superintendent is an officer or whether he is merely an employe. If a township highway superintendent is to be regarded as an officer, then the person referred to by you is ineligible in view of the constitutional provision that no person shall be elected or appointed to any office unless he possess the qualifications of an elector, which qualifications, under the provisions of section 1 of article V of the Constitution, include residence within the state for one year.

Mechem, in his work on public offices and officers, section 1, defines a public office as follows:

> "A public office is the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the

"pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer."

In distinguishing between an officer and an employe, the fact that the powers in question are created, defined and conferred by law is important. While the township highway superintendent is by section 3374 G. C. made amendable to the rules and regulations of the township trustees, or the county highway superintendent, so far as the rules and regulations of such county superintendent do not conflict with those of the township trustees, yet many of his powers and duties are created by law. Under section 3370 G. C. he is given control of the township roads of his district under the direction of the township trustees, and the duty is enjoined upon him of keeping such roads in good repair. Under section 3374 G. C. the township highway superintendent is required to make reports to the county highway superintendent.

Under chapter V of the Cass highway law many of the duties relating to the dragging of unimproved roads are enjoined upon the township highway superintendent. He is required to divide the graveled and unimproved public roads of his district into road dragging districts and to designate each district by number and file a description thereof with the township clerk. He is authorized and required to designate what districts shall be dragged and to adopt a suitable form of notice to be given each person contracted with to drag roads. It is his duty to report all claims for dragging, to keep the dragging records of his district and to attend demonstrations arranged by the county highway superintendent for the purpose of exhibiting the best method of dragging the public highways. He is authorized and required to enter into contracts on behalf of the township and is further authorized to cancel such contracts when the stipulations therein contained have not been properly complied with or when the work is not done in a suitable manner. The fact that the duties of township highway superintendents are so fully defined by the statutes argues for the conclusion that such superintendents are to be regarded as public officers. It is true that their authority is confined within their limits, but that fact has been generally held to be immaterial where the authority is actually conferred and defined by statute. Under section 3371 G. C., township highway superintendents are required to give bond to the state of Ohio for the use of the township in which they are appointed, conditioned upon the faithful performance of their duty, and section 3372 G. C. refers to the position as an office, the section in question reading as follows:

"Whenever a vacancy occurs in the *office* of the township highway superintendent by reason of death, resignation, removal or other cause, the trustees shall, within thirty days, fill such vacancy."

In view of the foregoing it is my opinion that a township highway superintendent is to be regarded as a public officer, and it therefore follows that the person referred to by you not having the qualifications of an elector, for the reason that he has not been a resident of the state for one year, is ineligible to serve as township highway superintendent. His ineligibility having existed throughout the entire period during which he has assumed to act as township highway superintendent, it follows that the trustees of the township would not be authorized to pay him for the services which he has performed.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1904.

CORRUPT PRACTICE ACT—CONSTRUCTION OF SECTION 5175-29 G. C. PERMITTING EXPENDITURE OF ADDITIONAL SUM OF $5.00 FOR EACH ONE HUNDRED VOTES IN EXCESS OF FIVE THOUSAND CAST FOR GOVERNOR AT LAST STATE ELECTION—APPLICABLE TO CANDIDATES FOR PUBLIC OFFICES IN COUNTIES, CITIES AND VILLAGES NOT ENUMERATED.

The provision of the second sentence of section 5175-29 *G. C.,* 103 *O. L.* 580, *permitting the expenditure of an additional sum of five dollars for each one hundred votes in excess of five thousand cast for governor at the last preceding state election, by candidates for office, is applicable only to candidates for other public offices than those specifically enumerated in the earlier part of said section, to be voted for by the qualified electors of a county, city or village, or a part thereof as referred to in the latter part of the first sentence of said section.*

COLUMBUS, OHIO, September 6, 1916.

HON. E. D. FRITCH, *Judge of the Common Pleas Court, Akron, Ohio.*

DEAR SIR:—Yours under date of August 31, 1916, is as follows:

"Under the provisions of R. S. O. section 5175-29, is a candidate for the office of judge of the court of common pleas or probate judge limited to five hundred dollars for campaign expenditures, or may he expend five hundred dollars plus five dollars for each hundred votes in his county in excess of five thousand votes.

"Opinion here is conflicting on the subject. A member of the general assembly, which passed the corrupt practices act, told me that the legislative intent was that the five dollars per hundred votes for all votes in excess of 5,000 votes applied only to candidates 'for any other public office' who are limited to three hundred dollars, and that the five dollars per hundred cannot be added by the candidates who are named and expressly limited in that part of the section preceding the phrase 'by a candidate for any other public office, etc.' In other words, that a candidate for probate or common pleas judge is not permitted to spend more than five hundred dollars for both primary and general election.

"It occurred to me that your office had probably ruled on the subject or might know of some decision settling the matter. This is a matter of considerable interest and importance to all who are candidates for any of the offices named in the act and section referred to from the beginning of the section to and including candidates for state representative.

"Please reply as soon as convenient."

Section 5175-20 G. C., 103 O. L. 580, to which you refer in your inquiry, provides as follows:

"The total amount expended by a candidate for a public office, voted for at an election, by the qualified electors of the state, or any political subdivision thereof, for any of the purposes specified in section 26 of this act, for contributions to political committees, as that term is defined in section 1 of this act, or for any purpose tending in any way, directly or indirectly, to promote or aid in securing his nomination and election, shall not exceed the amount specified herein; by a candidate for governor, the

sum of five thousand dollars; by a candidate for other state elective office the sum of two thousand five hundred dollars; by a candidate for the office of representative in congress or presidential elector, judge of the court of appeals, the sum of two thousand dollars; by a candidate for the office of state senator, the sum of three hundred dollars in each county of his district; by a candidate for judge of common pleas, probate or insolvency court, the sum of five hundred dollars; by a candidate for the office of state representative the sum of three hundred and fifty dollars; by a candidate for any other public office to be voted for by the qualified electors of a county, city, town or village, or any part thereof, if the total number of votes cast therein for all candidates for the office of governor at the last preceding state election shall be five thousand or less, the sum of three hundred dollars. If the total number of votes cast therein at such last preceding state election be in excess of five thousand, the sum of five dollars for each one hundred in excess of such number may be added to the amounts above specified. Any candidate for a public office who shall expend for the purpose above mentioned an amount in excess of the amounts herein specified shall be guilty of a corrupt practice."

The second sentence of the above quoted section is not entirely free from ambiguity. I am inclined to the view, however, that when the same is taken in connection with the latter part of the preceding sentence, the meaning of the second sentence is rendered reasonably clear. It will be first observed that there is no reference found in the preceding provisions of said section relative to the number of votes cast in the state or subdivision in which the candidate seeks election to office except in that applicable to "any other public office," which is as follows:

"by candidate for any other public office to be voted for by the qualified electors of a county, city, town or village, or any part thereof, if the total number of votes cast therein for all candidates for the office of governor at the last preceding state election, shall be five thousand or less, the sum of three hundred dollars."

It is clear that this provision with reference to the total number of votes cast has application only to the "candidates for any other public office" in that part of the first sentence of the above section, in which it is found. It further appears that the phrase "total number of votes cast therein" in the second sentence has the same meaning as that phrase when used in that part of the first sentence last above quoted. That is to say, the term therein as used in both the latter part of the first sentence and in the second sentence of said section 5175-29, supra, has reference to the county, city or village referred to in said latter part of the first sentence.

I am therefore of opinion, in answer to your inquiry, that the additional $5.00 for each one hundred in excess of five thousand votes cast therein provided in the second sentence of section 5175-29 G. C., supra, has reference only to candidates for any other public office than those specifically enumerated in the earlier portions of said section. I am strengthened somewhat in this conclusion by reason of the necessary result of the application of a different construction. For instance, it will be noted that it is provided that a candidate for any other state elective office than that of governor may not expend in excess of twenty-five hundred dollars in the first instance. If the provision for an additional amount of five dollars for each one hundred in excess of five thousand total votes in the state may be applicable to such other state officer, it would result that such increase in

the amounts authorized to be expended would be many times the initial amount so authorized. That is to say, a candidate for any state office, other than that of governor, would be thereby authorized to expend in excess of the twenty-five hundred dollars specifically provided in the earlier part of said section, under the provision of the second sentence thereof, as based upon the total vote for governor in the state at the last preceding state election, an amount equal to many times the initial amount of twenty-five hundred dollars.

It is hardly believed that it was the legislative intent that by reason of the application of the provision for the expenditure of five dollars for each one hundred votes cast in excess of five thousand, in addition to the original amount provided for candidates for state offices, they should be authorized thereby to expend an amount equal to many times the original amount of twenty-five hundred dollars.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1905.

APPROVAL, LEASES TO BOARD OF AGRICULTURE OF OHIO FOR FISH HATCHERIES.

COLUMBUS, OHIO, September 7, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication of August 23, 1916, transmitting to me for examination two leases to the board of agriculture of Ohio for fish hatchery purposes, one lease covering the old canal bed just north of its intersection with Buckeye Lake, and the other the borrow pits in the rear of the easterly embankment and north of the feeder lock at Lake St. Marys.

I find these leases to be in regular form and am, therefore, returning the same with my approval endorsed upon the triplicate copies thereof.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1906.

APPROVAL, RESOLUTION FOR IMPROVEMENT OF CANTON-CANAL DOVER ROAD.

COLUMBUS, OHIO, September 7, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of September 6, 1916, transmitting to me for examination final resolution relating to the improvement of section "A" of the Canton-Canal Dover road, Pet. No. 2942, I. C. H. No. 70.

I find this resolution to be in regular form and am therefore returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1907.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY AUGLAIZE COUNTY, OHIO.

COLUMBUS, OHIO, September 7, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Auglaize County, Ohio, in the amount of $21,000 for Bowsher road improvement, being twenty-one bonds of $1000 each."

I have examined the transcript of the proceedings of the county commissioners and other officers of Auglaize county relative to the above bond issue; also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form presented and signed by the proper officers will, upon delivery, constitute valid and binding obligations of Auglaize county.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1908.

APPROVAL, CONTRACT ENTERED INTO BETWEEN BOARD OF TRUSTEES OF OHIO UNIVERSITY AND THE CULLEN AND VAUGHN COMPANY, HAMILTON, OHIO, FOR CONSTRUCTION OF ANNEX TO WOMEN'S DORMITORY.

COLUMBUS, OHIO, September 8, 1916.

HON. I. M. FOSTER, *Secretary Board of Trustees of Ohio University, Athens, Ohio.*

DEAR SIR:—Your architect, Honorable Frank L. Packard, has submitted to this department the contract entered into between the board of trustees of Ohio University and The Cullen and Vaughn Company of Hamilton, Ohio, for the contruction and completion of an annex to the women's dormitory at Ohio University.

From the papers submitted it appears that at a meeting of the board of trustees of said university the president, or in his absence the vice president, together with O'Bleness and Biddle, as constituting the building committee of the board of trustees, were authorized to advertise for sealed proposals for the said annex and to receive and open same on August 3rd and award the contract therefor to the lowest bidder, the said building committtee to do and perform such acts as and for said board of trustees, and further, the president and secretary of said board were authorized to sign the contract.

It also appears that on August 3, 1916(President Ellis being absent, Vice President Jones acted as chairman of the committee; he, together with Mr. O'Bleness being present and Mr. Biddle being absent; that in accordance with said authority vested in said committee of three, and two of said committee being present, the bids were duly opened and read, and after consideration thereof the

contract was awarded to The Cullen and Vaughn Company, its bid of $9,180 being the lowest bid received. The said bid of $9,180 is below the architect's estimate of $9,185.40. The contract is duly signed not only by The Cullen and Vaughn Company, through its vice president and secretary, but also by the president and secretary of the board of trustees of Ohio University.

I find both the contract and bond securing the execution of the same to be in compliance with law and have this day filed the original of said contract and the bond in the office of the auditor of state and have returned to your architect the balance of the papers submitted.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1909.

APPROVAL, GAS AND OIL LEASE TO T. H. LOVE, LEESBURG, OHIO.

COLUMBUS, OHIO, September 9, 1916.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—On September 5, 1916, you transmitted for my approval a gas and oil lease executed to one T. H. Love of Leesburg, Ohio, said lease covering a tract of land in Carroll county, being the northeast quarter of section 16, township 4, range 6, in the civil township of Union, said lease calling for a one-eighth royalty on oil and a royalty of two hundred ($200.00) dollars on a gas producing well, and requiring the drilling of at least one well within six months from the date of the approval of the lease by the governor and attorney-general.

I have carefully examined the lease and find that the same is in all respects in accordance with law and duly executed. I, therefore, herewith return the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1910.

ROADS AND HIGHWAYS—TAX LEVY IN 1915 ON GRAND DUPLICATE OF COUNTY—PROCEEDS AVAILABLE FOR EXPENDITURE AFTER TAKING EFFECT OF CASS HIGHWAY LAW FOR PAYING COUNTY'S SHARE OF IMPROVING OR REPAIRING ROADS UNDER CHAPTER VI OF SAID LAW—BONDS—SUFFICIENT IF LEVY MADE TO COVER ANY DEFICIENCY WHEN BONDS ISSUED SOLELY IN ANTICIPATION OF COLLECTION OF SPECIAL ASSESSMENTS—NEED NOT LEVY FOR ENTIRE AMOUNT OF BOND ISSUE, ONLY DEFICIENCY.

Where, in the year 1915 *a tax levy was made upon the grand duplicate of the county for the purpose of paying the county's share of road improvements, or repairs carried forward by the county commissioners under any one of the several statutes under which the same might have been made, such levy being general in character and designed to produce funds for the payment of the county's share of the cost and expense of improving and repairing roads generally, the proceeds of such levy coming into the county treasury and being available for appropriation and expenditure after the taking effect of the Cass highway law, are available for the purpose of paying the county's share of the cost and expense of improving or repairing roads under chapter VI of the Cass law, and this without reference to the particular plan provided by section* 6919 *G. C. and selected in any given instance, provided, of course, such plan involves a payment by the county of a portion of the cost and expense.*

Where, under authority of section 6929 *G. C., bonds are issued solely in anticipation of the collection of special assessments, it is not necessary that a tax be levied at the time of the issuance of the bonds sufficient to pay the entire amount of the bonds in question. The statute will be fully complied with if, in the legislation providing for the issue of bonds, provision is made for levying and collecting annually on the grand duplicate of the county a tax sufficient to cover any deficiency in the payment or collection of the special assessments in anticipation of the collection of which the bonds are issued.*

COLUMBUS, OHIO, September 9, 1916.

HON. DEAN E. STANLEY, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication under date of August 25, 1916, in which communication you inquire as follows:

> "May county commissioners use part of the general road fund levied in 1915 to pay the county's share of the expense of improving roads under 214 et seq. of the Cass law (plan four being used as the method of payment).
>
> "When roads are being improved under the above act, and the county has sufficient funds to pay its share of the costs of said improvement in cash, but when bonds must be issued in anticipation of assessments against property benefited, does section 6929 of the General Code require a tax to be levied at the time of the issuance of the bonds sufficient in amount to pay the entire amount of bonds at maturity, together with interest thereon, or is it sufficient that a levy be made to meet deficiencies in assessments under 5630-1 G. C."

In response to my request for additional information you advised me, under date of September 1, 1916, that in the first question submitted by you you intended to refer to chapter VI of the Cass highway law, relating to road construction and improvement by county commissioners, instead of section 214 et seq. of that act.

The Cass highway law was passed May 17, 1915, approved June 2, 1915, and

under the terms of section 304 thereof went into effect on the first Monday in September, 1915. It will thus be seen that all tax levies for road purposes made in the year 1915 were made under the pre-existing statutes, but that no part of the taxes so levied came into the county treasury and was available for appropriation and expenditure until long after the Cass law had taken effect. The saving provisions of section 303 of the act, while they may properly be characterized as broad and comprehensive, are not, in my opinion, sufficient to preserve the pre-existing statutes and authorize proceedings thereunder merely because prior to the taking effect of the Cass highway law, tax levies for improving or repairing roads generally had been made under such pre-existing statutes. The effect of such a conclusion would be to unduly prolong a dual system of road improvement, and if such a conclusion were to be reached the old statutes would be continued in force during the fiscal year ending on the last day of February, 1917, for the reason that the proceeds of the first half of the 1915 tax collection would not be available for appropriation until March 1, 1916, and the proceeds of the second half of such tax collection would not be available until the first day of September, 1916.

Considering together all of the saving provisions of the Cass highway law, the more reasonable conclusion is that where taxes had been levied under pre-existing statutes authorizing general levies upon the grand duplicate of the county for road purposes, it was the intention of the legislature to preserve the right to collect such taxes but to require their expenditure for the same general purposes under the new scheme of road laws. It is therefore my opinion that where in the year 1915 a tax levy was made upon the grand duplicate of the county for the purpose of paying the county's share of road improvements or repairs carried forward by the county commissioners, under any one of the several statutes under which the same might have been made, such levy being general in character and designed to produce funds for the payment of the county's share of the cost and expense of improving or repairing roads generally, the proceeds of such levy coming into the county treasury and being available for appropriation and expenditure after the taking effect of the Cass highway law, are available for the purpose of paying the county's share of the cost and expense of improving roads under chapter VI of the Cass highway law, and this without reference to the particular plan provided by section 6919 G. C., and selected in any given instance, provided, of course, such plan involves a payment by the county of a portion of the cost and expense.

The second question submitted by you is evidently suggested by the following language found in section 6929 G. C.:

> "Prior to the issuance of such bonds, the county commissioners shall provide for levying and collecting annually a tax upon all the taxable property of the county to provide a sum sufficient to pay the interest on such bonds and to create a sinking fund for their retirement at maturity."

The force and effect of this language was considered at length by this department in opinion No. 1203, rendered to Hon. C. P. Kennedy, prosecuting attorney of Summit county, on January 5, 1916. The following is quoted from the opinion in question:

> "It is apparent that the legislature, in using the above quoted language, did not intend that where, under section 6929 G. C., bonds were issued in anticipation of tax on a county, a tax on a township and special assessments against benefited real estate, then the entire interest and redemption fund for such bonds should be provided by a levy on the county duplicate. Where bonds are issued in anticipation of a tax on a county, then the tax levied for the payment of such bonds is to be levied on the county, and where bonds are issued in anticipation of a tax on a township then the tax levied for the

payment of such bonds is to be levied on the township. Where bonds are issued in anticipation of special assessments, the interest and redemption fund is to be created by the special assessments in question. It is manifest that the legislature in using the above quoted language had in mind a tax similar to that provided for by section 5630-1 G. C., 106 O. L. 495, which section reads as follows:

" 'Bonds issued by county commissioners in the manner provided by law, in anticipation of the collection of special assessments levied against the property abutting upon a proposed improvement, or to be benefited thereby, or in anticipation of the collection of taxes upon the taxable property of any township or townships of the said county within which such improvement is to be made, shall be full, general obligations of such county for the payment of the principal and interest, of which, when due, the full faith, credit and revenue of such county shall be pledged. The county commissioners shall, prior to the issuance of the bonds above mentioned, provide for the levying of a tax upon all the taxable property of the county to cover any deficiency in the payment or collection of such special assessments or township tax.'

"It would not have been within the power of the legislature to provide that bonds should be issued in anticipation of a county tax, a township tax, and special assessments, and then further provide that the township tax and special assessments should not be levied, but that the entire interest and redemption fund should be provided by a levy on the taxable property of the county.

"Wasson v. Commissioners, 49 O. S. 622;

"Hubbard v. Fitzsimmons, 57 O. S. 436;

"State ex rel. Breenan v. Benham, 89 O. S. 351;

"Cooley on Taxation, p. 227;

"27 Am. and Eng. Encyc. of Law, 2d. Ed., 595; 37 Cyc., 723.

"It is elementary that there is a presumption in favor of the constitutionality of a statute, and that when a statute is susceptible of two constructions, one of which supports the act and gives it effect, and the other renders it unconstitutional and void, the former is to be adopted. The whole statute and all its parts are also to be taken together, and any particular provision must, if possible, receive a construction consistent with the rest of the act.

"In view of the above considerations, it would be impossible to reach a conclusion different from that herein announced, even if it be conceded that the language now under discussion is of doubtful import. It is my opinion that the legislature, by the use of the language in question, intended to provide that as between a county and the holder of bonds issued under section 6929 G. C., such bonds should be the full and general obligation of the county, that the credit and revenues of the county should be liable for the payment of such bonds, and that prior to the issuance of such bonds the commissioners should provide for levying and collecting annually a tax upon all the taxable property of the county sufficient to cover any deficiency in the township tax or assessments, to the end that there might be provided under all circumstances and conditions a sum sufficient to pay the interest on such bonds and to create a sinking fund for their retirement at maturity."

You do not in your question refer to the payment by an interested township or townships of any portion of the cost and expense of road improvement, and I assume that in the particular instance which you have in mind the cost and expense is being divided between the property owners and the county.

In accordance with the holding in the opinion rendered to Mr. Kennedy, I advise

you that where, under authority of section 6929 G. C., bonds are issued solely in anticipation of the collection of special assessments, it is not necessary that a tax be levied at the time of the issuance of the bonds sufficient to pay the entire amount of the bonds in question. The statute will be fully complied with if in the legislation providing for the issue of bonds provision is made for levying and collecting annually, on the grand duplicate of the county, a tax sufficient to cover any deficiency in the payment or collection of the special assessments in anticipation of the collection of which the bonds are issued.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1911.

CASE OF COMMISSIONERS V. SWANSON, COURT OF APPEALS, TUSCARAWAS COUNTY—PROSECUTOR SHOULD ENDEAVOR TO HAVE SAME REVIEWED BY SUPREME COURT.

Under the facts as submitted an effort should be made to secure a review by the supreme court of the case of Commissioners v. Swanson, being case No. 53, in the court of appeals, Tuscarawas county, Ohio.

COLUMBUS, OHIO, September 9, 1916.

HON. E. E. LINDSAY, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—I acknowledge receipt of your request for an opinion under date of September 7, 1916, which request reads as follows:

> "I am herewith submitting to you the bill of exceptions, record, briefs, and other papers in the case of The Board of County Commissioners of Tuscarawas County, et al. v. S. A. Swanson, et al., being case No. 53 in the court of appeals of Tuscarawas county.
>
> "This case involves the construction of a number of the statutes relating to county bridges and if the judgment of the court of common pleas and the court of appeals stands, Tuscarawas county will be compelled to pay a judgment of about $11,000.00 without having received anything in return therefor.
>
> "I desire to direct your special attention to the questions of the change in location of the proposed bridge and the failure to publish and circulate a newspaper notice of the commissioners' intention to erect the proposed bridge and the location thereof. It is my judgment that in view of the prior decisions of the courts of Ohio upon similar questions the county authorities should not, at the present time, submit to the judgment of the court of appeals and pay the judgment rendered against the county, and I believe that the case should be carried to the supreme court.
>
> "In view of the importance of the questions involved I deem it proper to submit to you the papers in the case and request your opinion as to the advisability of carrying the case to the supreme court."

The plaintiffs in their petition aver that for many years prior to the month of March, 1909, there was a bridge across the Tuscarawas River in Warwick township, Tuscarawas county, belonging to and maintained by the county, which bridge had become and was dangerous to public travel by reason of wear, decay and other causes,

and which bridge, after being examined by the surveyor and the commissioners and found to be dangerous to public travel by reason of said causes, was condemned for public travel by the board of county commissioners. It is further averred that the bridge in question was an important one which had theretofore been used by a large number of people who had occasion to cross the Tuscarawas river at or near to the point where the bridge stood. The plaintiffs say that upon the condemnation of the bridge the commissioners directed the surveyor, on or about March 29, 1909, to prepare plans and specifications for the construction of a new bridge to be built of concrete at or not far from the point where the old bridge stood and that the surveyor prepared such plans in the manner provided by law and filed the same with the county commissioners on or about June 19, 1909, whereupon the county commissioners examined and approved the plans and authorized the county auditor to advertise for bids. It is averred that the county auditor advertised in due form that bids would be received on July 19, 1909, at which time a number of bids were submitted, the bid of the plaintiffs being $31,196.77, and being the lowest and best bid. Plaintiffs further aver that on or about July 30, 1909, the commissioners awarded the contract to the plaintiffs and thereafter sold the bonds of the county, and again on or about August 11, 1909, awarded the contract to the plaintiffs and ordered that a contract in writing should be entered into between the plaintiffs and the county. Plaintiffs aver that at the time the contract was entered into and went into effect the required funds were in the county treasury to the credit of the proper fund, which fact was properly certified, and that the prosecuting attorney also approved in writing the form and correctness of the contract; that a bond was duly executed by plaintiffs and that they thereupon entered upon the execution of their contract. Their petition sets forth three causes of action, two causes being based on estimates made by the county surveyor and the third being for labor and materials furnished.

The county commissioners demurred to the petition on the ground that neither of the causes of action stated facts which showed a cause of action, which demurrer was sustained by the court of common pleas. The plaintiffs prosecuted error to the court of appeals, which court reversed the decision of the court of common pleas and remanded the cause with instructions to the common pleas court to overrule the demurrer.

The defendants then filed an answer, setting forth five grounds of defense. The first ground was that the new bridge was proposed to be constructed at a different place and on a different road from the place and road at and on which the alleged condemned bridge stood. The second and third defenses were in the nature of general denials and the fourth defense was that the prosecuting attorney did not make the proper certificate. The fifth defense was that the county commissioners did not at any time, prior to making the alleged contract or prior to locating the bridge, publish and circulate hand bills and publish in any newspaper of the county notice of their intention to erect such bridge and the location thereof.

Plaintiffs in their reply admit that the proposed new bridge was not located on the exact spot of the old bridge and that the commissioners, prior to making the contract with the plaintiffs, did not publish and circulate hand bills or notice in a news paper of their intention to erect the bridge.

The case was tried to a jury and resulted in a verdict for the plaintiffs in the sum of $10,663.84. A motion for a new trial was overruled and error being prosecuted the judgment was affirmed by the court of appeals.

It was established at the trial and was indeed admitted by all parties that the condemned bridge and the new bridge that the plaintiffs contracted to build are on two different roads, that the new bridge location is 3120 feet distant from the old bridge, measured in a direct line, and that the condemned bridge was repaired and is still used by the public. The advertisement for bids, the bid of plaintiffs and the written agreement between plaintiffs and the commissioners all provided for the con-

struction of the bridge in the new location. There was no publication of notice of the intention of the commissioners to erect the bridge and the location thereof as provided by section 2444 G. C. The board of commissioners did not submit to the voters of Tuscarawas county the question of the policy of making the expenditure for the bridge in question. It was claimed in behalf of the plaintiffs that the county commissioners were proceeding under section 5643 G. C., which section provides as follows:

> "If an important bridge belonging to or maintained by any county becomes dangerous to public travel, by decay or otherwise, and is condemned for public travel by the commissioners of such county, and the repairs thereof or the building of a new bridge in place thereof is deemed by them necessary for the public accommodation, the commissioners, without first submitting the question to the voters of the county, may levy a tax for either of such purposes in an amount not to exceed in any one year two-tenths of one mill for every dollar of taxable property upon the tax duplicate of said county."

Conceding the correctness of the claim that the commissioners were proceeding under section 5643, the charge of court to the effect that a vote of the people was not necessary was correct, but the court also gave the following special charge to the jury at the request of the plaintiffs:

> "As a matter of law, the jury are charged that it was not required of the county commissioners before letting a contract for the construction of a bridge under the circumstances, claimed by them in the petition to publish and circulate hand bills and publish in a newspaper of the county, notice of their intention to erect such bridge and the location thereof."

The question of the scope of section 2444 G. C. was before the court in the case of State ex rel. Ampt v. Hamilton County Commissioners, decided by the superior court of Cincinnati in 1900 and reported in 14 O. D., N. P. 228. The commissioners in that instance were seeking to proceed under section 2825 R. S., a part of which section became section 5643 G. C. It is true that section 2825 R. S., now section 5643 G. C., was amended subsequent to 1900 and prior to the letting of the alleged contract in the case now under consideration, but I am unable to see how the amendment affects the force of the decision in the Ampt case. In this case the court held that there was nothing in section 2825 R. S. to negative or excuse compliance with the provisions of section 877 R. S., now section 2444 G. C., requiring the circulation of hand bills and publication of notice. The court further held that section 877 R. S. was a general statute applying to all bridges and probably more so to bridges sought to be built under section 2825 R. S. than in the case of new bridges built under the general powers expressly conferred upon the commissioners. In the case of State ex rel. v. Amlin, 13 O. D. 334, the court held that section 2444 G. C. did not apply where county commissioners had been directed by a vote of the people to make an improvement, thus indicating the mandatory character of the section where a vote is omitted.

In this connection attention is also directed to the case of Buchanan Bridge Company v. Campbell, et al., Commissioners, 60 O. S. 406, in support of the proposition that a contract nade by county commissioners for the purchase and erection of a bridge, in violation or disregard of the statutes on that subject, is void, that no recovery can be had against the county for the value of such bridge and that the courts will leave the parties to such unlawful transaction where they have placed themselves and will refuse to grant relief to either party. In the view that I take of the case

now under consideration the decision of the court of common pleas in the first instance, in sustaining a demurrer to the petition, was in accordance with the Ampt case, whereas the decision of the common pleas court in thereafter overruling the demurrer, in compliance with the mandate of the court of appeals and the decision of the court of appeals in sustaining the court of common pleas, were in conflict with the Ampt case. So far as I have been able to ascertain, in a hasty examination of the voluminous briefs filed in the case now under consideration, the Ampt case was not called to the attention either of the trial court or of the court of appeals. The bridge which the plaintiffs contracted to build was never completed and the county has derived no benefit whatever from the services alleged to have been performed and without reference to the other questions involved in this case, and in view of the fact that the decision herein seems to be in direct conflict with that of the superior court of Cincinnati, in the Ampt case, supra, it is my view that an effort should be made by the county authorities of Tuscarawas county to secure a review of the entire matter by the supreme court. This view of the matter is strengthened by the fact that the practical effect of the decision now under consideration is to permit county commissioners, under the guise of building a new bridge in place of a condemned bridge, to construct a new bridge on a different road and at a distance of over 3,000 feet from the old bridge, and to repair the old structure and reopen the same to traffic, on the theory that the new bridge will serve the same travelers who were accustomed to use the old, although those persons who were accustomed to use the old bridges and who still find it the more convenient, will have no occasion to use the new structure by reason of the fact that the old bridge has been repaired. If the commissioners are authorized to locate a new bridge, built to take the place of a condemned structure, on a different road and at a distance of more than 3,000 feet from the site of the old bridge, then what is the limit within which the new structure may be placed? The fact that the new bridge was built on a different road and at a distance of over 3,000 feet from the location of the old and that the old bridge was thereafter repaired, to my mind casts strong doubt upon the authority of the commissioners to proceed under section 5643 G. C. and thereby escape the necessity of first submitting the question to the voters of the county. I am not prepared to say that in the construction of a new bridge, under authority of section 5643 G. C. the commissioners would not be justified in making slight changes in the location both of the bridge and of the road on which the same is to be built in order to secure a better or more practicable location, but a change of over 3,000 feet, and to another and different road, should not, in my opinion, be accepted by the present county officials as a proper and lawful change under the statute until every effort has been made to secure a contrary ruling from the courts, especially as the case is not one where the county has received anything of value and is retaining the same.

You have requested an early opinion upon the matter submitted by you and I have not had the opportunity to make the thorough examination of the record and briefs and the other papers submitted which I would have preferred. For this reason I have not alluded to certain other alleged grounds of error which, upon a more careful examination, might appear to be worthy of consideration by the supreme court.

For the reasons above set forth, however, I am of the opinion, and advise you, that the county authorities of Tuscarawas county should seek to have this matter reviewed by the supreme court before paying the judgment rendered against the county.

I reach this conclusion by reason of the importance to the county of the matters involved, the fact that the county has received nothing of value, the existence of a former decision at variance with that reached in the present case, which decision relates to the circulation of hand bills and publication of notice for the purpose of advising the public and affording opportunity for petitions, remonstrances and a hearing, and the great general and public importance of the ruling to the effect that in

building a new bridge to replace one condemned, the commissioners may locate the new structure on another and different road and at a distance of over 3,000 feet from the location of the old bridge. In reaching this conclusion it is scarcely necessary to add that the same cannot be considered by any one as in any possible way reflecting upon the courts before which the case has already been tried, but the matters here involved are of great importance, not only to the particular county and contractor, but also to other counties and contractors.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1912.

APPROVAL, RESOLUTIONS FOR IMPROVEMENT OF ROADS IN DELAWARE, FRANKLIN, GREENE, HENRY, HIGHLAND, KNOX, PREBLE, SCIOTO AND HARRISON COUNTIES.

COLUMBUS, OHIO, September 9, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communications of September 7, 1916, transmitting to me for examination final resolutions relating to the following road improvements:

"Delaware county—Sec. 'H,' Columbus-Sandusky road, Pet. No. 783, I. C. H. No. 4.

"Franklin county—Sec. 'F.' Columbus-Lancaster road, Pet. No. 2343, I. C. H. No. 49.

"Franklin county—Sec. 'D-3,' Columbus-Lancaster road, Pet. No. 2343, I. C. H. No. 49.

"Greene county—Sec. 'S-2,' Dayton-Chillicothe road, Pet. No. 2389, I. C. H. No. 29.

"Henry county—Sec. 'A,' Toledo-Napoleon road, Pet. No. 2476, I. C. H. No. 457.

"Highland county—Sec. 'M-2,' Milford-Hillsboro road, Pet. No. 1406, I. C. H. No. 9.

"Knox county—Columbus-Wooster road, I. C. H. No. 24, Pet. No. 2548. (Bridge.)

"Preble county—Sec. 'A,' Eaton-Greenville road, Pet. No. 2838, I. C. H. No. 210.

"Scioto county—Sec. 'L,' Ohio river road, Pet. No. 2903, I. C. H. No. 7.

"Harrison county—Sec. 'D,' Dennison-Cadiz road, Pet. No. 2454, I. C. H. No. 370."

I find these resolutions to be in regular form and am therefore returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1913.

ROADS AND HIGHWAYS—EIGHT HOUR LAW—EXTRAORDINARY EMERGENCIES—ROAD WORK PROSECUTED ONLY DURING SUMMER MONTHS—INCONVENIENCE TO PUBLIC—SUCH REASONS DO NOT CONSTITUTE "EMERGENCY" WITHIN MEAMING OF SECTION 17-1 G. C.

The facts that road work can be prosecuted only during the summer months and that those living along the route of a road improvement and also the public generally are inconvenienced during construction work do not constitute an extraordinary emergency within the meaning of the eight hour law, section 17-1 G. C.

COLUMBUS, OHIO, September 11, 1916.

HON. GEO. C. VON BESELER, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication of September 6, 1916, which communication reads as follows:

"Section 17-1 is as follows:

" 'Except in cases of extraordinary emergency, not to exceed eight hours shall constitute a day's work, and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state, or any political subdivision thereof, whether done by contract or otherwise; and it shall be unlawful for any person, corporation or association, whose duty it shall be to employ or to direct and control the services of such workmen to require or permit any of them to labor more than eight hours in any calendar day or more than forty-eight hours in any week, except in cases of extraordinary emergency. This section shall (not) be construed to include policemen or firemen.'

"By reason of the vast amount of work being done here by way of the construction of improved roads, Lake coutnty at the present time is engaged in building something like two miles of concrete road in conjunction with the state highway department. Another road, something like four miles in length, is being constructed in the village of Fairport, township of Painesville, and the city of Painesville connecting the two municipalities. Also two streets are being paved within the city of Painesville. It is very doubtful that this work can be completed before cold weather sets in. Will you please let me know your opinion as to whether or not these public improvements may be deemed to be extraordinary emergencies allowing the contractor to work more than eight hours. I might say that the purpose of the contractor is to employ the men on an eight hour basis and for eight hours a day, paying them various amounts for over time, always in excess of the regular day's wages per hour.

"I am informed that the state highway department is not enforcing this rule and the contractors are permitted to work more than eight hours.

"It seems to me that such improvements are in the nature of extraordinary emergencies for the reason that such work can be prosecuted only during the summer months; for the further reason that the public generally is very greatly inconvenienced during such construction work; and that the public who live along the route of proposed improvement are inconvenienced in getting in and getting out.

"As we are extremely anxious to have your view of this matter immediately, I shall appreciate an early reply."

In opinion No. 814 of this department, rendered to the bureau of inspection and supervision of public offices, on September 10, 1915, and found at page 1713 of the Opinions of the Attorney-General for that year, it was held that sections 17-1 and 17-2 G. C. apply to workmen engaged in the construction, repair, replacement or alteration of streets, roads and all public thoroughfares. The only question presented by your inquiry is, therefore, as to whether the facts that the road work can be prosecuted only during the summer months, and that not only those living along the route of a road improvement, but also the public generally, are greatly inconvenienced during construction work, constitute a case of extraordinary emergency. I advise you that this question must be answered in the negative.

The most common present meaning of the word "emergency" is set forth in the Standard Dictionary as follows:

> "A sudden or unexpected occurrence or condition calling for immediate action."

The closing of a road for the purpose of construction or repair, and the facts that the work can be carried forward only during favorable weather, and that during its progress persons will be inconvenienced, cannot be said to create a situation which might be properly described as either sudden or unexpected. The situation which you describe in your letter instead of being unexpected is the one which is to be expected whenever a road improvement is proposed. To hold that under such circumstances work might be prosecuted without regard to section 17-1 G. C., would be to practically repeal the eight hour law and the constitutional provision of which it is declaratory, and for the violation of which it provides a penalty, in so far as the construction and improvement of streets and roads is concerned.

I therefore advise you that the situation described in your communication does not constitute an extraordinary emergency within the meaning of the statute.

I note your observation in regard to the state highway department and am informed by a representative of that department that in so far as the department is proceeding by force account and directly employing labor, the department is complying strictly with all of the provisions of the eight hour law, and that in so far as the matter has been brought to the attention of that department by persons with whom it has contracted for the construction of roads, the department has advised such persons that the eight hour day for workmen engaged in any public work, carried on or aided by the state, even when done by contract, has been established by the constitution and laws of the state and that the department is without any power or authority to authorize any contractor to violate its provisions.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1914.

BONDS ISSUED FOR ROAD CONSTRUCTION PRIOR TO GOING INTO EFFECT OF CASS HIGHWAY LAW—ROADS IMPROVED BY GARRETT AND THOMAS LAWS, SECTIONS 6926 to 6956 G. C. INCLUSIVE—WHAT LIMITATIONS APPLICABLE TO TAX LEVIES FOR SAID PURPOSE—CASS LAW LIMITATIONS NOT APPLICABLE.

Tax levies made by county commissioners under authority of and for the purposes mentioned in section 6945 *G. C. as in force prior to September* 6, 1915, *the date of the going into effect of the Cass law, are not subject to the limitations of any provision of said law.*

A tax levy made by said county commissioners for interest and sinking fund purposes in connection with bonds issued prior to January 1, 1911, *for the purpose of providing a sinking fund to pay the cost of improvements made by said commissioners under authority of section* 6926 *et seq. G. C., is subject only to the 10 mill limitation provided in section* 6945 *G. C. as then in force and to the 15 mill limitation prescribed by section* 5649-5b *G. C. as amended and as now in force, subject to the qualification that, in the possible case where the tax levy made under authority of said section* 6945 *G. C., when taken in addition to all other levies required by law to be made, exceeds* 15 *mills and the county commissioners in such case have either failed to exercise the authority conferred upon them by section* 5656 *et seq. G. C. or have been unable, in the exercise of such authority, to sell refunding bonds of said county for the purpose of extending the time of payment of said bonds, said* 15 *mill limitation will not apply.*

A tax levy made by said county commissioners for interest and sinking fund purposes incident to bonds issued subsequent to January 1, 1911 *and prior to June* 2, 1911, *is subject only to the* 15 *mill limitation prescribed by said section* 5649-5b *G. C.*

A tax levy made by said county commissioners for interest and sinking fund purposes incident to bonds issued subsequent to June 2, 1911 *and prior to July* 28, 1913, *the date of the going into effect of the act of the general assembly amending said section* 6926 *to* 6956, *inclusive, is subject only to the* 10 *mill limitation prescribed by section* 5649-2 *G. C and the* 15 *mill limitation provided for in section* 5649-5b *G. C. as said sections are amended and now in force.*

A tax levy made by said county commissioners for the aforesaid purposes in connection with bonds issued subsequent to said date of July 28, 1913, *is subject to the* 10 *and* 15 *mill limitations above referred to and in addition thereto to the* 3 *mill limitation prescribed by section* 6945 *G. C. as amended,* 103 *O. L.* 202 *and as in force from and after said date of July* 28, 1913 *and prior to the going into effect of the Cass law on September* 6, 1915.

The 3 *mill limitation provided for in section* 6927 *G. C.* 106 *O. L.* 603, *has no application to tax levies made under authority of said section* 6945 *G. C. supra.*

COLUMBUS, OHIO, September 11, 1916.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—In your letter of September 6th you request my opinion as follows:

> "The county commissioners of Lucas county, Ohio, constructed certain roads under what was known as the Garrett law and its successor, the Thomas law (sections 6926 to 6956 inclusive). Bonds were issued by the county to meet the township's share of such construction, part prior to June 2, 1911, and part thereafter without vote, and the county commissioners have been levying taxes on the several townships under section 6950 for the payment of the interest on such bonds and their redemption.
>
> "Prior to the passage of the Cass law, there was apparently no limita-

tion on the rate of taxation that might be levied for the redemption of such bonds other than the 15 mills limitation of the Smith law. Section 106 of the Cass law now provides for a levy of not over 3 mills for such purpose. Is the levy for the redemption of the bonds issued under the Garrett and Thomas laws (now repealed) subject to the limitations found in the Cass law, to the limitations of the Smith one per cent. law, or to the limitations of the act under which they were issued?

"If subject to the provisions of the Smith law, is the levy to be considered as a levy for debt, and, therefore, subject to only the 15 mills limitation if the bonds are issued prior to June 2, 1911, and subject to the 2 mills for township purposes and 10 mills for all current purposes since that date?

"Can the levy now made under the Cass law for new construction, when taken together with the levy for the redemption of the bonds issued under the old law, exceed the 3 mills limitation provided by section 106 of the Cass law?"

Sections 6926 to 6956, inclusive, of the General Code, as found in the chapter relating to county roads and under the subdivisions relating to the improvement of stone and gravel roads, and formerly known as the Garrett law, were amended by the act of the general assembly known as the Thomas law (103 O. L. 198 et seq.) and as amended continued in force until the going into effect of the Cass law (106 O. L 574-664) on September 6, 1915.

It may be observed at the outset that tax levies made by the commissioners of Lucas county to pay the interest and provide a sinking fund for the retirement at their maturity, of bonds issued by said commissioners for the purpose of providing the necessary funds to pay the cost of improvements made by said commissioners under authority of section 6926 et seq. of the General Code as in force prior to said date of September 6, 1915, are not subject to the limitation of any provision of said Cass law. While said sections, generally speaking, were repealed by the going into effect of section 305 of said Cass law, those provisions of said sections governing the aforesaid tax levies were, by the saving provisions of section 303 of said law, continued in full force and operation.

Section 303 of said law provides as follows:

"This act shall not affect or impair any contract or any act done, or right acquired of any penalty, forfeiture or punishment incurred prior to the time when this act or any section thereof takes effect, under or by virtue of any law so repealed, but the same may be asserted, completed, enforced, prosecuted or inflicted as fully and to the same extent as if such laws had not been repealed. The provisions of this act shall not affect or impair any act done or right acquired under or in pursuance of any resolution adopted by the board of commissioners of any county, the trustees of any township, or the commissioners of any road district prior to the time of the taking effect of this act, and wherever under any law repealed by this act any organization now exists for the purpose of improving, repairing or maintaining any public road or roads, such organization shall not be affected by this act and all officers of such organization or organizations shall continue to hold office and exercise the powers heretofore exercised by them. Their successors in office with like powers shall be elected or appointed as heretofore till all contracts and obligations of such organization shall be fully met and complied with and all rights fully conserved. For such purposes such organization or organizations shall have all rights heretofore exercised by them to hire necessary assistance, clerical or otherwise; to fund or refund any indebtedness and to levy and collect taxes or certify the same for levy and collection; to pay such

debts and expenses together with salaries and other expenses of such organization or organizations; but no such organization or organizations shall contract any new obligation or obligations after the taking effect of this act, for the construction or repair of additional road or roads or the maintenance or repair of roads already improved. When all obligations existing at the time of the taking effect of this act have been fully met and complied with, such organization or organizations shall cease to exist and all property or funds of such organization or organizations shall be and become a part of the road fund of the county in which such organization or organizations exist. All roads macadamized or paved by any such organization shall be kept improved and in repair by the county highway superintendent at the cost of the county in which the same are located."

In view of the provisions of section 303 of said Cass law, above quoted, it is evident that the only limitations which affect the aforesaid tax levies are those found in the sections themselves when read in connection with certain provisions of section 5649-2 G. C. (101 O. L. 430) and the provisions of the so-called Smith law (Section 5649-2, as amended to 5649-5b of the General Code) prescribing general limitations on tax levies, all of which provisions will hereafter be considered.

You state that a part of the bonds in question were issued by said commissioners of Lucas county prior to June 2, 1911(the date when said Smith law became effective), and a part subsequent to said date and without a vote of the people, and I note in this connection that no provision of the statutes authorizing said bond issues required that the question of their issue be submitted to a vote of the qualified electors of the taxing district or districts in which the aforesaid tax levies were made.

While from your statement of facts it appears that the bonds under consideration are of two classes, i. e., those issued prior to said date of June 2, 1911, and those issued subsequent to that date, I find it necessary in determining the answer to your first question to consider said bond issue as divided into three classes:

"1. Those issued prior to January 1, 1911 (the date when section 5649-2 G. C., 101 O. L. 430, became effective).

"2. Those issued subsequent to said date and prior to said date of June 2, 1911.

"3. Those issued subsequent to June 2, 1911."

Relative to bond issues of the first class I call your attention to the provisions of sections 6928, 6945, 6949 and 6950 of the General Code as in force prior to their amendment in 103 O. L., 198 et seq., which were as follows:

"Sec. 6928. The county commissioners shall order that a portion of the cost, and expenses thereof, which shall not be less than one-half, nor more than two-thirds of the total, shall be paid out of the proceeds of any levy or levies upon the grand duplicate of the county against which the taxable property of any township or townships in which such road may be in whole or in part, as authorized hereinafter. They shall also order the balance of said cost and expense be assessed upon and collected from the owners of said real estate, and from the real estate benefited thereby in proportion to the benefit to be derived therefrom by said real estate as determined by said commissioners.

"Sec. 6945. For the purpose of providing by general taxation a fund out of which not less than one-half nor more than two-thirds of the costs and expenses of all improvements made under the provisions of this subdivision of this chapter can be paid, the commissioners are authorized to levy upon the taxable property of any township or townships within the county

in which such improved road is to be or has been constructed, not exceeding ten mills in any one year upon each dollar of the valuation of the taxable property in such township or townships. Such levy shall be in addition to all other levies authorized by law, notwithstanding any limitation upon the aggregate amount of such levies now in force.

"Sec. 6949. The county commissioners, if in their judgment it is desirable, may sell the bonds of any county in which such improvement is to be or has been constructed to an amount necessary to pay, of the costs and expenses of such road improvement, the respective shares of such township or townships and of the landowners whose lands therein are benefited by such road improvement. Such bonds shall state for what purpose issued, bear interest at a rate not in excess of five per cent. per annum, payable semi-annually, and mature, in not more than ten years after their issue, in such amounts and at such times as the commissioners shall determine, but not more than one-fifth of the principal of said bonds shall mature in any one year. They shall be sold according to law and for nor less than par and accrued interest.

"Sec. 6950. The proceeds of such bonds shall be applied and used exclusively for the payment of the expenses and cost of construction of such stone or gravel road improvement, and the levy for the payment of the principal and interest of such bonds may be in addition to any levy now authorized by law."

In view of the foregoing provisions of the statutes it is evident that in so far as bond isues of the first class above mentioned are concerned a tax levy for interest and sinking fund purposes made by said county commissioners prior to said date of January 1, 1911, upon the taxable property of the township or townships in which the improvement in question was located, are subject only to the limitation of ten mills in any one year provided for in the latter part of section 6945 G. C. supra, said section further providing that such levy should be in addition to all other levies authorized by law, notwithstanding any limitation upon the aggregate amount of such levies then in force. Said bond issues were subject also to the limitation contained in the latter part of section 6949 G. C. supra, that not more than one-fifth of the principal should mature in any one year.

Section 5649-2 G. C. (101 O. L. 430), by the terms of section 11 of the act in which the same is found, became effective on January 1, 1911, and as in force prior to the going into effect of its amendment (102 O. L. 268) on June 2, 1911, provided as follows:

"The maximum rate of taxes that may be levied for all purposes, by the taxing authorities of any taxing district, upon the taxable property therein, shall not in any one year exceed ten mills on each dollar of the tax valuation of the taxable property of such district, for that year, including the taxes, levied under authority of section 1 of this act. If in any year such rate of ten mills will not produce an amount equal to the aggregate amount of taxes levied in such district in the year 1909, plus six per cent. thereof for the year 1911, nine per cent. for the year 1912 and twelve per cent. thereof for any year thereafter, and exclusive of any additional amount authorized for sinking fund purposes, or under the provisions of section five of this act, or emergencies as provided for in section forty-four hundred and fifty, forty-four hundred and fifty-one, fifty-six hundred and twenty-nine and seventy-four hundred and nineteen of the General Code, such rate may be increased to the extent necessary to produce such aggregate amount, but in no case to exceed fifteen mills exclusive of levies for sinking fund and interest purposes."

Section 1 of the act (section 5649-1 G. C.) provided as follows:

> "In any taxing district, the taxing authority shall levy a tax sufficient to provide for sinking fund and interest purposes."

It will be observed that while section 5649-2 G. C. supra, provides a general tax limitation in a taxing district of ten mills for all purposes, it so conditioned said limitation by reference to the aggregate amount of tax levies in such district for the year 1909 that in so far as the tax levy for a bond issue of the first class above mentioned is concerned, the same was not affected by any of the limitations prescribed by said section.

Coming now to a consideration of the effect of the Smith law limitations upon the tax levy made subsequent to said date of June 2, 1911, to provide the necessary interest and sinking fund for a bond issue of the first class above mentioned, I note that by provision of the latter part of section 5649-2 G. C. as amended 102 O. L. 268, and as again amended 103 O. L. 552, said levy is expressly exempted from the ten mill limitation therein prescribed.

In opinion No. 601 of this department rendered to your commission July 12, 1915, I held that a levy, made by the commissioners of a county under authority of section 6956-14 G. C. on the taxable property of a township in which an improvement is located in whole or in part, to pay the proportion of the cost of said improvement apportioned to said township by said county commissioners under authority of section 6956-10 G. C., was not a levy made by the taxing officials of a township for township purposes within the meaning of section 5649-3a G. C. and that said levy was not therefore subject to the two mill limitation prescribed by said section. It seems clear to my mind that inasmuch as the levy under consideration is made by the county commissioners for interest and sinking fund purposes in connection with the aforesaid issue of county bonds for the improvement of county roads, the same cannot be said to be subject to said two mill limitation for township purposes prescribed in said section 5649-3a G. C.

In view of the foregoing it necessarily follows that the only limitation of said Smith law, if any, that can be said to apply to said tax levy is that prescribed by section 5649-5b G. C., which as originally in force and as amended in 103 O. L. 57, and as now in force, provides that:

> "In no case shall the combined maximum rate for all taxes levied in any year in any county, city, village, school district, or other taxing district, under the provisions of this and the two preceding sections and sections 5649-1, 5649-2 and 5649-3 of the General Code as herein enacted, exceed fifteen mills."

It is evident, however, that in so far as bond issues of the first class above mentioned are concerned, this latter limitation could not apply in a possible case where the tax levy made under authority of section 6945 G. C. supra, when taken in connection with all other levies required by law to be made exceeds the fifteen mills and the county commissioners in such case should either fail to avail themselves of the authority conferred by section 5656 et seq. of the General Code or should be unable, in the exercise of such authority, to sell refunding bonds of such county for the purpose of extending the time of the payment of said bonds. To hold that said limitation would apply in this case would result in the impairment of the obligation of the contract evidenced by the bonds in question.

Such a case, however, is not at all probable and I am of the opinion that, generally speaking, said tax levy is subject to said fifteen mill limitation prescribed by said section 5649-5b G. C.

It will be observed that the provision of the first part of section 5649-2 G. C. (101 O. L. 430), as in force prior to the going into effect of its amendment (102 O. L. 268) on June 2, 1911, by its terms would have brought a tax levy made by the commissioners of Lucas county for interest and sinking fund purposes incident to bond issues of the second class above mentioned, within the ten mill limitation therein prescribed, subject however to the conditions mentioned in the latter part of said section under which said levy would not have been subject to either the ten or fifteen mill limitation prescribed by said statute.

Inasmuch, however, as the first tax levy for bonds of said second class must necessarily have been set forth in the annual budget of said county commissioners filed with the county auditor on or before the first Monday in June, 1911, according to the requirement of section 5649-3a G. C., which section is a part of the act of the general assembly known as the Smith law (102 O. L. 266), it is evident that the only limitations that need be considered are those of said Smith law, and in view of what has already been said it is clear that the only limitation of said law, which, generally speaking, can be said to apply to said tax levy is that prescribed by said section 5649-5b G. C.

Relative to bond issues of the third class above mentioned, made subsequent to said date of June 2, 1911, and without a vote of the people, it may be observed that as to those bonds of said class issued prior to the going into effect of the amendment of said sections 6926 to 6956, inclusive, of the General Code on July 28, 1913, the provisions of section 6945 G. C. supra, are by implication modified by the subsequent enactment of the provisions of the Smith law and in view of what has already been said it necessarily follows that a tax levy for interest and sinking fund purposes incident to bond issues of said subdivision of said class three, above set forth, is outside of the two mill limitation for township purposes prescribed by section 5649-3a G. C., but subject to the ten mill limitation provided for in section 5649-2 G. C. as amended 103 O. L. 552, and to the fifteen mill limitation prescribed by said section 5649-5b G. C., as amended 103 O. L. 57.

Section 6945 G. C. as amended 103 O. L. 202, and as in force prior to the going into effect of the Cass law September 6, 1915, provided as follows:

> "For the purpose of providing by general taxation a fund out of which not less than one-half nor more than two-thirds of the costs and expenses of all improvements made under the provisions of this subdivision of this chapter can be paid, the commissioners are authorized to levy upon the taxable property of any township or townships within the county in which such improved road is to be or has been constructed, not exceeding three mills in any one year upon each dollar of the valuation of the taxable property in such township or townships. Such levies shall be in addition to all other levies authorized by law for township purposes, but subject to the maximum limitation upon the aggregate amount of all levies now in force."

In view of the above provisions of section 6945 G. C. as amended, it is evident that the legislature had in mind the general limitations on tax levies contained in sections 5649-2 to 5649-5b, inclusive, of the General Code hereinbefore referred to. It will readily be observed that the tax levy made for interest and sinking fund purposes incident to the bond issues of class three, above mentioned, issued subsequent to July 28, 1913, the date when section 6945 G. C. as amended became effective, is subject to the ten and fifteen mill limitations above referred to and in addition thereto to the three mill limitation prescribed by said amended section 6945 G. C. supra.

Answering your first question specifically I am of the opinion:

"1. That tax levies made by the commissioners of Lucas county to

provide a fund for the payment of the interest and for the retirement at their maturity of the bonds issued by said county commissioners for the purpose of providing the necessary funds to pay the cost of improvements made by said county commissioners under authority of sections 6926 to 6956, inclusive, of the General Code, as in force prior to September 6, 1915, are not subject to the limitation of any provision of the Cass law.

"2. That a tax levy made by said county commissioners for interest and sinking fund purposes in connection with bonds issued prior to January 1, 1911, is subject only to the ten mill limitation provided in section 6945 G. C. as then in force, and to the fifteen mill limitation prescribed by section 5649-5b G. C., as amended, and as now in force. this conclusion being subject of course to the qualification that, in the possible case hereinbefore considered where the tax levy made under authority of section 6945 G. C., when taken in addition to all other levies required by law to be made, exceeds fifteen mills, and the county commissioners in such case have either failed to exercise the authority conferred upon them by section 5650 et seq. of the General Code, or have been unable in the exercise of such authority to sell refunding bonds of said county for the purpose of extending the time of payment of said bonds, said 15 mill limitation will not apply.

"3. That a tax levy made by said county commissioners for interest and sinking fund purposes incident to bonds issued subsequent to January 1, 1911, and prior to June 2, 1911, is subject only to the fifteen mill limitation prescribed by said section 5649-5b G. C.

"4. That a tax levy made by said county commissioners for interest and sinking fund purposes incident to bonds issued subsequent to June 2, 1911, and prior to July 28, 1913, is subject only to the ten mill limitation prescribed by section 5649-2 G. C., and the fifteen mill limitation provided for in section 5649-5b G. C., as said sections are amended and now in force.

"5. That a tax levy made by said county commissioners for the aforesaid purposes, in connection with bonds issued subsequent to said date of July 28, 1913, is subject to the ten and fifteen mill limitations above referred to, and in addition thereto to the three mill limitation prescribed by section 6945 G. C. as amended, 103 O. L. 202, and as in force from and after said date of July 28, 1913, and prior to the going into effect of the Cass law on September 6, 1915."

Your second question has already been answered in determining the answer to your first question.

Section 106 of the Cass law, referred to in your third question, being section 6927 of the General Code, 106 O. L. 603, provides:

"For the purpose of providing by taxation a fund for the payment of the proportion of the costs and expenses of such improvement, to be paid by the township or townships interested, in which such road may be in whole or part situated, the county commissioners are hereby authorized to levy a tax not exceeding three mills in any one year upon all the taxable property of such township or townships. Such levy shall be in addition to all other levies authorized by law for road purposes, but subject to the limitation on the combined maximum rate for all taxes now in force."

The provisions of this statute governing county commissioners in the making of tax levies for the purposes therein set forth can only apply to improvements made subsequent to September 6, 1916, and have no application to tax levies made by county commissioners under authority of section 6945 G. C. supra, for the purpose herein before considered.

I am of the opinion, therefore, in answer to your third question, that the three mill limitation provided for in said section 6927 G. C. supra, has no application to said tax levies made under authority of said section 6945 G. C. supra.

Respectfully,
EDWARD C. TURNER.
Attorney-General.

1915.

INTOXICATING LIQUORS—PARTNERSHIP DULY LICENSED TO CONDUCT SALOON MAY CARRY ON BUSINESS IN WHATSOEVER NAME OR NAMES CHOSEN AT PLACE FOR WHICH LICENSE ISSUED—NO ADDITIONAL LICENSE REQUIRED—LIEBENTHAL BROTHERS & COMPANY—NATIONAL CORDIAL COMPANY.

A partnership duly licensed to conduct a saloon, or, in other words, having a saloon license, may carry on the business authorized under such license in whatsoever name or names they may choose at the place where such license is operative, so long as no other person or persons are in any way interested in such business than those whose names appear in the application for such license and to whom the same was granted and issued, and no other person or persons than the licensees have any financial interest in the business conducted at the place for which such saloon license is granted.

A partnership having a license to traffic in intoxicating liquors at a given place is not required to procure an additional license or licenses by reason of the fact that the partnership business is conducted in more than one name.

COLUMBUS, OHIO, September 12, 1916.

The State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—With your request for an opinion thereon you transmitted to me statement of facts submitted to you by Mr. George B. Harris of Cleveland, Ohio, as follows:

"CLEVELAND, OHIO, August 2, 1916.

"Liebenthal Brothers & Company is a partnership, composed of Sylvester and Melville Liebenthal, which does a wholesale and retail liquor business at 1438 West 9th street, in this city, having a license so to do. For purposes of business convenience, it proposes to bill out certain wholesale sales under the name of "National Cordial Company." The salesmen who are to make the sales are employed by Liebenthal Brothers & Company, the merchandise is to be prepared for delivery by the employes of Liebenthal Brothers & Company, and deliveries are to be made by those employed or hired by Liebenthal Brothers & Company, the billing is to be done by the employes of Liebenthal Brothers & Company, and the books kept by their employes. All of the foregoing are to be carried on at the place of business of Liebenthal Brothers & Company aforesaid, except the solicitation of salesmen, which, of course, is to be done at the place of business of the various customers.

"The questions presented are: (a) May Messrs. Liebenthal so use the name 'National Cordial Company?' (b) If so, must they acquire for National Cordial Company a liquor license?"

It is further stated by Mr. Harris, in personal interview, that the foregoing statement is intended to show only that all the business of trafficking in intoxicating liquors therein referred to is carried on at No. 1438 West Ninth street in the city of Cleveland, and that all of such business is done, owned, conducted and controlled by the partners in said statement named, and that no other person or persons have any interest therein and that the question sought to be submitted, stated in another way, is:

> "May persons who are duly licensed to traffic in intoxicating liquors, as a partnership, carry on such business under more than one name, if such business is conducted in all other respects in compliance with law?"

It will be borne in mind that subject only to certain exceptions not necessary to be here considered, no sale of intoxicating liquors may be lawfully made in this state unless the person or persons making such sale is duly licensed to engage in the business of trafficking in intoxicating liquors.

Under article XV, section 9 of the constitution, licenses to traffic in intoxicating liquors are authorized to be granted subject to certain restrictions and limitations therein prescribed. These constitutional limitations upon the power to grant licenses to traffic in intoxicating liquors are for the most part carried into the license law passed April 18, 1913, 103 O. L. 216.

The primary purpose running through both the constitutional and statutory authority for the granting of licenses to traffic in intoxicating liquors, and the restrictions or limitations thereof therein provided, is to limit the conduct of the business to a class of persons, associations and corporations possessing certain qualifications therein prescribed and to further so limit the number of saloons that they may not be in excess of a prescribed ratio to the population of the township or municipality in which the same are located in that territory of the state in which the sale of intoxicating liquors is not prohibited by law. Neither the constitution nor the license law operates to make the sale of intoxicating liquors fundamentally unlawful. In the exercise of the police power of the state it is sought, however, through the constitutional and statutory provisions referred to, to limit the sale of liquors to the class of persons therein defined and the number of saloons within a prescribed territory.

Aside from the provisions of section 23 of the license law, 1261-38 G. C., 103 O. L. 234, which requires that each licensee shall post in a conspicuous place within the enclosure or room where the liquors are sold the license certificate issued to him by the county boaad, and section 51 of the license law, 1261-66 G. C., 103 O. L. 238, which makes a failure to comply with the above mentioned provision of section 1261-38 G. C. a misdemeanor and provides a penalty therefor, neither article XV, section 9 of the constitution nor the license law in themselves purport to impose upon a licensee any restriction, limitation or regulation in the conduct of his business at the place for which the license is issued.

Beyond the limitation of the number of saloons and the restrictions of the power to grant licenses as to the class of persons to whom the same may be granted the laws regulating the manner of conducting the business of trafficking in intoxicating liquors, but for the exception above mentioned, must be sought elsewhere than in the section of the constitution above referred to and in the license law.

It is stated that the persons in question are duly licensed to conduct a wholesale and retail liquor business, and whether the license is issued to Liebenthal Brothers & Company or not, it is inferred that the business is now being conducted under that name. Licenses are granted on applications required to be filed with the county liquor licensing board having jurisdiction of the place for which the license is sought.

Section 1261 G. C., 103 O. L. 223, provides in part as follows:

> "Each applicant shall state:

"(a) His full name and address, or if more than one person, or if an association, the names of all the persons concerned, whether as partners or as members of said association, and the address of each person concerned, including street and number. * * *

"(c) The fact that the applicant is not in any way interested either as owner or part owner in a business, or a stockholder of a corporation engaged in the business, conducted at any other place where intoxicating liquors are sold or kept for sale as a beverage."

Whether the license was issued to Sylvester Liebenthal and Melville Liebenthal or to Liebenthal Brothers & Company, it must have appeared from the application that Sylvester Liebenthal and Melville Liebenthal were the only persons interested in the license sought and that neither of them were interested either as owner or part owner in a business, or as stockholder of a corporation engaged in the business conducted any other place where intoxicating liquors are sold or kept for sale as a beverage. So that it is conclusive that Liebenthal Brothers & Company and Sylvester Liebenthal and Melville Liebenthal are identical, and that for whatever is done by them in the conduct of the business carried on under such license—in violation of law or the rights of others—Sylvester Liebenthal and Melville Liebenthal are responsible.

With the foregoing observations let it be supposed that the partnership referred to, being duly licensed to conduct a saloon at the place mentioned, through its traveling salesman or representative, procures an order for a consignment of intoxicating liquors which the partnership in question sells at the place where it is duly licensed to sell intoxicating liquors and for reasons satisfactory to the licensee or licensees the consignment of liquors, in all other respects sold in compliance with law, is billed out to the vendee and consignee and charged against the person to whom sold on the books of the licensee in the name of the "National Cordial Company" or other wholly ficticious name, and that payment therefor is made by the vendee to the "National Cordial Company."

If such transaction be legally wrong there must be a legal remedy. The course of business described would, of course, be subject to the provisions of section 8096 G. C. et seq. requiring partnerships transacting business in this state under a ficticious name, with certain exceptions, to file with the clerk of the common pleas court of the county a certificate stating the names in full of all the members of the partnership and their places of residence. No penalty attaches to a failure to comply with the foregoing requirement that would render a sale so made in any substantial sense unlawful.

By section 1261-31 G. C., 103 O. L. 221, it is made the duty of the county liquor licensing board and they are authorized "to suspend or revoke, subject to the conditions and in the manner provided by law, all licenses granted or renewed in said county."

It is provided in part by section 1261-34 G. C., 103 O. L. 222, that:

"If at any time a corporation or association shall come to be without a designated manager as provided for herein, the license of said corporation or association shall be suspended unless within ten days a new manager or managers are appointed; and if in such case no new manager is designated within thirty days after the original manager ceases to occupy the position, unless the time is extended by the county board, and if the said manager has not all the qualifications provided by law in the case of an individual applicant, the license may be revoked. * * *

"Licenses shall not be granted to any applicant who is in any way interested in the business conducted at any other place where intoxicating liquors

are sold or kept for sale as a beverage, nor shall such license be granted unless the applicant or applicants are the only persons in any way pecuniarily interested in the business for which the license is sought, and no other person shall be in any way interested therein during the continuance of the license; if such interest of such person shall appear, the license shall be deemed revoked."

Section 1261-49 G. C., 103 O. L. 230, provides in reference to the power to suspend or revoke a license as follows:

"If any licensee within the jurisdiction of a county licensing board has been once convicted during the license year of an offense under laws or ordinances concerning the sale of intoxicating liquors, and if said board with due notice to the licensee and after a full hearing granted to him finds that the said licensee has, during said license year and after said conviction, violated the said laws or ordinances, the said board may suspend the license of the said licensee once for a period not to exceed ten days.

"If, after such conviction and suspension, offenses are, during the said license year, again repeated, the said board may, with due personal notice to the licensee, served not less than five days before the hearing, and after a full hearing granted to said licensee, revoke the said license of said licensee; and notice of such revocation shall forthwith be served upon the person whose license is so revoked.

"Upon a conviction under said laws and ordinances as for a second offense as provided for in section 54 hereinafter the county board may, if error proceedings are taken to the judgment of the court in which conviction is had, suspend the license of the licensee so convicted for the remainder of the license year. Should, however, the judgment of conviction be reversed prior to the termination of said license year then such suspension shall immediately terminate. During such suspension no new license shall be granted to take the place of the license so suspended."

Section 1261-73 G. C., 103 O. L. 241, provides in part as follows:

"If any licensee is more than once convicted for a violation of the laws in force to regulate the traffic in intoxicating liquors, his license shall be deemed revoked and no license shall thereafter be granted to him."

The foregoing provisions prescribe the conditions and manner provided by law for the suspension and revocation of licenses as referred to in section 1261-31 G. C. supra.

No further discussion is needed in this connection than to say that the transaction under consideration is manifestly not within contemplation of the authority to suspend or revoke a license by the foregoing statutory provisions conferred. Nor is it necessary here to consider the power to revoke a license based upon the loss by a licensee of any of the requisite qualifications by a licensee as it is not believed that the transaction under consideration of itself would operate to deprive one of any of those qualifications.

Section 1261-63 G. C., 103 O. L. 237, makes it a criminal offense for any person to sell intoxicating liquors without having been duly licensed with certain exceptions therein defined.

Section 1261-64 G. C., 103 O. L. 238, makes it an offense for any person whether licensed or not to sell intoxicating liquors in quantities of less than two gallons without having a saloon license with the same exceptions as made in the preceding section.

If then it be determined by those officers charged with, or other persons seeking the enforcement of the foregoing penal statutes that sales of intoxicating liquors are being made in any name or names under which no license has been granted or issued, since criminal proceedings may not be maintained against a mere name, it will necessarily devolve upon such officers or persons to ascertain the identity of the person or persons represented by such name or names and by whom, as a matter of fact, such sales are being made. If upon investigation it develop that such sales are being made by a person, persons or partnership duly licensed to make the same and that such sales are being made only at the place where the license is in force it needs no argument to support the conclusion that no prosecution under either of the foregoing sections could be sustained. That is to say if the person or persons represented by the name under which a sale is made are in fact licensees and they are the only persons interested in such sale no offense defined by the statutes above referred to would be committed solely by the use of a ficticious name in the transaction.

I am aware of no other statutory provision the application of which would render unlawful in any way the use of a fictitious name by a partnership having a saloon or wholesale license in the conduct of the business authorized by such license. It is elementary that a partnership may adopt and use in the conduct of its business any name or names and that obligations entered into thereunder are binding and valid.

This principle is recognized in the following cases:

Wright v. Hooker, 10 *N. Y.* 51.

"Partners may adopt any name for the transaction of their partnership business, and may bind themselves by different partnership names, in their different places of business."

Campbell v. Coal & Iron Co., 9 *Colo.* 60.

"Where the same persons carry on the same business as partners, in two different places, under different firm names, there is in law but a single partnership, and the assets of both nominal firms are equally applicable to the payment of all the creditors."

The same rule is laid down in the case of In re Williams and Company, 3 Woods (U. S.) 493.

While different places of business are mentioned in the foregoing cases it is not deemed essential to the right to use different names in the conduct of a partnership business that the business conducted under different names must be at different places.

Hunt v. Sunonin, 79 *Ky.* 270.

"Only the individuals composing a firm can be sued. They may be sued jointly or separately, whether they do business in one or any number of firm names."

In the case of Meier & Company v. Bank, 55 O. S. 459, the court in the opinion observed that:

"The adoption of a firm name is largely for convenience in making contracts binding on all the members by its use, thus obviating the necessity of securing the individual assent of, and execution by each of the partners, which, when the members are numerous, might not only be inconvenient, but sometimes impracticable."

It is submitted that the right to use more than one name solely for the reason that it may add substantially to the convenience of the proper conduct of a partnership business is here clearly recognized.

In 22 Am. & E. Ency. 79 it is stated:

> "Where, as is sometimes the case, a firm has several names, a contract made in any one of such names will be binding."

In the absence of statutory restrictions in reference thereto and for the reasons above set forth I am therefore of opinion in answer to the first question submitted that a partnership duly licensed to conduct a saloon or in other words having a saloon license, may carry on the business authorized under such license in whatsoever name or names they may choose at the place for which the license is issued so long as no other person or persons are in any way interested in such business than those whose names appear in the application for such license and to whom the same was granted and issued. And the licensees are in no way interested in the business at any other place where intoxicating liquors are sold or kept for sale as a beverage.

Since as above pointed out the persons to whom the license has already been granted may not be interested in any way in the business conducted at any other place and no other person or persons than the licensee or licensees may be in any way pecuniarily interested in the business for which the license is granted it follows that no additional rights would be acquired by the present licensees or partnership by procuring a license in the name of the National Cordial Company, nor could any other person or persons thereby be permitted to obtain any pecuniary interest in the business conducted at the place where the present license is in force. Nor is it believed that there is authority for granting more than one license to conduct the business of trafficking in intoxicating liquors at a single place.

The answer to the second question must therefore be in the negative.

The conclusion as above stated is confined solely to the facts under consideration.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1916.

MARYSVILLE REFORMATORY FOR WOMEN—NO SPECIFIC AUTHORITY FOR APPOINTMENT OF FIELD OFFICERS—EMPLOYES MAY BE APPOINTED WHO WOULD HAVE SOME OF THE POWERS OF FIELD OFFICERS.

The provisions of section 2212 *G. C. in respect to the appointment of field officers for certain penal institutions do not apply to the reformatory for women, but under the provisions of section* 1842 *G. C. the Ohio board of administration may determine whether it is necessary for said institution to have such services as correspond to those performed by field officers of the institutions named in said section* 2212 *supra, and if such board determines that such services are necessary it may designate the number of persons necessary to perform the same and fix their salaries, and the superintendent of said institution, under the provisions of section* 2148-4 *G. C. may thereupon appoint, as provided by law, the number so designated by said board.*

COLUMBUS, OHIO, September 12, 1916.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I have your letter of September 2, 1916, submitting the following inquiries:

"For the information of the Ohio board of administration, I wish you would designate to us the manner in which, and by whom, the field officers for the Ohio reformatory for women at Marysville are to be appointed; or does the law warrant the appointment of such officers."

The only statutory provisions providing for the appointment of a person or persons as a field officer or officers and defining their authority and duties are found in sections 2212 and 2213 G. C. These sections are as follows:

"*Section* 2212. The board of managers of the penitentiary and of the reformatory, respectively, shall appoint and employ one or more officers, to be known as field officers, for their respective institutions. Such officers shall carefully look after the welfare of all persons whose sentences have been suspended and those who have been paroled from such institutions."

"Sec. 2213. If a person placed upon probation fails to conduct himself in accordance with the rules and regulations of the institution in whose charge he has been placed, a field officer thereof, without warrant or other process, because of such failure, may arrest and convey him to the institution and the board of managers, after full investigation and a personal hearing, may forthwith terminate the probation and cause him to suffer the penalty of the sentence previously suspended. * * *"

It is manifest that the provisions of the above sections apply only to the institutions named therein and furnish no authority for the appointment of a field officer or officers for the reformatory for women. It follows, therefore, that there is no provision of law whereby any person or persons may be appointed as a field officer or officers for the institution named in your inquiry. But this does not mean that said institution shall be without the services which by law are imposed upon field officers or that it is without authority to have employes who may perform most of the services that are rendered by field officers, as provided in said foregoing sections, or by parole officers for the institutions named in section 2215 G. C.

In other words, while there is no specific authority to appoint a field officer or officers for the women's reformatory, there is ample authority for the employment of a person or persons who, as employes of said institution, may perform most of the services and discharge most of the same duties as those now imposed by law upon said field officers. Such employes would not have the power given to field officers by statute, such as the power to arrest without warrant or other process.

It is provided in section 2148-4 G. C. as amended 106 O. L. 130, that:

"The board shall select and designate a suitable woman as superintendent to manage the institution and promote the welfare of the inmates thereof. The selection of other employes shall be after the manner described in section 1842 of the General Code, except that as far as practicable the employes shall be women."

This section provides for the appointment of a superintendent of the institution named in your inquiry and further provides that all employes of said institution shall be selected after the manner described in section 1842 of the General Code.

Referring now to said section 1842 it is provided therein, among other things, that:

"The chief officer shall have entire executive charge of the institution for which he is appointed, except as otherwise provided herein. He shall select and appoint the necessary employes, but not more than ten per cent.

of the total number of officers and employes of any institution shall be appointed from the same county. He shall have power to discharge them for cause, which shall be recorded in a book kept for that purpose, and a report of all appointments and resignations and discharges shall be filed with the board at the close of each month. * * *

"The board, after conference with the managing officer of each institution, shall determine the number of officers and employes to be appointed therein. It shall from time to time fix the salaries and wages to be paid at the various institutions, which shall be uniform, as far as possible, for like service, provided that the salaries of all officers shall be approved in writing by the governor."

I am of the opinion that, in the section just quoted, may be found ample authority for providing said institution with the services of employes who may perform most of the duties of field officers as prescribed in said sections 2212 and 2213 aforesaid. I mean by this that said employes may be charged with the same duties as those imposed upon field officers, but would, of course, be without any of the authority which said statutes confer upon said officers. Said section 1842, aforesaid, delegates to your board in the first instance the power to determine, after conference with the managing officer of said institution, the number of officers and employes to be appointed therein and also their salaries and wages. The authority to so determine the number of officers necessarily includes the right of your board to consider and determine the necessity of the services to be rendered said institution by the officers and employes so considered. If, therefore, in your judgment, such services as those rendered by field officers are necessary to the institution in the proper and efficient administration of its affairs and in the enforcement of laws and regulations in respect thereto, the right primarily rests in your board to designate the number of persons who, as employes of said institution, may perform said services and to fix their salaries. When this is done, then, under the provisions of said section 2148-4 aforesaid, the superintendent of said institution is authorized to select and appoint said employes.

In answer, therefore, to your inquiry, I must advise that the Ohio board of administration, under the provisions of section 1842 G. C. supra, may determine whether it is necessary for the Ohio Reformatory for Women to have such services as correspond to those imposed by law upon field officers and parole officers of other institutions. If said board determines that such services are necessary to the proper and efficient administration of the affairs of said institution, then it may designate the number of persons who may be employed to perform said services and fix their salaries, and thereupon the superintendent of said institution may select and appoint in the manner provided by law the number of persons so designated by said board.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1917.

PUBLIC UTILITIES COMMISSION—ORDERS OF SAID COMMISSION ISSUED UNDER AUTHORITY OF SECTION 614-60 G. C. ARE NOT REQUIRED TO BE FILED WITH SECRETARY OF STATE—PURCHASER, HOME TELEPHONE COMPANY OF IRONTON—PROPERTY SOLD, CENTRAL UNION TELEPHONE COMPANY EXCHANGE AT IRONTON.

The orders of the public utilities commission of Ohio issued under authority of section 614-60 G. C. authorizing the purchase by The Home Telephone Company from The Central Union Telephone Company of Ironton exchange, and also fixing and determining rates, tolls, charges and rentals for service in said exchange are not required by law to be led with the secretary of state.

COLUMBUS, OHIO, September 12, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of September 6, 1916, in which you request my opinion as follows:

> "We are enclosing copy of orders of the public utilities commission of Ohio, relative to The Central Union Telephone Company and The Home Telephone Company.
>
> "The aforesaid instruments were submitted to this department for filing under section 614-61 of the General Code.
>
> "We kindly request an opinion on the question as to whether the secretary of state has the authority to file said instruments under the aforesaid section.
>
> "If your opinion is in the affirmative, under what index should the filing thereof be recorded, and also what would be the proper fee for so filing?"

The enclosures in your letter consist of certain orders and supplemental orders of the public utilities commission of Ohio:

> "In the matter of the joint application of The Home Telephone Company of Ironton, county of Lawrence, Ohio, and of The Central Union Telephone Company for consent and approval of the commission for the purchase of certain property of The Central Union Telephone Company by The Home Telephone Company, and for a connecting arrangement for an exchange of service between the applicants."

By virtue of these orders The Central Union Telephone Company is authorized to sell its property within the exchange area of Ironton, Ohio, to The Home Telephone Company, and an agreement for the physical connection of the two systems at Ironton for the interchange of service is approved. In these orders, also, the public utilities commission has ascertained and determined the valuation of the property within said exchange territory authorized to be sold upon which rates, tolls, charges and rentals are based, and also has fixed and determined such rates, tolls, charges and rentals so to be charged.

Section 614-60 of the General Code under which the sale of the Ironton exchange by The Central Union Telephone Company to The Home Telephone Company is authorized, is as follows:

> "Section 614-60. With the consent and approval of the commission, but not otherwise:
>
> "(a) Any two or more public utilities, furnishing a like service or

product and doing business in the same municipality or locality within this state, or any two or more public utilities whose lines intersect or parallel each other within this state, may enter into contracts with each other that will enable such public utilities to operate their lines or plants in connection with each other.

"(b) Any public utility may purchase, or lease the property, plant or business of any other such public utility.

"(c) Any such public utility may sell or lease its property or business to any other such public utility.

"(d) Any such public utility may purchase the stock of any other such public utility.

"The proceedings for obtaining the consent and approval of the commission for such authority, shall be as follows:

"There shall be filed with the commission a petition, joint or otherwise, as the case may be, signed and verified by the president and secretary of the respective companies, clearly setting forth the object and purposes desired, stating whether or not it is for the purchase, sale, lease or making of contracts or for any other purpose in this section provided and also the terms and conditions of the same. The commission shall, upon the filing of such petition, if it deem the same necessary, fix a time and place for the hearing thereof. If, after such hearing, or in case no hearing is required, the commission is satisfied that the prayer of such petition should be granted and the public will thereby be furnished adequate service for a reasonable and just rate, rental, toll, or charge therefor, it shall make such order in the premises as it may deem proper and the circumstances require, and thereupon it shall be lawful to do the things provided for in such order."

The above quoted section contains no requirement that any order of the public utilities commission issued under its provisions shall be filed with the secretary of state. Under section 614-61 of the General Code, which is a part of the same act, in which section 614-60 above quoted is found providing for the consolidation of certain defined telephone companies, the order of the public utilities commission authorizing such consolidation before going into effect must be filed in the office of the secretary of state, and I am informed that it is because of this provision that the orders of the public utilities commission in the present matter are presented to you for filing.

There is reason why the order of the public utilities commission issued under section 614-61 should be filed in your office, while no such requirement is made as to orders issued under section 614-60. The latter section confers authority for and prescribes the method and procedure whereby one public utility company may enter into contracts with another such company furnishing a like service to operate the plant or lines in connection with each other, or whereby one public utility company may purchase, sell or lease property, or purchase the capital stock of any other such company.

Section 614-61 of the General Code on the other hand authorizes and provides machinery for the consolidation of two or more telephone companies, which means a merging of their corporate management.

I therefore advise you that the law does not require the filing in your office of the orders of the public utilities commission enclosed in your letter.

The answer to your first question removes the reason for answering your second and third questions.

I am enclosing herewith the orders submitted to me.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1918.

MOTHERS' PENSION ACT—CONSTRUCTION OF STATUTE AS TO "LEGAL RESIDENCE"—SUFFICIENT IF MOTHER AND CHILDREN RESIDE FOR THREE YEARS IN ONE COUNTY OF THIS STATE IMMEDIATELY PRIOR TO MONTH'S RESIDENCE IN ANOTHER COUNTY OF THIS STATE.

The residence of a mother and her children for three years in one county of this state immediately prior to a residence of one month in another county of this state meets the requirement of section 1683-2 *G. C.,* 103 *O. L.* 877, *as to the mother and children having a legal residence in any county for two years, and if in all other respects qualified, the mother may be granted an allowance under said section in the latter county.*

COLUMBUS, OHIO, September 13, 1916.

HON. W. S. SPENCER, *Probate Judge, Marion, Ohio.*

DEAR SIR:—Yours under date of September 8, 1916, is as follows:

> "I am enclosing you copy of application of Salvina Miku for mother's pension and ask for opinion from your department as to the legality of payment of pension on said application, in view of that part of *section* 1683-2 which reads *'and such mothers and children have been legal residents in any county of the state for two years.'*
>
> "I find that the judges differ in their opinions upon this particular part of the law, some holding that the mother and children must have been legal residents of their respective counties for two years before they are eligible to draw the mothers' pension.
>
> "Kindly advise me the meaning of the above quoted part of section 1683-2 and oblige."

With your inquiry you submit a copy of the application of M. for a mother's pension, in which it is stated that the applicant is the mother of four children not entitled to receive an age and schooling certificate and that the applicant "became a resident of Marion county August 1, 1916," and that "she and her said children have continued to reside therein since that time, prior to August 1, 1916, residing three years in Belmont county, Ohio."

Section 1683-2 G. C., 103 O. L. 877, to which you refer in your inquiry, provides as follows:

> "For the partial support of women whose husbands are dead, or become permanently disabled for work by reasons of physical or mental infirmity, or whose husbands are prisoners or whose husbands have deserted, and such desertion has continued for a period of three years, when such women are poor, and are the mothers of children not entitled to receive an age and schooling certificate, and such mothers and children have been legal residents in any county of the state for two years, the juvenile court may make an allowance to each of such women, as follows: Not to exceed fifteen dollars a month, when she has but one child not entitled to an age and schooling certificate, and if she has more than one child not entitled to an age and schooling certificate, it shall not exceed fifteen dollars a month for the first child and seven dollars a month for each of the other children not entitled to an age and schooling certificate. The order making such allowance shall not be effective for a longer period than six months, but upon the expiration of such

period, said court may from time to time, extend such allowance for a period of six months, or less. Such homes shall be visited from time to time by a probation officer, agent of an associated charities organization, a humane society, or such other agents as the court may direct, provided that the person who actually makes such visits shall be thoroughly trained in charitable relief work, and the report or reports of such visiting agent shall be considered by the court in making such order."

In construing the above quoted section, my predecessor, Hon. Timothy S. Hogan, held in an opinion under date of June 29, 1914, addressed to the bureau of inspection and supervision of public offices, found at page 921 of the Report of the Attorney-General for the year 1914, that:

"Under the provisions of section 1683-2 General Code, a mother is not required to have resided two years in a county before applying in that county for a mothers' pension, but residence for two years on the part of the mother and children in any county in the state, whether that county be the county in which the two years' residence is established or not, entitles the mother to an allowance within a county of the state. Legal residence is not to be computed or ascertained by adding together periods of residence less than two years in different counties of the state. The mother and children must have resided legally for two years in some one county of the state."

In an opinion of this department under date of December 13, 1915, addressed to Hon. George M. Hoke, probate judge of Seneca county, found at page 2368 of the Opinions of the Attorney-General for the year 1915, it was held:

"A mother of dependent children returning to Seneca county, Ohio, where she formerly resided for the greater part of her life, after an absence of several years, in a sister state, is eligible to file application for mother's pension under the provisions of section 1683-2 G. C., and under the facts presented an award of such pension by the juvenile court judge would not be regarded as an abuse of discretion."

In consideration of the foregoing opinions, it follows that if the applicant and her children resided three years in Belmont county of this state, prior to August 1, 1916, as stated in the application, such residence in Belmont county, together with that in Marion county, would bring the applicant within the requirements of section 1683-2 G. C. supra, in respect to residence.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1919.

INDUSTRIAL COMMISSION—AUTHORITY UNDER BUILDING CODE TO ISSUE GENERAL ORDER FIXING REQUIREMENTS FOR HEATING PUBLIC BUILDINGS.

The industrial commission of Ohio is without authority to include in any general order fixing the requirements for the heating of theaters, assembly halls and school buildings, any system of heating not included within the provisions of sections 12600-31 *and* 12600-64 *G. C., but such commission with the concurrence of the proper municipal authorities may permit the use of any system of heating in said buildings when said system meets the requirements of section* 12600-277 *G. C.*

An order of said commission limiting the use of standard ventilating stoves to rooms seating less than one hundred persons in buildings of one story without basement is in conflict with the provisions of section 12600-64 *G. C., which said section contains no such limitation.*

COLUMBUS, OHIO, September 13, 1916.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have the following letter, under date of August 30, 1916, from your secretary, submitting certain inquiries:

> "I enclose herewith a copy of the minutes of the industrial commission of Ohio as of August 17, 1916, relative to the requirements for heating public buildings.
>
> "On the second and third pages of this copy, you will notice the 'Revised Requirements for Heating Public Buildings,' which were adopted by the industrial commission on the aforesaid date. Since some objection has been raised, as shown by the record submitted herewith, to the action of the commission in adopting these revised requirements, you are respectfully requested to render an opinion to this commission as to whether or not it acted within the scope of its legal rights when it adopted the revised requirements set forth in the minutes.
>
> "Inasmuch as further hearing in this matter has been continued until September 15, 1916, at two o'clock P. M., the commission is very anxious to receive your opinion on this matter before the date set for the hearing."

There is also attached to your letter certain copies of endorsements made by those advocating the adoption of the revised requirements aforesaid, and also a copy of your minutes of the date of August 29, 1916, wherein it appears that certain protests were made against the adoption of said revised requirements which resulted in your commission rescinding its former action, as shown by the minutes of August 17, 1916, whereby said revised requirements were adopted, and continuing the matter of their adoption until September 15th. It further appears from the foregoing records that the protests aforesaid were made upon the ground that your commission was without authority to adopt said revised requirements and that the same were in contravention of various sections of the building code of this state in that said revised requirements provide for a plan of system of heating not recognized or named in said sections, said plan or system being designated in your revised requirements aforesaid as the "Direct-indirect Steam or Hot Water System, Mechanical or Gravity."

Referring now to the statutory provisions as found in the building code in respect to the subject under consideration, it must be observed that titles 1 and 3 of said code

were the only titles under the classification made in section 12600-1 G. C., which were enacted by the legislature into law. This section provides:

> "Under part two which follows, will be found under their respective titles, the various classes of buildings covered by this code together with the special requirements for their respective design, construction and equipment.
>
> "The classification of the various buildings will be found under the following titles, viz.:
>
> "Title 1. Theaters and assembly halls.
> "Title 2. Churches.
> "Title 3. School buildings.
> "Title 4. Asylums, hospitals and homes.
> "Title 5. Hotels, lodging houses, apartments and tenement houses.
> "Title 6. Club and lodge buildings.
> "Title 7. Workshops, factories and mercantile establishments."

Title 1 as aforesaid includes theaters and assembly halls. Title 3 includes school buildings. The buildings included in the terms "theaters and assembly halls" are defined in section 12600-2 G. C., and the buildings included in "school buildings" are defined in section 12600-44 G. C. Neither of the two last named sections include hospitals or churches and as Title 2 and Title 4, above noted, specifically refer to churches and hospitals it is apparent that the statutory provisions hereinafter referred to as applying to theaters, assembly halls and school buildings may not apply to churches and hospitals, and as to the latter buildings, which are named in your revised requirements, there being no statutory provisions covering the matter of their heating, it follows therefore that your commission as to hospitals and churches may not adopt any regulations and requirements except such as are calculated to prevent fire or other casualty. Lodge rooms are also named in your revised requirements and it appears also that lodge buildings are specified in Title 6 aforesaid, but in the buildings defined in section 12600-2 supra, under the head of assembly halls, there is specified "halls used as lodge rooms" which in my judgment is sufficient to bring lodge rooms within the provisions of the law applying to theaters and assembly halls.

Coming now to consider the direct question whether the revised requirements so as aforesaid adopted by your commission conflict with any statutory provisions of the building code, we find that by section 12600-31 G. C., which applies to theaters and assembly halls, it is provided, among other things:

> "A heating system shall be installed which will uniformly heat all parts of the building to a temperature of sixty-five degrees in zero weather. * * *
>
> "The system to be installed where a change of air is required shall be either a gravity or mechanical furnace system, gravity indirect steam or hot water, or a mechanical indirect steam or hot water system."

The provisions of the building code in respect to the heating of school buildings are found in section 12600-64 G. C., which provides in part as follows:

> "A heating system shall be installed which will uniformly heat all corridors, hallways, play rooms, toilet rooms, recreation rooms, assembly rooms, gymnasiums and manual training rooms to a uniform temperature of 65 degrees in zero weather, and will uniformly heat all other parts of the building to 70 degrees in zero weather. * * *
>
> "The heating system to be installed where a change of air is required shall be either standard ventilating stoves, gravity or mechanical furnaces,

gravity indirect steam or hot water, or a mechanical indirect steam or hot water system."

It is unnecessary, and it would be impossible for me to discuss in detail the various systems of heating specified in the two foregoing sections of the building code. It is contended by those objecting to the adoption of the direct-indirect system aforesaid, that it is not included among the systems specified in said statutory provisions; while upon the other hand it is claimed by its advocates that it is in fact included in said statutory provisions, but not so designated therein. This controversy presents an issue of fact only, which of course is properly within your exclusive province to determine. If you decide that said system is not included in the systems named in said foregoing statutes, then we have the question of law as to whether said statutory provisions are mandatory or merely directory. I am of the opinion that they must be held to be mandatory, not only by reason of the language and expression of their enactment, but also because any other interpretation would be inconsistent with the purpose and policy of the building code and with its provisions which impose a penalty for any violation of any of its requirements, said penal provisions being found in sections 12600-279 and 12600-280 G. C., as well as in the provisions of sections 12600-274, 12600-275 G. C.

In view of this interpretation of the law it follows that your commission was and is without authority in issuing any general order or requirements for the heating of theaters, assembly halls and school buildings, to include therein any system not named in the sections aforesaid. This, however, does not mean that any system other than those named in said section may not be adopted and used in theaters, assembly halls and school buildings, for it is provided in section 12600-277 that:

"Nothing herein contained shall be construed to limit the council of municipalities from making further and additional regulations not in conflict with any of the provisions in this act contained, nor shall the provisions of this act be construed to modify or repeal any portions of any building code adopted by a municipal corporation and now in force which are not in direct conflict with the provisions of this act. Where the use of another fixture, device or construction is desired at variance with what is described in this statute, plans, specifications and details shall be furnished to the proper state and municipal authorities mentioned in section 1 (G. C., section 12600-281) for examination and approval, and if required actual tests shall be made to the complete satisfaction of said state and municipal authorities that the fixture, device or construction proposed answers to all intent and purposes the fixture, device or construction hereafter described in this statute. Instead of actual tests satisfactory evidence of such tests may be presented for approval with full particulars of the results and containing the names of witnesses of said tests."

Under the authority of this section, therefore, your commission, with the concurrence of the proper municipal authorities, may permit the use of any heating system which answers the requirements of the statute as completely as the systems named therein when this fact has been shown as required by said section.

Attention is further directed to the fact that by the revised requirements so as aforesaid adopted by your commission, the use of standard ventilating stoves is limited to rooms seating less than one hundred persons in buildings of one story without basement. No such limitation as this appears in section 12600-64 supra, which is the only section which permits of the use of ventilating stoves, and such limitation in your revised requirements, in so far as it may apply to school buildings, is not warranted by law.

Some criticism is made of the omission in said revised requirements of the provision in both sections in respect to the heating of theaters, assembly halls and school houses, that a system shall be installed which will uniformly heat to a certain temperature of a certain degree in zero weather. While these provisions might well have been included in your revised requirements, a failure so to do can not in anywise modify or repeal the provisions of the law in this matter, and any and every system placed in the buildings named must meet the standard fixed in this respect by the aforesaid sections of the code regulating the heating of said buildings.

Answering your inquiry, therefore, specifically, I must advise that your commission was and is without authority to include in any general order, and in the revised requirements aforesaid, in so far as they may apply to theaters, assembly halls and school buildings, any heating system not included within the provisions of sections 12600-31 and 12600-64 G. C., provided, however, that any system which complies with the requirements of said section 12600-277 supra, may, with your permission, and the concurrence of the proper municipal authorities, be used in the buildings named.

I am further of the opinion that the limitation that standard ventilating stoves may be used for rooms seating less than one hundred persons in buildings of one story without basement is in conflict with the provisions of section 12600-64 supra, which said section contains no such limitation.

I desire to observe in conclusion that the foregoing observations are made without any knowledge or consideration of the respective merits of the system or systems involved in this controversy, and are confined entirely to the legal questions involved in your inquiry.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1920.

DENTAL COLLEGE GRADUATES—NO INSTITUTION OF LEARNING MAY LEGALLY CONFER DEGREES FOR ANY COURSE OF STUDY UNLESS SECTIONS 9922 AND 9923 G. C. ARE COMPLIED WITH—OHIO STATE DENTAL BOARD MAY DEFINE A "REPUTABLE DENTAL COLLEGE"—LACK OF AUTHORITY TO CONFER DEGREES NOT CONCLUSIVE AGAINST ANY SUCH COLLEGE.

No institution of learning may legally confer any degree pertaining or in respect to any course of study, unless as to that particular course of study such institution has complied with the provision of sections 9922 *and* 9923 *G. C. as amended* 104 *O. L.* 236,

Under the provisions of section 1321 *G. C. the Ohio state dental board is vested with the authority and right to define what shall be a reputable dental college, and want of legal authority to confer degrees is not conclusive against any college to be so defined by said board.*

COLUMBUS, OHIO, September 14, 1916.

Ohio State Dental Board, Columbus, Ohio.

GENTLEMEN:—I have received your letter of August 19, 1916, requesting my advice in the matter of issuing licenses to practice dentistry to certain graduates of two dental colleges in this state. Attached to your communication is a copy of a protest filed against issuing the licenses aforsaid, which protest is made upon the ground that neither of the colleges in question has complied with the provisions of sections 9922 and 9923 G. C.

It appears from subsequent correspondence had with you and the colleges in question that while said colleges have operated under independent names, in each case it is claimed that the college in question is affiliated with, and a department of, another well known institution of learning, which last named institution has conferred the proper degrees upon the graduates, whose right to receive a license to practice dentistry is now questioned.

It is provided in section 9922 G. C. that:

> "When a college, university, or other institution of learning, incorporated for the purpose of promoting education, religion, morality or the fine arts, has acquired real or personal property, of twenty-five thousand dollars in value, has filed in the office of the secretary of state a schedule of the kind and value of such property, verified by the oaths of its trustees, such trustees may appoint a president, professors, tutors, and any other necessary agents and officers, fix the compensation of each, and enact such by-laws consistent with the laws of this state and the United States, for the government of the institution and for conducting the affairs of the corporation, as they deem necessary. On the recommendation of the faculty, the trustees also may confer all the degrees and honors conferred by colleges and universities of the United States, and such others having reference to the course of study, and the accomplishments of the student, as they deem proper."

Section 9923 G. C. provides, as amended 104 O. L. 236, as follows:

> "But no college or university shall confer any degree until the president or board of trustees thereof has filed with the secretary of state a certificate issued by the superintendent of public instruction that the course of study of such institution has been filed in his office, and that the equipment as to faculty and other facilities for carrying out such course are proportioned to its property and the number of students in actual attendance so as to warrant the issuing of degrees by the trustees thereof."

It appears from the subsequent course above mentioned that neither of the dental colleges in question has complied with the provisions of said section 9922 G. C., and further, that neither of the institutions of learning, which conferred the degrees aforesaid, has filed with the secretary of state the certificate provided by section 9923 G. C., that the course of study in said dental colleges or any course of study in any dental college controlled by said institution of learning, has been filed in the office of the superintendent of public instruction.

In short, it appears that the course of study completed by the graduates named is not on file either in the office of the secretary of state or the superintendent of public instruction.

An examination of the legislative history of section 9922 G. C. shows that from its first enactment to the present time there has been a gradual increase in the property qualifications required by said section, and indicates that it was not only the purpose of the legislature to demand the proper educational facilities and training, but also to require such substantial financial resources as to reasonably guarantee the perpetuation of any institution of learning.

By the provisions of said section 9923 G. C., as amended as aforesaid, no institution possessing the necessary property requirement may confer any degree until there is filed with the secretary of state the certificate of the superintendent of public instruction, that the course of study in such institution has been filed in his office and that the equipment as to faculty and other facilities for carrying out such course are proportioned to its property and number of students in actual attendance.

What is meant by the phrase "course of study" as here used? Manifestly it means the course of study in respect to which a degree may be conferred. It certainly would not be claimed that an institution filing a course of study as a college of liberal arts would, upon the approval of such course and the further compliance with the statutes by said institution as to the certificate aforesaid, thereby be authorized to confer a degree having reference only to a college of medicine, of law or of dentistry.

If, therefore, any institution of learning, which claims to operate as one of its departments a college of dentistry, has not filed with the secretary of state a certificate from the superintendent of public instruction, setting forth the matters required by section 9923 G. C. in respect to a course of study in a college of dentistry, such institution is without legal authority to confer any degree which pertains or has reference to a course of study in a college of dentistry.

The fact, however, that the institutions from which the applicants in question have graduated are without authority to confer the proper degrees, or that the institutions which conferred the degrees have not complied with the provisions of section 9922 G. C. is not conclusive against the right of such applicants to receive or your right to grant a license to practice dentistry, because it is provided by section 1321 G. C.

> "Each person who desires to practice dentistry within this state shall file with the secretary of the state dental board a written application for a license and furnish satisfactory proof that he is at least twenty-one years of age, of good moral character, and present evidence satisfactory to the board that he is a graduate of a reputable dental college, as defined by the board. Such application must be upon the form prescribed by the board and verified by oath."

This section vests in your board the discretion and right to define which shall be regarded and held by you to be a reputable dental college. The fact that a dental college is authorized by law to confer degrees does not necessarily constitute it a reputable college, nor impose upon you the unqualified duty of so defining it. Nor does the fact that a dental college, by reason of not possessing the necessary property qualifications or for any other reason, not affecting its efficiency, is not authorized to confer degrees, necessarily deprive it of the right to be regarded by your board as a reputable college.

A question very similar to the one here presented was determined by the supreme court in the case of state ex rel Medical College v. Coleman et al., 64 O. S. 377. In that case the relator, a medical college, had complied with all of the provisions of law authorizing it to confer the necessary degrees, but the state board of medical registration and examination refused to recognize it as a medical institution in good standing. Thereupon a suit in mandamus was instituted to compel said board to issue certificates to practice medicine to the holders of diplomas from said college. The court, in commenting upon the right of the board to refuse to issue said certificates, made the following comments:

> "The statute does not define what shall constitute a medical institution in good standing. Its language is that 'if the board shall find the diploma to be genuine, and from a legally chartered medical institution in good standing as determined by the board,' etc., thus leaving the standing of the institution whose diploma is presented by an applicant, to be determined according to the best judgment of the board.
>
> "It is unnecessary to inquire here whether there may be cases in which the courts would undertake to correct or control the judgment of the board on this question. It is clear that the standing of a medical college within the

meaning of the statute is not to be determined alone from the course of study it has prescribed for graduation. The statute imports, at least, that the institution shall be one which has established a favorable reputation among members of the medical profession; and the board should not be required to recognize one that, from the brief period of its existence, or the novelty of its system of treatment has not yet acquired such reputation, but might, in the judgment of the board, be considered as still in an experimental state. The statute has undoubtedly left much in this respect to the sound discretion of the members of the board, who, in passing upon the various applications presented to them, it must be assumed, will act as their official position requires, fairly, impartially, and justly to all concerned."

I am therefore of the opinion that notwithstanding the fact that the students in question have graduated from institutions not authorized by law to confer degrees, or have received degrees from institutions not so authorized to confer them, yet your board in its discretion, if said students have successfully passed the examination, may grant them licenses to practice dentistry.

However, I respectfully suggest that your board at once take such steps as will prevent a recurrence of the present situation and establish and promulgate such rules, with respect to what shall be deemed by your board to constitute a reputable dental college, as will prevent your refusal in the future to issue licenses, working any injustice to worthy applicants.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1921.

CIVIL SERVICE—AUTHORITY TO DETERMINE WHETHER ANY POSITION NOT NAMED IN UNCLASSIFIED SERVICE SHOULD BY REASON OF ITS CONFIDENTIAL CHARACTER BE EXEMPT FROM THAT OF COMPETITIVE EXAMINATION RESTS WITH STATE CIVIL SERVICE COMMISSION.

The authority to determine whether any position not named in the unclassified service should, by reason of its confidential character, be exempted from the test of a competitive examination, rests primarily with the state civil service commission, and it is its duty in the first instance to decide any claim made upon this ground.

COLUMBUS, OHIO, September 14, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of September 11, 1916, as follows:

"The duties of the assistant statistician or inspector of the bureau of vital statistics in the office of the secretary of state is purely of a confidential nature, in this to wit:

" 'Where local registrars fail to properly make their reports according to law it is the duty of said inspector to call upon the delinquent registrar and have said registrar make a proper report, or in case of said registrar's

neglect or refusal to make a proper report to have said registrar removed and prosecuted according to law. Said inspector shall report his said action to the bureau of vital statistics and to the secretary of state.'

"In your opinion as to the inspectors of the state fire marshal's office my understanding is that you held that the inspectors in said department were exempt from civil service.

"Will you please give me your opinion as to whether or not the position of assistant statistician or inspector in the bureau of vital statistics of this department is or is not exempt from civil service under the law."

Your information in regard to my opinion as to assistant fire marshals is incorrect. I advised in that opinion that the duties imposed by statutory law upon such officers were of the character of a secret service, and that the positions held by them were confidential. I did not hold that they were thereby exempt from a competitive civil service examination, but expressly advised that the question as to whether or not it was practicable to ascertain their merit and fitness by competitive examination was a matter to be determined by the state civil service commission. It must be observed that in all cases where a position, which is not classified by statutory law as exempt from the requirement of an examination, is claimed to be exempt therefrom by reason of the confidential service it involves, the authority and power in the first instance to so determine such exemption rests entirely with the state civil service commission, and their right in this respect, until exercised, may not be invaded by any other authority.

The case presented in your inquiry involves a position not specifically exempted by statutory law from the test of examination. Therefore, if it is claimed to be exempt upon the ground of being a confidential one, the matter of deciding whether it is practicable to ascertain the merit and fitness of applicants therefor by competitive examination is one belonging in the first instance entirely to the administration of the state civil service commission, and presents solely a question of fact, for the reason that the duties involved in said position are not specifically prescribed by statute. The determination, therefore, of the facts in reference to the duties of the position in question, being one primarily for the disposition of said state civil service commission, it would not be proper for this department by any advice or opinion to anticipate any action of said commission unless such opinion was requested by the commission itself.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1922.

STATE CIVIL SERVICE COMMISSION—ANNUAL REPORTS—CONSTRUCTION OF SECTIONS 2264-1 G. C. AND 486-7 G. C., PARAGRAPH 7, 106 O. L.—ONLY ONE ANNUAL REPORT REQUIRED.

The report prescribed by section 2264-1 *G. C.,* 106 *O. L.* 508, *is the only annual report now required of the state civil service commission, but such report must contain the information required by the provisions of paragraph* 7 *of section* 486-7 *G. C.,* 106 *O. L.* 404.

COLUMBUS, OHIO, September 15, 1916.

State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—I have your letter of September 13, 1916, as follows:

"Section 486-7, paragraph 7, of the civil service law provides that the state civil service commission shall:

"'Make a report to the governor annually, on or before the first day of January of each year, showing its own actions, the rules and all exceptions thereto in force, and any recommendations for the more effectual accomplishment of the purposes of this act. The commission shall also furnish any special reports to the governor whenever the same are requested by him. Such reports shall be printed for public distribution, under the same regulations as are the reports of other state officers, boards or commissions.'

"Section 2264-1 of the laws of Ohio, 1915, page 509, provides that the state civil service commission along with other departments shall make:

"'A report of the transactions and proceedings of the department for such fiscal year, excepting however receipts and disbursements unless otherwise specifically required by law. Such report shall contain a summary of the official acts of such officer, board or corporation, and such suggestions and recommendations as may be proper. On the first day of August of each year one of said reports shall be filed with the governor of state, one with the secretary of state, and one shall be kept on file in the office of such officer, board, commission, institution, association or corporation.'

"The question has arisen as to whether under these two sections the civil service commission is required to make two annual reports, or whether the report required to be submitted by section 2264-1 is to take the place of the report required by section 486-7 of the civil service law."

The civil service act (106 O. L. 400) of which said paragraph 7 of section 486-7 G. C., quoted in your letter, is a part, was filed in the office of the secretary of state on the 1st day of June A. D. 1915. The act (106 O. L. 508) of which said section 2264-1 G. C., also quoted in your letter, is a part, was filed in the office of secretary of state on the 4th day of June, 1915.

It is further provided in section 2264-2 G. C., which said section is also a part of the act last named, that:

"Sec. 2264-2. Wherever in the statutes of this state annual reports are required to be made to the governor, or annual reports to the governor are referred to, the words 'to the governor' shall be held to mean annual reports in triplicate as provided in section 2264-1 and the special information required by any such statutes to be included in such annual report to the governor shall be included in such triplicate reports."

The provisions of this last section are decisive of your inquiry. Being a statute of later enactment than that of said section 486-7 supra, it must control and be considered supplementary to said last named section in the sense that it makes the report provided for by section 2264-1 aforesaid the report required by said section 486-7 aforesaid, and directs that matters specified in said section 486-7 shall be included in the reports prescribed by section 2264-1 supra.

Answering your question, therefore, specifically, I must advise that you are not required to make two annual reports, but that the report prescribed by section 2264-1 supra, is the only report now required by law of your commission, and that such report, as before observed, must contain all the information required by paragraph 7 of section 486-7 G. C. aforesaid.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1923.

ROADS AND HIGHWAYS—BARNESVILLE-HENDRYSBURG ROAD IN BELMONT COUNTY—UNDER FACTS SUBMITTED OHIO VALLEY CONTRACTING COMPANY MAY CONTINUE IMPROVEMENT WITHOUT ENTERING INTO NEW CONTRACT.

Under the facts relating to the improvement of the Barnesville-Hendrysburg road inter-county highway No. 101, in Belmont county, as submitted by the state highway commissioner, the state highway department may permit the receiver for the Ohio Valley Contracting Company to continue the work of improving said road without entering into any new contract or taking any new bond, pay the estimates on account of work performed and for which no payment has yet been made, and continue to make payments on estimates from time to time as the work progresses.

COLUMBUS, OHIO, September 16, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of September 12, 1916, relating to the improvement of the Barnesville-Hendrysburg road, inter-county highway No. 101, in Belmont county, which communication reads as follows:

"Permit me to direct your attention to a condition confronting us in the improvement of section 'M' of the Barnesville-Hendrysburg road, I. C. H. No. 101, in Belmont county, Ohio.

"This department has in its files a certified copy of a final resolution by the board of county commissioners of Belmont county, appropriating $32,000.00 toward the expense of improving 2.56 miles of inter-county highway No. 101 north of the north corporation line of the village of Barnesville. This final resolution contemplated the use by the state of $21,000.00 in inter-county highway funds. Inter-county highway No. 101 is also known as Main Market road No. XXII and in order to furnish sufficient funds for the completion of the improvement, and also to prevent the commingling of inter-county highway and main market road funds, this department set aside from the main market road fund $11,000.00 for the improvement of the above mentioned road.

"After notice by publication, bids were received and two contracts entered into with The Ohio Valley Contracting Company of Cincinnati, Ohio, one in the sum of $8,999.00, covering the grading and building roadbed; main market road funds were to be used in making payments on this contract. The other contract was in the sum of $46,898.00 and covered the construction of bridges and culverts and paving the roadway, and inter-county highway funds were to be used by the state in paying its proportion of the cost of this contract.

"On both these contracts the name of the Illinois Surety Company appears as surety by C. H. Bancroft, attorney-in-fact. Mr. Bancroft presented to this department a power of attorney from the Illinois Surety Company.

"The Ohio Valley Contracting Company failed to make the proper progress on these contracts and we received this year many protests from citizens of Belmont county, and the county officials, requesting us to take over the work and we determined early this summer to complete the work in some manner other than by the original contract. On June 16th, however, Mr. L. G. Jennings was appointed receiver in the common pleas court of Hamilton county. I am quoting herewith for your information the body of the entry appointing him receiver, a certified copy of which is in our files:

" 'Upon motion of the plaintiff, and the court being fully advised in the premises, L. G. Jennings is hereby appointed receiver of said The Ohio Valley Contracting Company. Said receiver is hereby ordered to give a bond to the satisfaction of the clerk for the faithful discharge of his duties as receiver in the sum of $20,000.00. Said receiver is hereby authorized and directed to continue the business of said company, to fulfill the said contracts and to employ labor and purchase materials so that said work may be continued and completed.'

"The receiver, however, failed to proceed with the work as we had desired and on August 4, 1916, we notified the receiver that this department would enter upon and complete the work under force account. Copies of our letters of August 2nd to Mr. C. H. Bancroft of the Illinois Surety Co. and August 4th to Mr. L. G. Jennings, receiver, of the Ohio Valley Contracting Company are attached.

"On the third day of August this department entered into an agreement with The Adams Bros. Contracting Co. of Zanesville, Ohio, under which agreement the contracting company agreed to furnish certain equipment and act as agent for this department in the employment of all necessary labor and the purchase of all necessary materials. In consideration of the equipment furnished and services rendered, this department agreed to pay 12 per cent. of the amount paid by the state for labor, etc., employed by the above named contracting company for the state. The state agreed to honor all payrolls when presented, and bills for material.

"Immediately upon receipt of our notification, the receiver of The Ohio Valley Contracting Co. placed a very substantial force upon the work and commenced to prosecute the work with extreme vigor. The Adams Bros. Contracting Co. moved their equipment on the site of the improvement but did no work upon the road. The work which the receiver was doing without authority progressed very rapidly and he made representation to this department that if restored to the work as of right, his progress would be continuous and rapid. We advised him verbally that if he could adjust the matter with The Adams Bros. Contracting Co., we would agree to permit him to proceed with the work. Shortly thereafter and on the 24th day of August, the Adams Bros. Contracting Company executed a release to the state from all claims arising under our agreement of August 3rd.

"Subsequently, on the 5th day of September, 1916, Mr. Jennings resigned as receiver and the court appointed Mr. Frank Farley receiver. The body of this entry, a certified copy of which is in our files, reads as follows:

" 'This day this cause came on to be heard, and the court having received the resignation of Mr. L. G. Jennings, as receiver, does hereby accept same.

" 'IT IS HEREBY ORDERED that Frank Farley be and he hereby is appointed receiver of The Ohio Valley Contracting Company, to succeed said L. G. Jennings; said receiver is ordered to give a bond to the satisfaction of the clerk of this court for the faithful discharge of his duties as rereceiver, in the sum of $20,000.00.'

"And said Frank Farley having appeared in open court, accepted said appointment, and was duly sworn to faithfully discharge his duties as such receiver.

" 'Said receiver is hereby authorized and directed to continue the business of said company, fulfill the state contracts, employ labor and purchase materials, so that the road building contracts which said company has, may be continued and completed, to receive and receipt for any and all estimates due or to become due from the state of Ohio, or any of the counties where

roads are being built by said company, and to do any and all things necessary or incident to the above.'

"On April 19, 1916, a receiver was appointed for the Illinois Surety Company, surety on the above contracts, so that on August 23d we wrote Mr. James S. Hopkins, the receiver, asking him to say whether or not he would regard our original contract with The Ohio Valley Contracting Company as continuing obligations upon the surety if we restored the receiver to the work. I quote from his answer:

" 'Replying to your letter of August 23d and your telegram of this date, I beg to advise that the Illinois Surety Company was enjoined from doing further business on April 19, 1916, at which time I was appointed receiver. My attorneys advise me that all liability on the part of the Illinois Surety Company ceased and terminated as to future liability from that date and I have no authority whatsoever to consent to the release of estimates.'

"This department has not made any payments for work done on the above road subsequent to August 3d.

"I am desirous of permitting the receiver of the Ohio Valley Contracting Company to proceed to complete the improvement but wish proper legal protection in so doing.

"I, therefore, respectfully request an opinion from you as to what steps are necessary to safeguard the interest of the state in paying for the work done subsequent to August 3d and in entering into arrangements with the receiver for the completion of the improvement."

Your letter to Mr. C. H. Bancroft, agent for the Illinois Surety Company, under date of Auagust 2, 1916, reads as follows:

"On account of the slow and unsatisfactory progress being made on section 'M' of the Barnesville-Hendrysburg road, I. C. H. No. 101, Pet. No. 1191, Belmont county, the Ohio Valley Contracting Company will be relieved of this contract and the work will be completed by this department. The contract was let on July 23d, 1915."

Your letter to the receiver for the Ohio Valley Contracting Company, under date of August 4, 1916, reads as follows:

"You are hereby notified that the Ohio Valley Contracting Company is relieved of the contract covering section 'M,' I. C. H. No. 101, Barnesville-Hendrysburg road, in Belmont county, and that this department will enter upon and complete the work under force account.

"Our men will be upon the work probably not later than August 7th or 8th.

"You have probably been advised of this action by your superintendent, Mr. Farley, who received notice to this effect under date of July 27th."

The situation with reference to this road improvement may be briefly stated as follows:

Your department entered into two contracts with the Ohio Valley Contracting Company for the construction of this road. Thereafter the Surety Company, signing the bonds of the Ohio Valley Contracting Company, decided to wind up its affairs and a receiver was appointed to take charge of its business. Subsequent to this action on the part of the surety company a receiver was appointed to take charge of the business of the contractor. After the appointment of this receiver, your department sought to take over the work and complete the same by force account and no-

tified the receiver for the contractor and the agent, or former agent, of the surety company that you were taking this action. You thereupon entered into an agreement with the Adams Bros. Contracting Company to furnish the necessary equipment, take charge of the work on behalf of the state and complete the same by force account, and this company moved its equipment on to the road but did no work thereon. The receiver for the original contractor disregarded your notice to the extent of continuing the work and immediately thereon such a force as to indicate that if allowed to continue he would complete the road promptly and satisfactorily. The receiver also negotiated with the Adams Bros. Contracting Company, and, as I understand the situation, secured the withdrawal of this company by paying the company a substantial sum for materials delivered on the work and for its labor in moving its equipment. In any event, the Adams Bros. Contracting Company has withdrawn from the work and has relinquished all claims for compensation under its contract and has waived its right to proceed with the work, and I understand that your department has agreed to this action on its part. As a matter of fact, the receiver for the original contractor has never surrendered possession of the work and, since you took your action looking toward the completion of the work by force account, the second receiver has been vigorously prosecuting the work of construction, has done a considerable amount of work and if present conditions continue will complete the work within a reasonable time and in a satisfactory manner.

The original contracts for this work were let on July 23, 1915, prior to the taking effect of the Cass highway law. The section of the General Code then in force and applicable to a situation where a contractor was not carrying forward his work with reasonable progress was section 1203-1 G. C., 103 O. L. 456, which section reads as follows:

> Sec. 1203-1. If the contractor has not commenced or carried forward with reasonable progress or is improperly performing or has abandoned, or fails or refuses to complete a contract under the provisions of this chapter, the state highway commissioner shall have full power and authority to enter upon and construct, either by contract, force account or in such manner as he may deem for the best interests of the public, paying the full cost and expense thereof from any moneys that may be due or become due such contractor, and in case there is not sufficient moneys due the contractor to pay for such work, the highway commissioner shall require the contractor or his bondsman to pay for it. It is the duty of the attorney-general or any prosecuting attorney of the county in which said highway is situated, to collect the same from the contractor and his bondsman."

This section was repealed by the Cass highway law, 106 O. L., 574, but the above quoted provision was preserved in substantially the same form in section 202 of that act, section 1209 G. C., 106 O. L. 635, which section reads as follows:

> "If, in the opinion of the state highway commissioner, the contractor has not commenced his work within a reasonable time, or does not carry the same forward with reasonable progress, or is improperly performing his work, or has abandoned, or fails or refuses to complete a contract entered into under the provisions of this chapter, the state highway commissioner shall have full power and authority to enter upon and construct said improvement either by contract, force account or in such manner as he may deem for the best interest of the public, paying the full costs and expense thereof from the balance of the contract price unpaid to said contractor, and in case there is not sufficient balance to pay for said work, the state highway commissioner shall require the contractor or the surety on his bond

to pay the cost of completing said work. It shall be the duty of the attorney-general or the prosecuting attorney of the county in which said improvement or some part thereof is situated, upon request of the state highway commissioner, to collect the same from the contractor and the surety on his bond."

Under either of the above quoted sections the state highway commissioner, in a case where a contractor is not carrying forward his work with reasonable progress, is authorized to enter upon and complete the work, either by contract, force account, or in such manner as the state highway commissioner may deem for the best interest of the public. The state highway commissioner is by these provisions given a wide discretion in the matter, being authorized to proceed not only by contract or force account, as he may deem best, but also "in such manner as he may deem for the best interest of the public." In the case now under consideration, while you have sought to remove the representative of the original contractor from the work, your action in the premises has not served as yet to accomplish that result, and no third person has any rights which would be affected by allowing the receiver to continue the work, the Adams Bros. Contracting Company having for a consideration paid by the receiver relinquished all its rights under its agreement with your department, and you having consented to this action on its part. The original contracts are still in full force and effect, and in view of the wide discretion vested in you by the statute it is clear that the surety of the original contractor would have no cause for complaint if such contractor be allowed to complete the work of construction. The fact that the company signing the bond of the original contractor is in process of liquidation does not affect the present matter, and is to be given consideration only to the extent of suggesting unusual caution in the allowance and payment of estimates to the end that the road may be completed for the amount in the fund available for its construction, and that there may thereby be avoided the necessity of proceeding against a surety company which is in process of liquidation, and may or may not be able to pay in full the just claims against it.

In view of the foregoing I advise you that, if in your judgment the receiver for the Ohio Valley Contracting Company is now carrying forward the work with reasonable progress, and performing the same in a proper manner, you may, without taking any additional bond, or entering into any further written agreement with him, notify him that at his request your action in taking the work away from him is rescinded, pay him estimates on account of work performed, and for which no payment has yet been made, and continue to make payments from time to time as the work progresses. It is not necessary to take any steps to safeguard the interests of the state other than to observe the precaution above suggested of exercising unusual care in the allowance and payment of estimates, in view of the possible insolvency of the surety company, and, as before stated, there will be no necessity for entering into any further contract with the receiver or taking any additional bond.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1924.

COUNTY BOARD OF REVISION—INCREASE OF PROPERTY VALUATION—NOTICE NECESSARY TO PROPERTY OWNERS—WHERE COUNTY AUDITOR NEGLECTED OR WAS UNABLE TO GIVE NOTICE IN TIME REQUIRED—TAX COMMISSION MAY EXTEND TIME FOR COMPLETION OF WORK OF COUNTY BOARD OF REVISION SO AS TO GIVE OPPORTUNITY TO FILE COMPLAINTS.

Where, due to the neglect or inability of the county auditor to give the notice required by the provisions of sections 5606, 5607 *and* 5608 *G. C.*, 106 *O. L.* 262, *to be given to owners of property, such notice was not in fact given, the time limit for the filing of complaints against valuations prescribed by section* 5609 *G. C.*, 106 *O. L. 259 does not apply, and in such case the state tax commission, acting under authority of section* 5593 *G. C.*, 106 *O. L.* 257, *may, in the exercise of its discretion, fix a time for the completion of the work of the county board of revision of such county beyond the expiration of the thirty day period prescribed by said section* 5609 *G. C., or having fixed said date for the completion of said work prior to September 6,* 1916, *the expiration of said thirty day period, said commission has the right to extend the time for such completion beyond said date and fix a time limit prior to said completion date for the filing of complaints with said board of revision sitting as a board of complaints.*

COLUMBUS, OHIO, September 16, 1916.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your letter of September 13th is as follows:

"The commission respectfully requests your written opinion upon the following questions:

"Has the tax commission, or the county auditor, or the board of revision power to extend the time of filing complaints against the valuations of real or personal property on the tax list for the current year beyond the period of thirty days from and after the first Monday of August as fixed by section 5609 of the General Code?

"If there is no power to extend the time for filing complaints what is the last day upon which complaints may be legally filed for the year 1916?

"In some of the counties of the state county auditors were unable to print and circulate the pamphlets required by section 5608 of the General Code until after the expiration of the thirty day period, above referred to, and, therefore, the taxpayers received no notice of any increase in the value of their real estate until that time had expired, and had no opportunity to present complaints.

"In connection with these questions the commission also calls your attention to the fact that section 5593 of the General Code provides that boards of revision shall convene at such times other than the second Monday in June and the first Monday in August, as the tax commission may order. If complaints cannot be filed after the expiration of thirty days from the first Monday of August, this provision for the convening of the board by the tax commission would seem to be of no use."

The provisions of the statutes pertinent to your inquiry are found in the following sections of the act of the general assembly known as the Parrett-Whittemore law (106 O. L. 246-272).

Section 40 of the act (section 5593 G. C.):

"County boards of revision shall hold sessions beginning on the second Monday of June and the first Monday of August, respectively, and convene at such other times as the tax commission of Ohio may order. Such boards may adjourn from day to day, and shall complete their work within such times as may be fixed by the tax commission of Ohio for the completion thereof."

Section 43 of the act (section 5596 G. C.):

"The county board of revision shall in all respects be governed by the laws respecting the valuation of real and personal property, and shall make no change of valuation except in accordance with such laws. The county board of revision may call persons before it and examine them under oath as to their own or other's property, moneys, credits and investments to be placed on the tax list and duplicate for taxation, or the value thereof. If a person notified to appear before the board refuses or neglects to appear at the time required, or appearing, refuses to be sworn or answer any question put to him by the board or by its order, the chairman of the board shall make complaint thereof, in writing, to the probate judge of the county, who shall proceed against such person in like manner as is provided for in the last subdivision of chapter three, title one, part second, of the General Code."

Section 44 of the act (section 5597 G. C.):

"It shall be the duty of the board of revision to hear complaints relating to the assessment of both real and personal property laid before it by the county auditor, and it shall investigate all such compliants and may increase or decrease any valuation or correct any assessment complained of, or it may order a re-assessment by the original assessing officer. At a hearing before the board the assessing officer and the county auditor may appear to defend such assessments."

Section 45 of the act (section 5598, G. C.):

"The county board of revision shall have power to investigate all assessments on the tax list with respect to the amount of property listed as well as with respect to the valuation at which the same is listed. The power of the board shall extend to all cases in which real or personal property has been assessed for taxation for the current year, but not to assessments, additions or corrections hereafter made by the tax commission of Ohio."

Section 46 of the act (section 5599 G. C.):

"The county board of revision shall not increase any valuation complained of, nor increase the listed amount of any taxable property complained of without giving reasonable notice to the person in whose name the property affected thereby is listed, and affording him an opportunity to be heard. Such notice shall be served in the manner prescribed herein, and shall describe the real or personal property the tax value of which is to be acted upon, by the description thereof as carried on the tax list of the current year, and shall state the name in which it is listed."

Section 47 of the act (section 5601 G. C.):

"The county board of revision shall not decrease any valuation complained of, nor reduce the listed amount of any taxable property complained of, unless the party affected thereby, or his agent, makes and files with the board a written application therefor, vertified by oath, showing the facts upon which it is claimed such decrease or reduction should be made, and not without affording the county auditor an opportunity to be heard thereon."

Section 48 of the act (section 5602 G. C.)

"The county board of revision shall certify its action to the county auditor, who shall correct the tax list and duplicate according to the deductions and additions ordered by the board in the manner provided by law for making corrections thereof. If the tax duplicate has been delivered to the county treasurer the county auditor shall certify such corrections to him, and he shall enter such corrections on his tax duplicate."

Section 52 of the act (section 5609 G. C.):

"Complaints against any valuation or assessment on the tax list for the current year may be filed with the county auditor before the meeting of the county board of revision on the first Monday of August or within thirty days thereafter if the board remains in session so long. Any taxpayer may file such complaint as to the valuation or assessment of his own or other's property, and the county commissioners, the prosecuting attorney, county treasurer or any board of township trustees, any board of education, mayor or council of any municipal corporation in the county shall have the right to file such complaint. The county auditor shall lay before the county board of revision all complaints filed with him."

Section 58 of the act (section 5606 G. C.):

"When the board of revision has completed its work of equalization, and has transmitted the statements and returns to him, the county auditor shall give notice, by advertisement in two newspapers of opposite politics, published in and of general circulation throughout the county, that the tax statements and returns for the current year have been revised and the valuations completed and are open for public inspection in his office, and that complaints against any valuation or assessment, except the valuations fixed and assessments made by the tax commission of Ohio, will be heard by the county board of revision, stating in the notice the time and place of the meeting of such board. Such advertisements shall be inserted in a conspicuous place in each such newspaper, and be published daily for ten days, unless there be no daily newspaper published in and of general circulation throughout such county, in which event such advertisement shall be so published once each week for two weeks. The county auditor shall, upon request, furnish to any person a certificate setting forth the assessment and valuation of any tract, lot or parcel of real estate, or any specific personal property, and mail the same, when requested to do so, upon receipt of sufficient postage."

Section 59 of the act (section 5607 G. C.)

"On or before the 15th day of July, annually, the county auditor shall

cause to be printed a list showing all changes made in the assessment of any tract, lot or parcel of real estate or improvement thereon, or minerals or mineral rights therein, and shall cause a copy of such list to be mailed to each owner whose assessment has been changed, if known, and if not, then to his agent, if known."

Section 60 of the act (section 5608 G. C.):

"On or before the first day of September, nineteen hundred and sixteen, and every fourth year thereafter, the county auditor shall cause to be printed separate lists showing the assessment of all real estate in each ward in municipal corporations divided into wards, and in each township and municipal corporation not divided into wards, in his county. Such lists shall be in such form and shall contain in detail such information as the tax commission of Ohio may prescribe. The county auditor shall cause a copy thereof to be mailed to each owner of real estate in the ward, township or municipal corporation, if known, and if not known, then to his agent, if known. In such years the county auditor shall not print and mail the lists provided for in the next preceding section."

Pursuant to the provisions of section 5593 G. C. supra, county boards of revision were required to begin their session as boards of complaints on the first Monday of August, 1916, and by the further provision of said section said boards are required to complete their work as such boards of complaints within such times as may be fixed by your commission for the completion thereof.

The authority of such boards to hear complaints, to call and examine witnesses and to increase or decrease any valuation of real or personal property complained of, is found in sections 5596 and 5597 of the General Code as above quoted, provided that notice is given in case of an increase in valuation as required by section 5599 G. C. and in the manner prescribed by sections 5606, 5607 and 5608 of the General Code as above set forth, and provided further that any decrease in valuation of property is made upon the written application under oath of the owner of such property or his agent, as required by section 5601 G. C. supra.

Section 5609 G. C., as above quoted, by its terms provides that complaints against any valuation or assessment of property may be filed with the county auditor (who by provision of section 5592 G. C. as amended 106 O. L. 433 is ex officio secretary of the board of revision) before the first Monday of August or "within thirty days thereafter if the board remains in session so long."

You first inquire whether, in view of this provision of section 5609 G. C. supra, there is any authority to extend the time of filing complaints against valuations of property beyond the period of time prescribed in said section.

It may be argued that said provision of said section 5609 G. C. is mandatory; that no authority is vested in your commission, the county auditor or the board of revision itself by provision of any statute now in force to extend the time of filing complaints beyond the period of time prescribed as aforesaid, and that any complaint filed after the expiration of said period of time may not therefore be considered by said board of revision, and if the provisions of said section be considered by themselves without reference to the provisions of the other statutes hereinbefore set forth and as prescribing a time limit of general application, much might be said in support of said argument.

In this connection your commission will remember that in opinion No. 1208 of this department rendered to you on January 28, 1916, the somewhat similar provision of the Warnes law was under consideration. Section 19 of that law (103 O. L. 792) as in force prior to January 1, 1916, the date when the Parrett-Whittemore law became effective, provided as follows:

"The district board of complaints shall begin its session on the first Monday of August annually, and may adjourn from day to day The board shall complete its work within such time as may be fixed for the completion thereof by the tax commission of Ohio.'

and section 24 of said law as then in force (103 O. L. 793) provided:

"Complaints against any valuation or assessment on the tax list for the current year may be filed with the county auditor before the meeting of the district board of complaints or thereafter during its session. Any tax payer may file such complaint as to the valuation or assessment of his own or other's property, and the county commissioners, the prosecuting attorney, county auditor, county treasurer or any board of township trustees, any board of education, mayor or council of any municipal corporation in the county shall have the right to file such a complaint."

It was observed in said opinion that under provision of section 19 of said law as above quoted the time within which the district board of complaints was required to complete its work was fixed by the tax commission and that under the above provision of section 24 of said law complaints against any valuation or assessment on the tax list for the current year had to be filed with the county auditor before the meeting of the district board of complaints or thereafter during its session. It was held in said opinion that the district board of complaints was neither required nor authorized to consider complaints against any valuation or assessment on the tax list for any year filed with the county auditor, as secretary of said board, after its adjournment in said year at the time fixed by the tax commission for the completion of its work for said year.

It will also be remembered that in opinion No. 1391 of the department rendered to your commission under date of March 17, 1916, section 31 of said Warnes law was under consideration and I held that the time within which an appeal from the decision of the district board of complaints could be taken to the tax commission was limited to the thirty day period therein prescribed and that your commission was without jurisdiction to consider complaints filed after the expiration of said period of time.

In considering this latter holding it must be observed, however, that the parties having the right to appeal were the district assessor on the one hand and any complainant on the other hand as provided in section 24 of said act as above set forth. Both of said parties were present at the hearing before the district board of complaints and had knowledge of just what the finding of said board of complaints was, so that neither could complain of not having had notice of such finding and of being unable on that account to file said appeal within said thirty day period. Said limitation of time prescribed by the legislature for the filing of said appeal was therefor reasonable and fair to all concerned and consistent with a diligent administration of the law governing the return of property for taxation.

As I view it the situation out of which the question under consideration arises is materially different from the one presented by your inquiry in answer to which opinion No. 1391 of the department was rendered.

As a condition precedent to the exercise by the county board of revision of its authority to increase any valuation of property complained of or to increase the listed amount of any taxable property complained of, section 5599 G. C. supra, requires that reasonable notice shall be given to the person in whose name the property affected thereby is listed and an opportunity afforded such person to be heard. The notice referred to is the notice by publication prescribed by section 5606 G. C., the mailing of a printed list of changes in the assessment of real estate to each owner whose assess-

ment has been changed, if known, and if not,. then to his agent if known, and in this year and every fourth year thereafter section 5608 G. C. requires the printing and mailing to each owner of real estate, of the lists containing the information prescribed in said section, the latter part of said section providing that:

> "In such years the county auditor shall not print and mail the lists provided for in the next preceding section."

Under the provision of the latter part of section 5606 G. C. supra, the county auditor is required to furnish to any person upon request "a certificate setting forth the assessment and valuation of any tract, lot or parcel of real estate or any specific personal property, and mail the same, when requested to do so, upon receipt of sufficient postage."

In view of the foregoing provisions relative to notice, and of your statment that in some of the counties of the state county auditors were unable to print and circulate the pamphlets required by section 5608 supra, until after the expiration of the thirty day period hereinbefore referred to and that on this account the taxpayers received no notice of the increase in the value of their real estate until that time had expired and had no opportunity to present complaints, to hold that complaints filed since the expiration of said thirty day period may not be considered by county boards of revision would, as I view it, be giving to said section 5609 G. C. a construction unreasonable and unfair to the property owner and contrary to the intention of the legislature in enacting the same.

It will readily be observed from what has already been said, that the opportunity afforded a property owner to file a complaint is by no means equal to that of a complainant to appeal to your commission under authority of section 5610 G. C. (106 O. L. 260) from the finding of the board of revision sitting as a board of complaints.

The fixing of the time for the completion of the work of the county boards of revision, sitting as boards of complaints at the August session, is within the discretion of your commission under provision of section 5593 G. C. supra, and must be determined by you in view of the amount of work to be done by each board in its respective county. The provision of the latter part of section 5602, G. C. supra, that "if the tax duplicate has been delivered to the county treasurer, the county auditor shall certify such corrections to him and he shall enter such corrections on his tax duplicate," makes it plain that the legislature contemplated the possibility of the August session of the board of revision being continued until after the tax duplicate has been delivered to the county treasurer.

The plain terms of section 5599 G. C. supra, require the giving of reasonable notice to the property owner and the offering to him of an opportunity to be heard. It is clear that in those cases where, due to the neglect or inability of the county auditor to give the notice required by the foregoing provisions of the statutes to be given to owners of property, such notice was not in fact given, the time limit prescribed by section 5609 G. C cannot be said to apply.

I am of the opinion therefore in answer to your first question that in such cases the tax commission, acting under authority of section 5593 G. C. supra, may in the exercise of its discretion fix a time for the completion of the work of the county board of revision beyond the expiration of the thirty day period prescribed by said section 5609 G. C., or having fixed said date for the completion of said work prior to September 6, 1916, the expiration of said thirty day period, said commission has the right to extend the time for such completion beyond said date and fix a time limit prior to said completion date for the filing of complaints with said board of revision sitting as a board of complaints.

Your second question has been answered in determining the answer to your first question.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1925.

ROADS AND HIGHWAYS—BONDS ISSUED UNDER AUTHORITY OF SECTION 3298-8 G. C.—THE FACT THAT SUCH BONDS ARE TO BE REDEEMED SOLELY OUT OF PROCEEDS OF SPECIAL ASSESSMENTS DOES NOT OBVIATE NECESSITY OF FIRST SUBMITTING QUESTION OF ISSUING SUCH BONDS TO ELECTORS OF TOWNSHIP.

Where bonds are issued under authority of section 3298-8 G. C., the fact that such bonds are to be redeemed solely out of the proceeds of special assessments does not obviate the necessity of first submitting the question of issuing such bonds to a vote of the qualified electors of the township.

COLUMBUS, OHIO, September 16, 1916.

HON. CHARLES T. STAHL, *Prosecuting Attorney, Wauseon, Ohio.*

DEAR SIR:—I acknowledge receipt of your request for an opinion under date of September 12, 1916, which request reads as follows:

"Fulton township, this county, is seeking to improve a road under authority of the Code, 3298-1 et al., upon petition, by abutting land owners (invoking 3298-15 G. C.), sixty per cent. of the cost to be paid by general taxation and forty per cent. by levy upon abutting real estate, payable in installments.

"It is purposed to issue bonds of the township to secure the deferred payments to be paid by future levies as above stated, and sixty per cent. (township portion) will be paid in cash.

"This office is asked, and we submit the question to you: Is it necessary to hold an election pursuant to section 3298-1 et al., of the Code before such bonds can issue.

"You will see that 'Rockel's Ohio Roads and Bridges,' 154, notes that the question is a doubtful one.

"It will be seen that the statute (3914-1 G. C.) requires pledging the full revenue of the township and the bonds are a 'general obligation.'

"So then, it would seem that the township is interested in the bond issue, though it occupies a quasi surety position.

"Indeed, independent of this consideration and aspect, it seems to me that the language (3298-9 G. C.) 'Before the bonds of the township are issued to provide funds for improving the roads thereof,' the question shall be submitted is so plain as to construe itself.

"These bonds, pledging the full credit of the township, being 'general obligations,' are unquestionably the 'bonds of the township', and they certainly 'are issued to provide funds for improving the roads.' The only distinction in the purpose of the two issues, i. e., the issue for the township's portion and the issue for the abutter's portion, is in the method of acquiring funds wherewith to liquidate at maturity, the one by general and the other

by special taxation, and whichever method is pursued the fact remains in either event the general taxpayer might suffer for the poor judgment of the trustees.

"I am, therefore, of the opinion, that an election must be held and carried to validate the bond issue in question.

"Insomuch as the proceedings are being held up pending your answer, I would ask for as early a reply as possible."

There may be some question as to the applicability of section 3914-1 G. C., 106 O. L. 495, in the case of bonds of the class referred to by you. The section in question reads as follows:

"Bonds issued in anticipation of the collection of special assessments shall be full, general obligations of the issuing municipal corporation, and for the payment of the principal and interest of the same, the full faith, credit and revenues of such municipal corporation shall be pledged. To provide for any deficiency in the payment or collection of said assessments as the same fall due, the council of the issuing municipal corporation shall, prior to the issuance of the bonds above mentioned, provide for the levy of a tax upon all the taxable property of said corporation."

While the term "municipal corporation" is often held to include townships, yet reference in the above quoted section to "the council" might be taken as indicating that the legislature, in the enactment of this section, intended to use the term "municipal corporation" in its more narrow signification. In the view that I take of the statutes relating to township road improvements, it will be unnecessary, however, to pass upon this question.

Rockel, in section 154 of his work on Ohio roads and bridges, makes the following observation as to the question submitted by you.

"If bonds are issued, and the same are to be redeemed by money raised by assessments, it is not clear that there must be a vote thereon before they can be issued. Perhaps to be safe there ought to be a vote, etc."

The statutory provisions to be considered in determining the question submitted by you are to be found in chapter III of the Cass highway law, relating to road construction and improvement by township trustees. The section authorizing the issuance of bonds, being section 67 of the act, section 3298-8 G. C., reads as follows:

"If the money raised by the levy aforesaid does not furnish sufficient funds for the construction and repair of the designated roads in such township, the trustees may issue and sell the bonds of said township to provide funds for the construction or reconstruction of such roads. Such bonds may be issued at such times and in such amounts as in the judgment of such trustees shall be necessary. The bonds shall bear interest at a rate not exceeding six per cent. per annum, payable semi-annually, and in denomination of not less than one hundred dollars and not more than one thousand dollars each, and shall mature in not more than ten years, as may be determined by such trustees. Such bonds shall be signed by the trustees, or a majority thereof, on behalf of the township, and attested by the township clerk. The interest thereon shall be evidenced by proper coupons attached to each bond, and such coupons shall be authenticated by the signature of the township clerk."

The section requiring the question of a bond issue to be submitted to a vote of the electors, being section 68 of the act, section 3298-9 G. C., reads as follows:

"Before the bonds of the township are issued to provide funds for improving the roads thereof, the question of issuing said bonds shall be first submitted to the qualified electors of the township at a general or special election therefor. The trustees shall provide by resolution for the submission of such question to the qualified electors of the township, and shall give notice by publication once each week for three consecutive weeks, in a newspaper of general circulation in said township, of the date of such election, and the purpose for which it is held. Said notice shall state the amount of the proposed bond issue."

The section relating to assessments, being section 73 of the act, section 3298-14 G. C., reads as follows:

"The township trustees may assess, not to exceed all or any part of the cost of improving said road against the lands, not more than one mile from either side or terminus of said improvement, or against the lands abutting upon said improvement, as the trustees may determine. Such assessments shall be made in proportion to the benefits resulting to the property included in the plan of assessment adopted by said trustees. The trustees shall cause the county highway superintendent to apportion against the lot and land owners benefited that part of the cost of said improvement as determined and ordered by the trustees. The trustees shall determine the number of installments in which such assessment shall be paid, and the time of payment thereof. The number and time of payment of said installments shall be so fixed as to meet the principal and interest on the bonds as the same become due. Before making such assessments the township trustees shall give notice by publication once each week for two successive weeks, in a newspaper of general circulation in the county, of the amount apportioned to each tract of land to be assessed. Such notice shall give the name of the owner in addition to a description of the land in each instance. The description by which said lands are designated upon the tax duplicate shall be sufficient for such notice. Said notice shall fix a date for hearing objections to said assessment, and the trustees after such hearing shall approve such assessments as modified by them, and they shall order them certified to the auditor to be placed upon the tax duplicate for collection as the same become due."

The section relating to petitions, being section 74 of the act, section 3298-15 G. C., is as follows:

"Under the provision of this section, the owners of real estate in any township may petition the township trustees, asking for the construction, reconstruction or improvement of any public road or part thereof, in said township. The petition shall state that the cost and expense of the proposed improvement, which shall not be less than fifty nor more than seventy-five per cent. of the total, shall be paid out of the proceeds of any levy or levies against the taxable property of the township in which the road is situated, and the balance of such cost and expenses shall be assessed and collected from the owners of the real estate within one mile or one-half mile on either side or terminus of the highway, as requested by the petitioners, in proportion to the benefits accruing to such real estate, as determined by said township trustees. The petition shall be signed by at least fifty per cent. of the

land or lot owners whose property lies as specified in said petition within one mile or one-half mile of the proposed improvement and who are to be assessed and taxed for such improvement as hereinafter provided. The petition shall be signed by the owners of real estate within the limits prescribed, whose property is benefited by such improvement, but it shall not be signed by resident land and lot owners whose only real estate within the territorial bounds of such road is located in a municipality, nor shall it be signed by the owners of life and leasehold estates, or minors not represented by legal guardians, or tenants in common of an undivided estate unless they are united in favor of the improvement. No person signing such petition shall be permitted to withdraw therefrom unless it shall be shown to the satisfaction of the township trustees that fraud was committed in obtaining his signature. When the petition is presented to the township trustees they shall place it on file and within sixty days after such presentation shall go upon the line of said proposed improvement. After viewing the same they shall determine whether or not the public convenience and welfare require that such improvement shall be made. When they have determined that any road shall be constructed, improved or repaired as requested in the petition submitted under the provisions of this section, the board of township trustees shall direct the county surveyor to make, subject to their approval, such survey, plats, profiles, cross-section, estimates and specifications as may be required and such improvement shall be made and paid for in accordance with the provisions of this act relating to the construction, improvement, maintenance and repair of highways by township trustees."

It will be noted that the provisions of section 3298-9 G. C. are general in their terms and there is nothing to indicate that the legislature intended that such section should apply only where bonds are to be redeemed out of the proceeds of a general tax levy and intended to exempt from the operation of the section bonds issued in anticipation of the collection of special assessments.

It is provided by section 3298-14 G. C. that the number and time of payment of the installments in which assessments are to be paid shall be so fixed as to meet the principal and interest on bonds as the same become due, indicating that the legislature had in mind only one scheme or method for the issuance of bonds and intended that the same should apply without regard to whether the bonds were to be redeemed out of the proceeds of a general tax, or out of the proceeds of a general tax and special assessments, or out of the proceeds of special assessments only.

In view of the general nature of the provisions requiring a bond issue under chapter III of the Cass highway law to be submitted to the qualified electors of the township, and in view of the fact that there is no provision whatever found in the act to indicate that the legislature did not intend that this provision should apply where the bonds were to be redeemed entirely out of the proceeds of special assessments, I am of opinion that your conclusion upon this question is correct and that it will be necessary to submit to the qualified electors of the township a bond issue of the character referred to by you and to secure a favorable vote thereon, in accordance with the provisions of section 3298-11 G. C., before such bonds may be lawfully issued.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1926.

EVAPORATED SKIMMED MILK—SALE PROHIBITED IN OHIO—"HEBE"—COMPOUND OF EVAPORATED SKIMMED MILK AND VEGETABLE FATS ACCORDING TO LABEL.

Under existing laws, evaporated skimmed milk can not be sold in the state of Ohio.

"HEBE" said to be a compound of evaporated skimmed milk and vegetable fat according to the label used on it is an article the sale of which is prohibited by the laws of Ohio.

Be it a compound or something else, its makeup is such that it can not be sold in the state under the label used or any other label.

COLUMBUS, OHIO, September 19, 1916.

The Board of Agriculture, Columbus, Ohio.

GENTLEMEN:—Your request for an opinion relative to the sale of "HEBE" in the state of Ohio is as follows:

> "I have felt for some time that evaporated milk sold under the label known as 'HEBE' does not comply to Ohio laws. It seems to me the label in itself is evidence of this when it states 'Evaporated Skimmed Milk.'
>
> "Section 12725 provides:
>
> " 'Condensed milk must be made from pure, clean, fresh, healthy, unadulterated milk from which the cream has not been removed.'
>
> "I will appreciate an early opinion as to whether the manufacturer will be permitted to sell these goods under this label."

Immediately upon receipt of your request investigation into the matter referred to was begun, but it having been learned from outside sources that the particular product known as "Hebe" had been approved and specifically permitted to be sold by the former commissioner of the dairy and food department, S. E. Strode, upon receiving this information from one of the attorneys who appeared before Mr. Strode in connection with the matter a request was made of your office that a search of your files be made in order that the previous action of the department might be thoroughly understood and taken note of. Following the request you found and transmitted to me the originals and copies of letters from your files which clearly show that the department under Mr. Strode specifically approved the sale of "Hebe" in the state of Ohio. Particular attention is directed to the letter of Mr. Hubert Fuller, attorney for the proprietors of "Hebe," under date of June 4, 1915, to Hon. S. E. Strode, state dairy and food commissioner, which letter is as follows:

> "CLEVELAND, OHIO, June 4, 1915.
>
> "HON. S. E. STRODE, *State Dairy and Food Commission, Columbus, Ohio.*
>
> "MY DEAR MR. STRODE:—Mr. Stevens, of The Hebe Company, and I were very much pleased with the result of our conference with you and Mr. Bartlow, yesterday.
>
> "In line with my suggestion, I am writing this letter to you in order that there may be no possible room for misunderstanding as to just what agreement was reached.
>
> "First of all, for The Hebe Company, we agree that we will not ship into Ohio any more of our products known as 'Hebe' except that which bears the label approved yesterday by you and Mr. Bartlow. As soon as we can

secure them from the lithographers we will send you two copies of this label; one to be retained for your files and the other to be stamped and returned to us.

"On the other hand, your office, as we understand it, agrees to permit the sale of all Hebe bearing the old label now in the state of Ohio, which was shipped to May 1st, last. We do not know what the exact amount of this is, but it is not large, because we have in this state only three distributive houses. These houses are The Monypeny-Hammond Company of Columbus; The Dahl-Milliken Grocery Company of Washington Court House, and The Weakly-Worman Company of Dayton.

"Will you kindly acknowledge receipt of this letter and confirm the correctness of this statement of the situation?

"Very truly yours,

"(Signed) HUBERT B. FULLER."

Mr. Strode's reply to the above letter under date of June 5, 1915, is as follows:

"June 5, 1915.

"MR. HUBERT B. FULLER, 1110 *Williamson Building, Cleveland, Ohio.*

"DEAR MR. FULLER:—Yours of June 4th, stating your understanding of the verbal agreement between Mr. Stevens of The Hebe Company, and this department, received.

"I wish to say that your statement is entirely in accord with my understanding. The Hebe Company agrees to change its labels to conform to the rulings and regulations of the National and Ohio pure food departments. Copy of label is to be submitted and approved by this department. The company further agrees not to ship any goods into the state until these labels have been approved. The department agrees to permit the sale of all Hebe products bearing the old label which was shipped into the state prior to May 1, 1915, and distributed by The Monypenny-Hammond Company, Columbus, Ohio; The Dahl-Milliken Grocery Company, Washington Court House, and The Weakly-Worman Company, Dayton, Ohio.

"Very respectfully,

"*Commissioner in Charge.*"

With reference to the subject under consideration I am also in receipt of a letter from Mr. E. C. Morton, of the law firm of Morton, Irvine & Blanchard, Columbus, Ohio, who also appeared before Mr. Strode in connection with the investigation concerning "Hebe," Mr. Morton at that time representing one of the Ohio distributors. His letter is as follows:

"COLUMBUS, OHIO, July 20, 1916.

"HON. E. C. TURNER, *Attorney-General, Columbus, Ohio.*

"MY DEAR SIR:—Confirming my verbal statements to you concerning the approval of *'Hebe'* by the dairy and food department, and the labeling of that product in accordance with the requirements of the department, permit me to advise you that in the spring and early summer of 1915, Mr. S. E. Strode, who was Mr. Calvert's predecessor in charge of the department, stated to me and to the representative of the company engaged in the manufacture of 'Hebe' that there was no legal objection to the sale of that product if properly labeled. Question was raised concerning the label, and the manufacturer undertook to meet the department's objections. Two or more suggestions were made and designs and labels submitted illustrating them, and,

after pointing out objections to one or more of the sketches or designs, the last one was approved and that approved label has been in use for a year or more.

"I recall distinctly that the nature of the product, the fact that it was a compound of evaporated skimmed milk to which vegetable fats had been added, and that it was marketed under a trade name, were discussed, and Mr. Strode clearly and definitely stated to us that the product was unobjectionable if the manufacturer would label it according to his requirements.

"You will understand that we did not represent the manufacturer of 'Hebe' and that we appeared because our client, having notice that the sufficiency of the label had been questioned by the department, did not wish to distribute the article until all objections had been met. Having been assured by the head of the department that the product itself was not objectionable, we watched the proceedings carefully in order that we might advise our client concerning the label, which was disposed of in the manner above related.

"We are advised that counsel representing the manufacturer will be here within a day or two, probably before the end of this week, to present their views of the matter, and, having in mind the department's approval pursuant to which the product has been marketed in Ohio, it occurs to us that definite and final action should be postponed until these gentlemen can be heard.

"Very truly yours,
"(Signed) E. C. MORTON."

While, so far as I have been able to learn, this matter was never presented to this department, yet in its present consideration the action of your department through the former commissioner places the department on record as to a departmental interpretation, and makes the present consideration of the matter somewhat embarrassing.

It was also learned upon investigation that the question of the sale of "Hebe" had also been before the federal authorities and immediately upon receipt of this information a letter was addressed to Dr. C. L. Alsberg, chief of the bureau of chemistry, department of agriculture, Washington, D. C., whose reply has just been received.

Sometime after the receipt of your request for an opinion concerning this matter, a memorandum was forwarded by Mr. Charles J. Pretzman, as attorney for the Ohio Dairyman's Association.

In view of the former action, as indicated by the foregoing recital of facts, as well as the conditions surrounding the submission of the request for an opinion, it was believed only fair to afford the proprietors of "Hebe" an opportunity to be heard through counsel as to their right to continue the sale of their product in this state. Accordingly a hearing was given to Messrs. Healy and Stevens, of The Hebe Company, who were accompanied by their attorney, Mr. Hubert B. Fuller, of Cleveland, and subsequently Mr. Fuller submitted a brief in support of the contention being made by The Hebe Company.

On account of the matters referred to above, the rendering of the opinion asked for has been somewhat delayed.

Section 12725 of the General Code, which is made the basis of your request for an opinion is as follows:

"Whoever manufactures, sells, exchanges, exposes or offers for sale or exchange, condensed milk unless it has been made from pure, clean, fresh, healthy, unadulterated and wholesome milk, from which the cream has not been removed and in which the proportion of milk solids shall be the equiv-

alent of twelve per cent. of milk solids in crude milk, twenty-five per cent. of such solids being fat, and unless the package, can or vessel containing it is distinctly labeled, stamped or marked with its true name, brand, and by whom and under what name made, shall be fined not less than fifty dollars nor more than two hundred dollars, and, for each subsequent offense, shall be fined not less than one hundred dollars nor more than five hundred dollars and imprisoned not less than ten days nor more than ninety days."

The label under which "Hebe" is sold bears a statement as follows:

"A compound of evaporated skimmed milk and vegetable fat."

The term "skimmed milk" indicates milk from which cream has been removed, and in this connection the court, in the case of Commonwealth v. Elizabeth Hufnal, appellant, 185 Pa., 376, at page 380, says:

"* * * And 'skimmed milk' we understand to be the generic term by which is meant milk from which its natural cream has been taken in whole or in part."

It appearing clearly that by skimmed milk is meant natural milk from which the cream has been removed, we must look to the purpose and intent of section 12725 of the General Code supra, and its relation to the product known as "Hebe."

Section 12725 of the General Code supra, in its original form, prior to codification was section 13 of house bill No. 185, "An act to prevent adulteration of and deception in the sale of dairy products, and supplementary to Chapter II, title I, part IV, of the Revised Statutes," passed May 17, 1886, to be found in 83 Ohio Laws, at page 178 to 181, inclusive.

Section 5778 of the General Code provides, in part, as follows:

"Food, drink, confectionery or condiments are adulterated within the meaning of this chapter: (1) If any substance or substances have been mixed with it, so as to lower or depreciate or injuriously affect its quality, strength or purity; (2) if any inferior or cheaper substance or substances have been substituted wholly, or in part, for it; (3) if any valuable or necessary constituent or ingredient has been wholly, or in part, abstracted from it; * * *"

It has been represented to this department that in manufacturing "Hebe" in the first place the cream is removed from the milk, and according to the ordinary and common understanding that the cream constitutes a valuable constituent of milk, that would constitute an adulteration of milk under the provisions of section 5778 of the General Code supra, in that:

"Food * * * or condiments are adulterated * * * if any valuable or necessary constituent or ingredient has been wholly, or in part, abstracted from it. * * *"

It is further claimed that to replace the butter fat removed by the separation of the cream, another and inferior substance has been added to the milk in place of the cream, and this would also constitute an adulteration under the provisions of section 5778 of the General Code, supra.

These, of course, are facts to be determined by your department in arriving at the conclusion as to whether the compound or product known as "Hebe" is an adulteration under the provisions of section 5778 of the General Code, supra.

In this connection, section 12716 of the General Code should be taken into consideration as it defines adulterated milk. The section is as follows:

> "Section 12716. In all prosecutions under this chapter, if milk is shown upon analysis to contain more than eighty-eight per cent. of watery fluid, or to contain less than twelve per cent. of solids or three per cent. of fats, it shall be deemed to be adulterated."

Section 12717 of the General Code is, in part, as follows:

> "Whoever sells, exchanges, or delivers, or has in his possession or custody with intent to sell or exchange, or exposes or offers for sale or exchange, adulterated milk, or milk to which water or any foreign substance has been added, * * shall be fined, etc., * * *."

The provisions in section 12716 of the General Code to the effect that milk shall be deemed to be adulterated if it contains "less than twelve per cent. of solids or three per cent. of fat" can mean but one thing, and that is, that the twelve per cent. of solids referred to are milk solids, and the three per cent. of fats are the natural fats of pure milk.

Section 12725 of the General Code, supra, is specific in referring to the proportion of milk solids, and among other things in the section is to be found the following:

> "* * * and in which the proportion of milk solids shall be the equivalent of twelve per cent. of milk solids in crude milk, twenty-five per cent. of such solids being fat."

From all of the foregoing it appears clear to me that the laws of the state will not permit the sale of milk from which the cream has been removed or to which a foreign substance has been added, save and except under the provisions of section 12720 of the General Code, which provides for the sale of skimmed milk as follows:

> "Whoever sells, exchanges, delivers or has in his custody or possession with intent to sell, exchange or deliver, milk from which the cream or part thereof has been removed, unless in a conspicuous place above the center and upon the outside of each vessel, can or package, from which or in which such milk is sold the words 'skimmed milk' are distinctly marked in uncondensed gothic letters not less than one inch in length, shall be fined not less than fifty dollars nor more than two hundred dollars."

Under the provisions of the section just quoted it will be noted that the right to sell skimmed milk is recognized and provided for with the condition that the vessel, can or package from which or in which such skimmed milk is sold is to be plainly marked with the words "skimmed milk" in letters of a specified size and style.

In considering a case under a statute almost identical with section 12725 of the General Code supra, which was as follows:

> "No condensed or preserved milk shall be manufactured, sold or exchanged or offered or exposed for sale or exchange, unless the same be manufactured from or out of pure, clean, healthy, fresh, unadulterated and wholesome milk from which the cream has not been removed either wholly or in part, or unless the proportion of milk solids of same shall be in quantity the equivalent of twelve and fifty-one hundredths per centum of milk solids in crude milk, and of which milk solids three and fifty-one hundredths per centum

> shall be butter fats. No person shall manufacture, sell or exchange, or offer or expose for sale or exchange any condensed or preserved milk unless the same be put up, packed or contained in packages with the name of the manufacturer of the solid milk distinctly branded or stamped thereon."

the court, in the case of Nicholas A. Reiter v. State of Maryland, 109 Maryland Reports 235, at page 239, says:

> "A glance at section 235 (supra) shows that the intention of the legislature was not only to prevent fraud and deception from being practiced on consumers of condensed milk, by prohibiting the sale of any product of milk, not manufactured from milk of the quality required, under the name of condensed milk, but to absolutely prohibit the sale of condensed milk manufactured out of milk not possessing all the qualities required by the statute. This section does not say that condensed milk of the kind prohibited shall not be sold unless marked and branded as provided, but requires, as one of the means of preventing the sale of condensed milk prohibited by the section, that it shall be packed in the way provided, with the name of the manufacturer stamped thereon. In other words, the primary object of this legislation was not to prevent fraud and imposition, but to prohibit the sale of any article deemed by the legislature either injurious to health, or lacking some of the qualities of healthy food."

The chief contention of the "Hebe" representatives is that "Hebe" is a compound, and not condensed milk, and hence it does not come under the inhibition of section 12725 of the General Code supra.

Section 5774 of the General Code is as follows:

> "No person, within this state, shall manufacture for sale, offer for sale, sell or deliver, or have in his possession with intent to sell or deliver, a drug or article of food which is adulterated within the meaning of this chapter, or offer for sale, sell or deliver, or have in his possession with intent to sell or deliver, a drug or article of food which is misbranded within the meaning of this chapter."

If for the sake of argument the contention of the "Hebe" representatives that "Hebe is a compound," which contention is supported by the bureau of chemistry, department of agriculture, Washington, D. C., be admitted, it is to be borne in mind that its principal constituent—evaporated skimmed milk—is a product which cannot under the provisions of section 12725 of the General Code supra, be sold in the state of Ohio under any circumstances, it being clearly understood and, in fact, admitted by the representatives of The Hebe Company, that the term "evaporated milk" is synonymous with "condensed milk," is it to be said that the adding of a minor constituent to an adulterated product under the law places the resulting compound in a position whereby by changing the name the law can be evaded and the adulterated product sold? Such an interpretation of a law, which clearly has for its purpose not the regulation of the sale of an article of food under the standard, but its absolute prohibition, would be ridiculous and defeat the purpose of the law.

The condition to be remedied through the enactment of various pure food statutes is not theoretical, but practical, and that the product known as "Hebe" is regarded as condensed milk by a large percentage of the public is beyond a question of doubt.

While the manufacturers of the product may in no way be responsible for its being sold as condensed milk, the widespread practice of dealers is to sell it as such and on account of its adaptability to that purpose it finds a ready market as condensed milk.

In the brief submitted by counsel for The Hebe Company the case of the United States v. McConnon & Company is cited as saying in respect to pure food laws that one of their objects is:

> "* * * to prevent people from so labeling an article that a man buying it will think that he is buying one thing when in reality he is buying another."

While this may be one of the purposes of the law, and it unquestionably is, it must be borne in mind that the intention of the manufacturer or of the seller of an article otherwise prohibited does not govern. That is to say, that the intention of the Hebe Company to sell "Hebe" as a product other than condensed milk does not operate to legalize the sale, when in fact the product which is sold under another name is in reality condensed milk.

While it is to be regretted that the manufacturers of "Hebe" may have been misled through the holding of a former departmental official, such holding is not of itself binding as is contended by counsel for the Hebe Company; nor is it within the power of an official of the state to estop the state in a criminal prosecution. Regardless of any finding by an officer of the state, the judicial determination of any question involved would prevail.

In view of the provisions of sections 12716, 12717, 12725, taken in connection with sections 5774 and 5778 of the General Code, it is my opinion that the product known as "Hebe," be it a compound or otherwise, the major portion of which is evaporated skimmed milk, cannot be sold in the state of Ohio under the label at present used, or any other label under existing law.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1927.

WHERE ATTORNEY IS EMPLOYED TO ASSIST PROSECUTING ATTORNEY TO BRING SUIT FOR COUNTY TREASURER TO COLLECT TAXES—FEES NOT APPORTIONABLE TO VARIOUS SUBDIVISIONS ENTITLED TO SHARE IN SUCH TAXES.

If an attorney is employed to assist the prosecuting attorney under section 2412 *G. C. to bring suit for county treasurer to collect taxes, the attorney's fees paid are not apportionable to the various subdivisions entitled to share in such taxes, under section* 5700 *G. C.*

COLUMBUS, OHIO, September 19, 1916.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Under date of July 7, 1916, you requested my opinion as follows:

> "We desire an opinion from your department upon a question arising upon the semi-annual settlement of liquor traffic tax collections.
>
> "It appears that the auditor and treasurer of Henry county employed counsel to undertake certain defenses and actions at law to recover upon Dow tax charges in a matter in which the then prosecuting attorney of the county could not, with a due regard to the ethics of his profession, undertake owing to the fact that he had been employed against the county and state in the same matters before his qualifying as prosecuting attorney.

"We attach hereto statements prepared at our request by the auditor of that county.

"We desire to know whether this contract of employment of Mr. Conway is a legal one binding upon the county, and also whether payment under such contract may be made out of the undivided liquor tax fund."

A brief statement of the facts in the case has been furnished by Mr. Rafferty, county auditor, as follows:

"T. A. Conway, prosecuting attorney, Henry county, 1904-1905.

"The Christ Diehl Brewing Company placed on liquor duplicate under the Cain law.

"Conway asked by county treasurer to render an opinion on the legality of such tax.

"Prior to this, said company enjoined the collection of taxes similarly assessed at Continental, Putnam county, and the circuit court had held that they were illegal.

"Conway advised the county treasurer that the taxes were legal and should be collected.

"In 1905 said company brought an action against the county auditor and treasurer, enjoining the collection of said taxes.

"Mr. Conway succeeded in office by E. N. Warden, who had appeared in a court of record in this county as an attorney for said company in said case.

"Injunction sustained in common pleas court, which followed the decision rendered by the circuit court in Putnam county.

"*Mr. Conway, employed August 24th*, 1907, to represent defendants, auditor and treasurer, in said case.

"The circuit court held that said company was liable for the tax on the undisputed facts in said case.

"The Supreme court sustained the circuit court.

"Personal judgment not asked for upon promise, by counsel for said company, that when the supreme court had passed upon the validity of the tax that the company would pay it.

"The Brewing Company refused to pay anything.

"On May 14th, 1912, $238.14 collected by county treasurer on distraint.

"Commenced an action for foreclosure of lien and personal judgment.

"On April 28, 1914, recovered judgment in common pleas court for $7,869.32.

"Judgment confirmed by the court of appeals.

"Motion filed in the supreme court to certify record for review.

"On two different attempts to levy on personal property of said company, each time suit was brought against the treasurer, sheriff and Mr. Conway for damages as tresspassers.

Accompanying said statement is a letter from Mr. Rafferty under date of June 29th to the bureau of inspection and supervision of public offices, which is in part as follows:

"Shall the fees of Thomas A. Conway, as counsel for the defendants, auditor and treasurer of this county, in this case, be deducted by myself from the shares or portions of revenue of the subdivisions entitled to share in the distribution of such taxes and assessments?

"I wish to state further, that the record here in this office shows that Mr. Conway was employed by the auditor and treasurer as counsel to defend them in this action, and that his compensation was fixed at a sum equal to thirty-five per cent. of the amount collected from said company.

"Neither the commissioners' journal nor any other records on file in this office disclose any evidence that the prosecuting attorney filed a request with the board of county commissioners for any assistants, help or additional counsel in this case at the time Mr. Conway was originally employed on August 24th, 1907.

"Mr. Conway has been working on this case for over ten years, and I assure you that I think he has earned his fee of thirty-five per cent., which will be due him in case the supreme court reviews this case (which is doubtful) and sustains the decision of the lower courts.

"It certainly would be unjust to have Henry county pay the whole fee and thus be the looser when neither county, state or municipality would have ever received a cent of those taxes or assessments had it not been for the bull dog tenacity and staying qualities of Mr. Conway. Had he been willing to follow the decision rendered in the Putnam county case, which was identically the same, the matter would undoubtedly have been dropped and never been heard of again.

"This is a case so out of the ordinary that I think your bureau should permit me to withhold Mr. Conway's fees as he has paid all his own personal expenses, which has been no small amount, in this case, and no subdivision as yet has paid any expense unless it may be so ordered by the court.

"Your attention is particularly called to the provisions of section 5700 of the General Code of Ohio, which I think is broad enough in its terms to permit the fees of Mr. Conway to be deducted from the amount of the judgment before the balance is distributed according to law.

"I am withholding my July liquor settlement until I may receive a reply from your bureau, and trusting that the same will be favorable, I beg to remain."

After reading over the facts submitted by Mr. Rafferty I considered it proper that I should write to Mr. Conway and get the entire history of the case from him. Under date of July 26th, Mr. Conway wrote to me as follows:

"Your communication of the 20th inst., addressed to me atNapoleon, Ohio, was forwarded to Elyria, which place has been my home since September, 1907. I was prosecuting attorney of Henry county from 1904 to 1907. During my incumbency in that office I was called upon by the county treasurer for an opinion as to the legality of certain taxes and assessments which had been placed on the liquor duplicate of that county against the Christ Diehl Brewing Company on account of investigation made by representatives of the dairy and food commissioners' office. After considerable investigation, I informed the treasurer that the taxes were legal and properly on the duplicate. This same company maintained a storage house in Continental, Putnam county, and conducted its business so far as I could learn, identically the same at this storage house as it did in its storage houses in Holgate and Deshler, Henry county.

"The company brought an action against the treasurer of Putnam county to enjoin him from collecting the taxes and assessments by distraint. Judge Donnelly, who was on the common pleas bench, held that the company was not liable for the tax. The case was appealed to the circuit court of Putnam county, the judgment rendered by the common pleas court was

affirmed by the circuit court of Putnam county. Notwithstanding the decision rendered by the circuit court, I was still of the opinion that the sales were made at the storage houses and that therefore, the brewing company was liable for the payment of the Dow tax. The company brought an action to enjoin the treasurer of Henry county from collecting the tax by distraint. Donovan & Warden, of Napoleon, were the counsel for the brewing company in that case. Mr. Warden succeeded me as prosecuting attorney of Henry county in 1907. This case against the treasurer was still pending at that time. Judge Cameron, of Defiance, heard the case in common pleas court, and following the decision rendered in the Putnam county case granted the injunction to enjoin the treasurer from collecting the tax by distraint, and held that the company was not liable for the payment of the tax. It was perhaps in August, 1907, that I entered into a contract with the commissioners of Henry county, to represent the treasurer in that case, Mr. Warden being disqualified to represent the treasurer on account of having formerly represented the brewing company in that particular case. The case was appealed to the circuit court, who rendered a decision in favor of the treasurer in the fall of 1907. The brewing company prosecuted error to the supreme court and the supreme court rendered a decision in the fall of 1909 affirming the decision of the circuit court of Henry county. I did not ask for a personal judgment against the brewing company in the case which went to the supreme court thinking that the only question was whether or not the company was liable for the payment of the tax, and that in the event that the court held that it was, the tax would be paid without any further trouble. However, the company refused to pay the tax and on the written request of the prosecuting attorney of the county under the provisions of section 1274 R. S., I entered into a contract with the commissioners to assist the prosecuting attorney in bringing a suit against the brewing company for a personal judgment and for the foreclosure of the statutory lien. My contract provided that I should receive from the county a sum equal to thirty-five per cent. of the amount of taxes and penalties collected as a result of that suit. My brother, Lawrence F. Conway, of Toledo, was assisting me and when I was appointed probate judge of Lorain county, in 1912, I was too busy to look after the litigation and I canceled that contract with the county and had the commissioners enter into a similar contract with my brother who was to take up the work instead of me. He died in February, 1913, in Columbus, while a member of the legislature. After his death, I went to Napoleon, and in view of the fact that I had spent a great deal of time and money in my efforts to collect this tax and in further view of the fact that I was thoroughly familiar with all the intricacies of the case, at the request of the present prosecuting attorney, R. W. Cahill, and at the request of the then county treasurer, Louis W. Schultz, I entered into a contract with the county commissioners which was identical with the contract which I had originally entered into with the commissioners of that county, by which it was agreed that I should receive a sum equal to thirty-five per cent. of the amount of taxes and assessments collected from the said company. I think the county auditor of Henry county sent a copy of the letter signed by the prosecuting attorney requesting my appointment, a copy of the resolution adopted by the board of commissioners and a copy of the contract to the state auditor. I have not a copy of it here or would send it to you, but was very careful to come within the provisions of the statute authorizing the commissioners to employ counsel to assist the prosecuting attorney.

"I have been working on this case with a great deal of regularity for

over ten years. As a result of my efforts and aggressiveness in attempting to collect this tax I was sued twice by the brewing company for trespass at the time that I accompanied the county treasurer to take possession of the personal property of the brewing company to sell the same by distraint, and was compelled to employ counsel to defend me in both of those cases. I have also spent several hundred dollars in paying expenses in traveling back and forth from Elyria to Napoleon, Toledo, Wapakoneta and Lima.

"In 1907 the county commissioners had so little faith in my contention that the company was liable for the tax that they would not have given me a straight fee of fifty dollars to take the case to the supreme court, but they were willing to let me attempt to collect it on a contingent basis.

"This briefly is a history of the case. I think it would be inequitable to say the least, in the event that the tax should be finally collected, to require the county to pay me my fee out of the portion of the tax which goes to the county, for the reason that the county would not receive enough of the taxes to pay my fee, and would thus be the loser. If there is any way to do it I think the fee should first be deducted from the total amount collected before distribution is made to the several taxing districts entitled to the same, and I trust that it can be so deducted, and distribution made thereafter. I might add in conclusion that I never received a cent of compensation for all my labor in the case of The Christ Diehl Brewing Company against Beck et al., which went to the supreme court. There was a small amount of money collected by distraint, something over two hundred dollars, of which I was paid my percentage. This was the only compensation which I have ever received for my labor in this matter for a period of over ten years.

"I will probably be in Columbus some time next month, and if you desire any further information from me in regard to this case I will gladly call at your office when in the city."

It appears, therefore, that so far as the employment of Mr. Conway in 1907 was concerned the contract of employment was canceled, as well as the contract which was made prior to his appointment as probate judge; that a new contract was entered into under the provisions of section 5700 G. C. on the 12th day of February, 1913, under a resolution of the county commissioners, which is to the following effect:

"In the matter of the employment of T. A. Conway as legal counsel for the purpose of collecting the taxes standing charged against The Christ Diehl Brewing Company and Christ Diehl upon the tax duplicate of Henry County, Ohio	Employment of Counsel.

"Whereas, there is now pending in the court of common pleas of Henry county, Ohio, a case entitled Louis W. Schultz, as Treasurer of Henry County, Ohio, Plaintiff, vs. The Christ Diehl Brewing Company, et al., Defendants, which suit was brought for the collection of certain Dow-Aiken taxes and penalties charged against the said defendant on the tax duplicate of this county, and whereas Lawrence F. Conway, formerly employed in this case, is now deceased,

"Whereas, the prosecuting attorney has this day filed a written request with this board that we employ T. A. Conway, an attorney-at-law, as legal counsel to assist him in the prosecution of said case so pending, and

"Whereas, the county treasurer has this day filed a written request asking that the board employ, and that he be authorized to employ the said

T. A. Conway for the purpose of acting as legal counsel to assist the prosecuting attorney in the prosecution of the said case, and in the collection of the taxes and penalties involved therein, therefore,

"Be it resolved, that we deem it for the best interests of the county to employ the said T. A. Conway, and that he be and is hereby employed and appointed as legal counsel to assist the prosecuting attorney in the prosecution of said case, and in the collection of the taxes and penalties involved therein, and that the said T. A. Conway be authorized to assist the prosecuting attorney in all suits that in the judgment of the county treasurer it may be necessary to bring against the said The Christ Diehl Brewing Company, and to do such other things as may be necessary and proper for the collection of said taxes.

"Be it further resolved, that the compensation which the said T. A. Conway shall receive for the service rendered by him shall be a sum equal to thirty-five per centum (35%) of the amount of taxes and penalties collected from or paid by said company, whether by suit or otherwise, said compensation to be paid to said T. A. Conway as soon as the taxes so collected shall be paid into the county treasury, and said sum to be paid in full compensation for all services which may be rendered and expenses incurred by the said T. A. Conway under this resolution.

"Be it further resolved, that the county treasurer be and hereby is authorized and empowered to employ the said T. A. Conway as legal counsel to assist the prosecuting attorney in the prosecution of said suit, and in any other suits that in his judgment it may be necessary for him to bring for the collection of said taxes and penalties owing by the said The Christ Diehl Brewing Company for trafficing in intoxicating liquors in Henry County, Ohio, and that the compensation of the said T. A. Conway for his services in said matter shall be a sum equal to thirty-five per centum (35%) of the amount of taxes collected from or paid by said company, whether acting under his contract of employment made with this board, or under a contract of employment made with the county treasurer as hereby authorized, or both.

"The foregoing resolution was offered by John Rice, seconded by Geo. Harmon. Upon roll call upon the same the vote was as follows:

"The terms and conditions of the foregoing resolution are hereby accepted this 12th day of February, A. D., 1913.

"Signed, T. A. Conway.

"Signed, Wm. Stoner,
Jno. Rice,
G. E. Harmon } County Commissioners."

Section 5700 of the General Code provides as follows:

"When an action has been commenced against the county treasurer, county auditor, or other county officer, for performing or attempting to perform a duty authorized or directed by statute for the collection of the public revenue, such treasurer, auditor, or other officer shall be allowed and paid out of the county treasury reasonable fees of counsel and other expenses for defending the action. The amount of damages and costs adjudged against him, with the fees, expenses, damages, and costs shall be apportioned ratably by the county auditor among all the parties entitled to share the revenue so collected, and be deducted by the auditor from the shares or portions of revenue at any time payable to each, including as one of the parties, the state itself, as well as the counties, townships, cities, villages, school districts, and organizations entitled thereto."

Section 5700 G. C. supra, was in full force and effect at the time of the passage of the resolution of the county commissioners, hereinbefore set forth, and is the only section that I have been able to find which permits of an apportionment of the expenses of attorney's fees among the various political subdivisions entitled to share in the revenues of tax collection, and the question arises as to whether or not said section is sufficiently broad to permit of the apportionment of the fees due to Mr. Conway against the various subdivisions including the state.

The fees that are to be paid to Mr. Conway are to be paid in pursuance of the resolution of the county commissioners, hereinbefore set forth, which was passed on September 12, 1913, and are not to be paid by reason of any previous employment since in the statement submitted by Mr. Conway he distinctly states that the original contract of employment was canceled.

Section 5700 G. C. has reference solely to an action commenced *against* a county treasurer, auditor or other county officer for performing or attempting to perform the duty of collection of public revenue, and does not by its terms in any way authorize the payment of such expenses in a suit of the county treasurer seeking to collect taxes. Therefore, the apportionment of the expenses of such collection cannot be made in the present matter.

In the case of State ex rel. v. Cappeller, 39 O. S. 207, the first branch of the syllabus is as follows:

> "The state is not liable for any part of the fees or expenses of the county treasurer or county auditor, or their assistants, except where such liability is created by statute. The state is not bound by the terms of a general statute unless it be so expressly enacted."

In view of the decision in the above case I am of the opinion that section 5700 G. C. cannot be given an interpretation broader than is contained expressly in the provisions thereof. I am therefore of the opinion, in answer to your question, that while the employment of Mr. Conway is a legal one binding upon the county, under the provisions of section 2412 G. C., there is no authority in law for the apportionment of the compensation, to be received by Mr. Conway by reason of said employment, among the various political subdivisions entitled to share in the amount of taxes collected.

Respectfully,

EDWARD C. TURNER,
Attorney-General.

1928.

FUGITIVE FROM JUSTICE—DEPOSIT WITH CLERK OF COURT OF TEN CENTS PER MILE—WHEN FUGITIVE ESCAPES—CONTINGENCIES PREVENTED FROM HAPPENING—HOW DEPOSIT MAY BE DEMANDED AND RECEIVED FOR SISTER STATE.

When a deposit of ten cents per mile is made under the provisions of section 115 *G. C. and thereafter before the trial of the defendant, he escapes from the custody of the state, making such deposit thereby preventing the happening of either of the contingencies named in said section under which said deposit may be paid to the defendant or returned to the demanding state, the latter upon proper proof of the fact of said escape may demand and receive said deposit.*

COLUMBUS, OHIO, September 19, 1916.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—I beg to acknowledge receipt of your letter of September 8, 1916, as follows:

> "Your official opinion is requested respecting the following:
> "A requisition is made by the governor of the state of Virginia upon the governor of Ohio for an alleged fugutive, and warrant issued on such requisition for the arrest of said alleged fugitive. A deposit was demanded of the agent appointed by the state of Virginia, under the provisions of section 115 of the General Code of Ohio, and a deposit of fifty dollars was accordingly made by said agent with the clerk of the courts of the county wherein the said alleged fugitive was under arrest, and the said alleged fugitive delivered to said agent of the state of Virginia and returned by said agent to the state of Virginia, but while awaiting trial the said alleged fugitive escaped from jail and is still at large. Is the clerk of the courts of the county in which the said alleged fugitive was arrested and with whom the deposit was made entitled, under the Ohio law, to retain the amount so deposited until the supposed fugitive is either convicted or acquitted.
> "Correspondence between the governor of Virginia and the governor of Ohio is herewith submitted for your information."

It appears from the correspondence attached to your letter that one I. D. Sanger was indicted in the county of Frederick, Virginia, and was thereafter arrested in Champaign county, this state, and a requisition from the governor of Virginia was thereupon duly honored by you and the said defendant was returned to Virginia for trial. Under the provisions of section 115 G. C. the sheriff of said county of Frederick was required to deposit with the clerk of the courts of Champaign county the sum of fifty dollars, representing a charge of ten cents a mile from the place where the arrest was made to the place of prosecution. The defendant pending his trial in said county escaped from the county jail and is now at large. Attached also to your letter is an opinion from the attorney-general of the state of Virginia to the governor of said state in which the governor is advised that the money so deposited constitutes a trust fund and that by reason of the escape of the prisoner the object of the trust is ended and that the state of Virginia is now entitled to the return of the deposit aforesaid.

Sectio 115 G. C., whose provisions are involved in this inquiry, as it now stands, provides:

> "On payment of costs by the agent, and the deposit of a sum of money with the clerk of the court, equal to ten cents a mile from the place where the

arrest was made to the place for prosecution, the fugitive shall be delivered to such agent to be returned for prosecution. If the agent does not appear within the time so fixed, pay the costs, and make such deposit, the sheriff shall discharge the person so imprisoned. If the supposed fugitive is not found guilty of the crime charged in the warrant, the deposit shall be paid to him; but, upon the conviction of the fugitive of the crime so charged, such sum shall be paid to the agent making the deposit."

The deposit required by this section is in the nature of a guaranty that the accused shall not be put to any unnecessary expense by reason of the action of the state of Ohio in delivering him to the demanding state, and the fund thus created is clearly for the purpose of providing transportation for him from the demanding state back to the point at which he was delivered to the agent of that state, in case he is acquitted of the charge against him. This is the only condition which can give rise to any right on his part to the money so deposited and it must not be overlooked that the reason for the requirement of this deposit by the state of Ohio is to prevent the accused from being subjected to any unnecessary expense by reason of its act.

It follows, therefore, that in order for the accused to have any claim on the money, his presence in the demanding state, released by acquittal from the charge against him, must be the result of the action of the state of Ohio in delivering him to the authorities of that state. By his escape he has made it impossible for that situation to be brought about, for if he should now be arrested and brought to trial, or should voluntarily submit himself to the jurisdiction of the courts, his presence there for trial could not then in any sense be said to be the result of any action of the state of Ohio. On the other hand, his escape has rendered impossible his conviction, for it can not be assumed, for the purposes of this question, that he will ever be apprehended and brought to trial, and as stated above, even if he should be, it would be entirely independent of the proceedings in extradition.

There is, therefore, in the hands of the clerk of courts a fund placed there in accordance with section 115 G. C. which can not be distributed in accordance with the provisions of said section, and this question must necessarily be answered on general grounds without reference to the statute. So answering, I can see no escape from the conclusion that the clerk of courts should now return the money to the source from which it was received, and this I think he would be entirely justified in doing. Clearly, the clerk has no right to retain the deposit indefinitely, and the accused has voluntarily placed himself beyond the possibility of ever having any claim against it but the party depositing it has a right to it which I believe could be maintained in a proper proceeding, and to this party the money should be paid.

I am therefore of the opinion that the clerk of the court of the county in which the accused was arrested is not entitled, under the circumstances stated by you, to retain the money so deposited, but that he should now, upon proper showing that the accused has escaped from the custody of the authorities to whom he was delivered, return the money to the party from whom he received it.

The application for the return of said deposit may be made by the attorney-general of the state of Virginia and should be addressed to the court of common pleas of Champaign county and be supported by affidavits showing the facts as claimed in respect to the escape of said defendant.

Should the attorney-general of Virginia desire this department to represent him in this matter before said court I shall be pleased so to do upon his request to that effect, and the receipt of the proper application and the proof aforesaid.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1929.

APPROVAL, RESOLUTIONS FOR IMPROVEMENT OF ROADS IN ASHLAND, DELAWARE, ERIE AND VINTON COUNTIES.

COLUMBUS, OHIO, September 19, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of September 15, 1916, transmitting to me for examination final resolutions relating to the following road improvements:

"Ashland county—Sec. 'A,' Ashland-Medina road, Pet. No. 2032, I. C. H. No. 139.

"Ashland county—Sec. 'G,' Ashland-Oberlin road, Pet. No. 2036, I. C. H. No. 144.

"Ashand county—Sec. 'A,' Jeromeville-Sullivan road, Pet. No. 2043, I. C. H. No. 454.

"Ashland county—Sec. 'B,' Jeromeville-Sullivan road, Pet. No. 2043, I. C. H. No. 454.

"Ashland county—Sec. 'F,' Ashland-Oberlin road, Pet. No. 2036, I. C. H. No. 144.

"Delaware county—Sec. 'D,' Columbus-Wooster road, Pet. No. 2295, I. C. H. No. 24.

"Erie county—Sec. 'O,' Milan-Elyria road, Pet. No. 2312, I. C. H. No. 288.

"Erie county—Sec. 'N,' Milan-Elyria road, Pet. No. 2312, I. C. H. No. 288.

"Vinton county—Sec. 'A,' McArthur-Gallipolis road, Pet. No. 3041, I. C. H. No. 398.

I find these resolutions to be in regular form and am, therefore, returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1930.

CHILDREN'S HOME—CHILDREN OF DIVORCED WOMAN—CANNOT SECURE LEGAL SETTLEMENT UNTIL TWELVE MONTHS HAVE ELAPSED FROM DATE OF DECREE—CHILDREN NOT ELIGIBLE TO BE RECEIVED IN CHILDREN'S HOME IN COUNTY OF RESIDENCE OF MOTHER UNTIL SUCH TIME HAS ELAPSED.

The children of a divorced woman cannot secure a new legal settlement through the mother in whose custody they have been placed through the decree until twelve months have elapsed from the date of the decree.

Until such time has elapsed the children are not eligible to be received in a childrens' home in the county of the residence of the mother whose residence before the decree of divorce was granted was in another county.

COLUMBUS, OHIO, September 19, 1916.

Board of State Charities, Columbus, Ohio.

GENTLEMEN:—Your request of August 10, 1916, for an opinion is as follows:

"We submit to your consideration the following statement and query for an opinion as to proper procedure:

"About three years ago John Doe deserted his wife and two children in 'A' county. His wife Mary Doe, applied to the children's home of that county for the admission of her two children. Upon investigation it was found that they had not resided in the county for one year. In accordance with the provisions of section 3094 G. C. the superintendent of the home removed the children to the home of 'B' county within which this family had previously resided. The children were received by the superintendent of the home of 'B' county, where they were kept and cared for for more than two years. Nearly one year ago the mother instituted divorce proceedings against her husband. The divorce was granted by the common pleas court of 'A' county wherein she has continued to reside since the time of desertion. The court also granted her the custody of her two children, although she has never maintained a home of her own, being employed as a domestic. She has secured the release of these children from the home in 'B' county and now seeks to have them admitted to the home of 'A' county. The trustees of the home of 'A' county decline to receive these children on the ground that Mary Doe has not obtained a poor law settlement because she was receiving a form of public aid through the care of her children in the home of 'B' county. (See section 3477 G. C.). They contend that they are still liable to be cared for in 'B' county.

"Query: Is the home of 'A' county, through its board of trustees warranted in accepting these children, provided they need institutional care, or should they be returned to the home in 'B' county?"

At the outset, it will be observed that while the wife referred to in your communication was deserted in 'A' county about three years ago, an application for divorce was instituted by the wife less than one year ago in 'A' county, where she has continued to reside since the time of desertion by her husband. At the time of the granting of the divorce the custody of her two children was given to her, and I understand from statements made by your Mr. Shirer that they are now being maintained in the home in which the mother is employed as a domestic in 'A' county.

Section 3089 G. C., as amended 103 O. L. page 890, which refers to what children may be admitted to county children's homes, is in part as follows:

> "The home shall be an asylum for children under the age of eighteen years, of sound mind and not morally vicious and free from infectious or contagious diseases, who have resided in the county not less than one year, and for such other children under such age from other counties in the state where there is no home, as the trustees of such home and the persons or authority having the custody and control of such children, by contract agree upon, who are, in the opinion of the trustees, suitable children for admission by reason of orphanage, abandonment or neglect by parents, or inability of parents to provide for them."

Reference is made in your letter to the fact that the trustees of the children's home in 'A' county decline to receive the children, claiming that the mother has not obtained a poor law settlement because she was receiving a form of public aid through the care of her children in the home of 'B' county, reliance being placed by the trustees upon the provisions of section 3477 of the General Code which defines legal settlement in language as follows:

> "Sec. 3477. Each person shall be considered to have obtained a legal settlement in any county in this state in which he or she has continuously resided and supported hinself or herself for twelve consecutive months, without relief under the provisions of law for the relief of the poor, subject to the following exceptions: * * *"

The fact that the children of the mother referred to were inmates of the children's home of the county in which the mother formerly resided is not to be taken as a bar to the mother's securing a legal settlement in another county where she may have continuously resided and supported herself for twelve consecutive months without relief under the provisions of law for the relief of the poor. There is, however, another feature to this case which to my mind is controlling, and which embraces the principles laid down in the case of The Trustees of Spencer township in Guernsey county v. The Trustees of Pleasant township in Perry county, reported in 17 O. S. at page 32. The opinion of the court in that case is in part as follows:

> "1. The legal settlement of a minor child, member of his father's family, continues to be in the township where his father was last legally settled, notwithstanding the father removes with his wife and children to a township in another county and there abandons them, if neither he nor his family remain in such township long enough to acquire a new settlement.
>
> "2. The abandoned wife, during coverture, is not legally able to acquire for herself or minor child a legal settlement different from that of her abandoned husband, the father of the child.
>
> "3. After such abandoned wife procures a divorce from her husband, she then, but not before, becomes able, as a *femme sole* to acquire for herself a legal settlement; and if her custody of the minor child, granted by the decree of divorce, has any effect, to make her legal settlement instead of her former husband's, the settlement of the child, such effect cannot follow until time enough elapses after the divorce and before her subsequent second marriage, to enable her to acquire a legal settlement as a *femme sole*."

Up to and including the time when the decree of divorce was granted to the mother

her legal settlement was in "B" county, notwithstanding the fact that she may have resided for two years or thereabouts in "A" county, as it is specifically held in the case above that "the abandoned wife, during coverture, is not legally able to acquire for herself or minor child a legal settlement different from that of her abandoned husband, the father of the child."

Immediately upon the granting of the decree of divorce the status of the mother, a *feme sole*, became such that she might begin to acquire a legal settlement of her own independent of the one formerly had by reason of the fixing upon her of the legal settlement of her husband.

In the case of Trustees of Bloomfield v. Trustees of Chagrin, reported in 5 Ohio Rep. page 316, it is held that:

> "The mother of an infant pauper settled in one township, does not change the infant's residence, by marrying a second husband settled in another township, and there residing without the infant pauper."

In the case under consideration the decree of divorce provided that the mother should have the custody of her children, and notwithstanding the fact they may have for some time remained in the children's home in "B" county, that fact would not interfere with the operation of the provisions of section 3477 G. C. supra, in so far as the mother was able to establish a legal settlement for herself from which a legal settlement might be derived by the children.

Under the facts presented by you it is my opinion that until twelve months shall have elapsed from the date of the granting of the divorce decree the mother could not be said to have acquired a new legal settlement different from the one cast upon her during coverture. However, when such time has elapsed and the mother has resided continuously and supported herself for twelve consecutive months in any county without relief, under the provisions of law for the relief of the poor, she will have acquired a legal settlement, and when such settlement has been acquired, her children, who have been placed in her custody through the operation of the court's decree in the divorce proceedings, will derive a legal settlement from her. Until such time the trustees of the children's home of "A" county have no authority to receive the children referred to, and if such children are public charges the responsibility for their maintenance rests upon "B" county.

Respectfully
EDWARD C. TURNER,
Attorney-General.

1931.

COLLATERAL INHERITANCE TAX—WHERE PERSON OTHER THAN THOSE EXEMPTED BY PROVISION OF SECTION 5331 G. C. TAKES AN ESTATE BY VIRTUE OF PROVISIONS OF SECTION 10581 G. C. —SAID ESTATE SUBJECT TO SAID TAX PRESCRIBED IN SECTION 5331 G. C.

Where a person, other than those exempted by the provision of section 5331 *G. C.,* 103 *O. L.,* 463, *takes an estate by virtue of the provisions of section* 10581 *G. C., said estate is subject to the collateral inheritance tax prescribed by said section* 5331 *G. C.*

COLUMBUS, OHIO, September 20, 1916.

HON. GEORGE THORNBURG, *Prosecuting Attorney, St. Clairsville, Ohio.*

DEAR SIR:—In your letter of September 11th you request my opinion as follows:

"Wm. F. Fletcher died January, 1916, leaving a will which bequeathed all his property to his mother, Martha Fletcher, to her and her heirs forever.

"Martha Fletcher died several years before her son, William F. Fletcher, died. Martha Fletcher left a daughter, Sarah E. McKirahan, her only child and heir, who is still living. Sarah E. McKirahan gets all the property by virtue of section 10581 of the General Code.

"Is this estate liable for the collateral inheritance tax?

"The mother would not have been liable for the tax if she had been living and received the estate under the will. The daughter who is a sister of Wm. F. Fletcher, would have been liable if willed to her direct. Does the fact that the sister takes the property 'as the devisee would have done, if she had survived the testator' as provided by section 10581 defeat the collection of the tax?

It seems to me that since this estate passed to the sister direct without passing through the mother that the estate is liable for the tax. The estate amounts to about $25,000.00, and the attorneys for the estate think the tax should not be collected, hence I would like to have your opinion on the matter."

Section 10581 G. C. provides as follows:

"When a devise of real or personal estate is made to a child or other relative of the testator, if such child or other relative was dead at the time the will was made, or dies thereafter, leaving issue surviving the testator, in either case such issue shall take the estate devised as the devisee would have done, if he had survived the testator. If such devisee leaves no such issue, and the devise be of a residuary estate to him or her, and other child or relative of the testator, the estate devised shall pass to, and vest in such residuary devisee surviving the testator, unless a different disposition be made or required by the will."

As observed by you, by the foregoing provisions of section 10581 G. C., Sarah E. McKirahan, sister of William Fletcher, the testator, and daughter of Martha Fletcher, mother of the said William Fletcher, who is named as the beneficiary in the will in question and who died prior to the date of the death of the said William Fletcher,

takes the property mentioned and referred to in said will as the said Martha Fletcher would have done if she had survived the testator; the manifest purpose of the legislature in enacting said provisions of said statute being to prevent the lapsing of a legacy or devise under the conditions therein prescribed.

However, said section must be read in connection with the provisions of the will itself and it cannot be said that the said Sarah E. McKirahan has any greater rights, in so far as the collateral inheritance tax is concerned, than she would have had if she had been named in said will in place of her mother, Martha Fletcher, and had taken directly by the terms of said will. In this connection it must be observed that section 5331 G. C., providing for the collateral inhertiance tax, is a statute of later enactment than section 10581 G. C. and the provisions of the latter section must be considered as modified by the limitations of the former section in respect to the right of the said Sarah E. McKirahan to take the estate in question.

Section 5331 G. C. (106 O. L. 463) provides in part that:

> "All property within the jurisdiction of this state, and any interests therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which pass by will or by the intestate laws of the state, or by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor, to a person in trust, or otherwise, other than to or for the use of father, mother, husband, wife, lineal descendant or adopted child, shall be liable to a tax of five per cent. of its value above the sum of five hundred dollars. * * *"

In view of the above provisions of said section 5331 G. C. it is evident that the said Sarah E. McKirahan, as sister of the testator, is not exempted by said provisions from the tax therein prescribed. I am of the opinion therefore, in answer to your question that the estate, referred to in your letter, in excess of the sum of five hundred dollars mentioned in said section, is subject to said collateral inheritance tax.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1932.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, BELMONT, OHIO.

COLUMBUS, OHIO, September 20, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Belmont county, Ohio, in the amount of $78,960, in anticipation of the collection of taxes and assessments for the improvement of McMahon's Creek road in Richland township, being one bond of $960 and 78 bonds of $1,000 each."

I have examined the transcript of the proceedings of the county commissioners and other officers of Belmont county in connection with the above bond issue; also the bond and coupon form submitted by The Columbus Blank Book Manufacturing Company, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of Belmont county.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1933.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY MONROE TOWNSHIP RURAL SCHOOL DISTRICT, MADISON COUNTY, OHIO.

COLUMBUS, OHIO, September 20, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Monroe township rural school district, Madison county, Ohio, in the sum of $5,000, being ten bonds of $500 each numbered consecutively from 81 to 90 inclusive, and being the remaining unsold part of a bond issue of $45,000, of which bonds amounting to $40,000 have been heretofore purchased by and delivered to the commission."

I have examined the transcript of the proceedings of the board of education of Monroe township rural school district, Madison county, Ohio, relatively to said original issue of $45,000; also the transcript of the supplementary proceedings authorizing the sale of the remaining $5,000 of said bonds; also the bond and coupon form submitted, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted, when executed by the proper officers will, upon delivery, constitute valid and binding obligations of said Monroe township rural school district.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1934.

MUNICIPAL CORPORATION—NOT DUTY OF BUREAU TO INSTALL SYSTEM OF ACCOUNTING FOR CITIES—DUTY OF CITY AUDITOR OR VILLAGE CLERK—COUNCIL APPROPRIATES IN CITIES AND CITY AUDITOR EMPLOYS EXTRA CLERKS FOR SUCH PURPOSE—IN VILLAGE COUNCIL PROVIDES EMPLOYES.

It is not the duty of the bureau of inspection and supervision of public offices to install system of accounting prescribed by it for municipalities.

It is the duty of the city auditor or village clerk so to do.

If council creates the positions and appropriates money necessary therefor, city auditor may employ extra clerks. In villages council provides employes.

COLUMBUS, OHIO, September 20, 1916.

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

GENTLEMEN:—Under date of September 13, 1916, you wrote to me as follows:

> "The bureau of inspection and supervision of public offices has recently formulated a new system of accounting for municipalities. In consideration of the provisions of section 277 G. C., together with section 4284 G. C.
>
> "(1) Is it a duty of the bureau to install such system in the various municipalities?
>
> "(2) Has the bureau authority to assign state examiners to do the installation and charge the taxing district therefor in the same manner as charge is made for examinations?
>
> "(3) Is it the duty of the city auditor of such municipality to install such system, the forms and procedure being furnished him by the bureau?
>
> "(4) If so, has the city auditor the power, with authority of council, to engage extra help to enable him to install such system?"

Section 4283 of the General Code provides as follows:

> "In the following provisions of this chapter, the word 'city' shall include 'village', and the word 'auditor' shall include 'clerk'."

Section 4284 of the General Code, referred to in your letter, provides in part as follows:

> "At the end of each fiscal year, * * * the auditor shall examine and audit the accounts of all officers and departments. He shall prescribe the form of accounts and reports to be rendered to his department, and the form and method of keeping accounts by all other departments, and, subject to the powers and duties of the state bureau of inspection and supervision of public offices, shall have the inspection and revision thereof. * * *"

This section as it appears in the General Code is a codification of the section as the same was enacted in 98 O. L. 196.

Section 277 G. C. referred to in your letter provides as follows: (101 O. L. 382).

> "The auditor of state, as chief inspector and supervisor, shall prescribe and require the installation of a system of accounting and reporting for the

public offices, named in section two hundred seventy-four. Such system shall be uniform in its application to offices of the same grade and accounts of the same class, and shall prescribe the form of receipt, vouchers and documents, required to separate and verify each transaction, and forms of reports and statements required for the administration of such offices or for the information of the public."

Since section 277 G. C. is the later enactment it must govern in so far as the same is not in harmony with section 4284 G. C.

Section 277 G. C. provides that the auditor of state shall prescribe and require the installation of a system of accounting and reporting for public offices, but does not state that the same shall be installed by the bureau. Therefore, in answer to your first question I am of the opinion that it is not the duty of the bureau to install the system prescribed by it in the various municipalities.

Not being required to install the system, an answer to your second question becomes unnecessary.

Since the auditor of state, as chief inspector and supervisor, is given the duty to prescribe and require the installation of a system of accounting and reporting for public offices, it necessarily follows, in answer to your third question, that it is the duty of the city auditor or village clerk to install the system required, the forms and procedure being furnished by the bureau.

Section 4214 G. C. provides that council shall determine the number of clerks and employes in each department of the city government and fix by ordinance or resolution their compensation. Under section 4216 G. C. council may provide such employes for the village as they may determine, and section 4219 G. C. provides that council shall fix the compensation of all employes in the village government.

Since the matter of the employment of employes in both the city and village governments is left to council, I am of the opinion, in answer to your fourth question, that in cities if council prescribes extra clerks to install a system of accounting prescribed by the bureau and fixes the compensation of the same the city auditor would have the power to employ such extra clerks and pay them the amount as fixed by council. In villages council provides the employes.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1935.

BOARD OF EDUCATION—WHEN PUPILS WHO ARRIVE AT AGE OF SIX YEARS AFTER BEGINNING OF SCHOOL YEAR MAY ENTER UPON FIRST YEAR'S WORK—BOARD MAY ADOPT REASONABLE RULES AND REGULATIONS GOVERNING THE SAME.

Boards of education may adopt reasonable rules and regulations governing the time at which pupils who arrive at the age of six years after the beginning of the school year may enter upon the first year's work of the elementary schools.

COLUMBUS, OHIO, September 21, 1916.

HON. MILTON HAINES, *Prosecuting Attorney, Marysville, Ohio.*

DEAR SIR:—Yours under date of September 15, 1916, is as follows:

"Section 7681 of the General Code of Ohio (106 O. L., 489), provides in part as follows:

" 'The schools of each district shall be free to all youth between six and twenty-one years of age, who are children, wards or apprentices of actual residents of the district, including children of proper age who are inmates of a county or district or of any public or private children's home or orphans' asylum located in such a school district, *but the time in the school year at which beginners may enter upon the first year's work of the elementary schools shall be subject to the rules* and regulations of the local boards of education.'

"The Darby township rural school board of our county at a regular meeting of the board passed the following rule: 'That no pupil who has not attained the age of six years before November 1st of the school year shall be admitted during said school year, and must enter at beginning of the year.'

"I would greatly appreciate the favor if you would give me an opinion as to this rule being legal and can the board enforce it.

"I am very much in doubt as to this rule being enforcible, but because of the reading of the section which I have underscored, I desire your opinion."

Under date of January 13, 1911, my predecessor, Hon. Timothy S. Hogan, rendered an opinion to Hon. George D. Klein, prosecuting attorney Coshocton county, found at page 1018 of the report of the attorney-general for that year, on the question of whether or not the board of education of an incorporated village has the legal authority to refuse to admit pupils, who become six years of age in the middle of the school term after the holidays, to the first grade, as follows:

"Upon careful examination it is the opinion of this department that under section 7681 of the General Code, which provides:

" 'The schools of each district shall be free to all youth between six and twenty-one years of age, who are children, wards or apprentices of actual residents of the district, including children of proper age who are inmates of a county or district children's home located in such a school district, at the discretion of the board of education, etc.',

there is no power given to the board of education in any district to refuse the right of admission to any pupil of school age to enter such school upon becoming of said lawful age.

"Further, under section 4750 of the General Code, the board or boards of education have the statutory authority to make such rules and regulations as it deems necessary for its government and the government of its employes and the pupils of the schools, but it does not give authority to the board of education to make any rule which will deprive a student of the proper school age, under said section above referred to, admission to said school."

The foregoing opinion was rendered prior to the amendment of section 7681 G. C., 103 O. L. 897, and its subsequent amendment in 106 O. L. 489. At the time

the above opinion was rendered, that part of section 7681 G. C., therein quoted, was followed in the same sentence by the following provision:

> "but the time in the school year at which beginners may enter upon the first year's work of the elementary schools shall be subject to the rules and regulations of the local boards of education."

This provision my predecessor failed to consider. Here in plain and unequivocal language was the same provision as at present found in section 7681 G. C., which confers upon local boards of education full authority to control, by rules and regulations, the time in the school year at which beginners may enter upon the first year's work of the elementary school. This provision has no other meaning than that the board of education may determine by rule or regulation the time or times within the school year at which children, who are not six years of age at the beginning of the school year, but who arrive at that age within the school year, may enter school and begin the first year's work. That is to say, this provision vests in the boards of education power to exercise their sound discretion in the adoption of reasonable rules and regulations governing this matter.

Section 4750 G. C. also confers upon boards of education power to make such rules and regulations as it deems necessary for its government and the government of its employes and the pupils of the schools. This provision, however, adds nothing to the power conferred by section 7681, supra, in respect to the time when pupils may begin the first year's work in the elementary school.

There being vested in the board the authority to exercise its discretion in the matter, its action would not be interfered with by courts except for fraud or gross abuse of its discretion.

I am hardly prepared to say that the rule stated by you would constitute such gross abuse of discretion, but in the absence of further facts tending to show a substantial foundation in reason for such rule, I am much inclined to the view that it approaches very nearly the limit of such discretion. Each case may involve facts peculiar to itself, which would be controlling, thus rendering it difficult to lay down a fixed rule which may be applied to all cases. Many schools have adopted the rule that pupils may begin the first year's work in the elementary school either at the beginning of the year or at the term beginning after the holiday vacation. This I consider a reasonable rule and one in the nature of which the necessity in the case, in most instances, demands.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1936.

FISH AND GAME LAWS—PROSECUTIONS INSTITUTED BY AFFIDAVIT OF GAME WARDEN—OFFENSE NOT COMMITTED IN PRESENCE OF SUCH WARDEN—COSTS CANNOT BE COLLECTED FROM COUNTY IN CASE OF ACQUITTAL OR DISCHARGE OF DEFENDANT FROM CUSTODY—PROVISO WHEN COSTS CAN BE COLLECTED FROM COUNTY.

Where a prosecution is instituted under the fish and game laws, by affidavit of a warden or other officer authorized by law to prosecute such cases, and the offense was not committed in the presence of such warden or officer, costs incurred therein can not be collected from the county in case of an acquittal or discharge of the defendant from custody, unless the prosecution was instituted with the approval of the prosecuting attorney of the county where the offense was committed, or the attorney-general.

COLUMBUS, OHIO, September 21, 1916.

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

GENTLEMEN:—Your letter of September 15, 1916, asking my opinion, received and is as follows:

> "We would respectfully request your written opinion upon the following questions:
>
> "Where a prosecution is instituted under the fish and game laws of the state, and the provisions of section 1397, General Code, are not observed, may the costs incurred be paid from the county treasury in cases where the defendant is acquitted, pursuant to the provision of section 1404, G. C.?"

Section 1393 G. C. (106 O. L. 170) provides in part as follows:

> "The chief warden, special wardens and deputy state wardens shall enforce the provisions of this act and the laws relating to the protection, preservation and propagation of birds, fish and game."

Section 1397 G. C. provides in part as follows:

> "Sheriffs, deputy sheriffs, constables and other police officers shall enforce the laws for the protection, preservation and propagation of birds, fish and game."

Section 1404 G. C. provides that:

> "A person authorized by law to prosecute a case under the provisions of this chapter shall not be required to advance or secure costs therein";

and further provides that in case the defendant be acquitted or discharged from custody, the costs shall be certified to the county auditor and after correction by him shall be paid to the person or persons entitled thereto.

Section 1397 G. C. supra also provides:

> "Prosecutions by a warden or other police officer for offenses not committed in his presence shall be instituted only upon the approval of the

prosecuting attorney of the county in which the offense is committed or upon the approval of the attorney-general."

It is quite evident from the foregoing provisions of law that one of the purposes, if not the moving purpose, of the legislature, in providing for approval by the prosecuting attorney or attorney-general of prosecutions for offenses not committed in the presence of the officer, instiuted by a warden or other police officer, none of whom are required to advance or secure costs, was to prevent the institution and the consequent incurring of costs in cases in which the facts or the available evidence did not justify such action.

Aside from the plain provisions of section 1397 G. C. supra, to the effect that such prosecutions "shall be instituted only" upon the approval of the prosecuting attorney or attorney-general, it is clear that this very proper intention of the legislature can be carried out only by a proper showing to the court, before the affidavit is filed and a warrant issued thereon, that the provisions of said section have been complied with. I believe it was the intention of the legislature that the requirements of said section 1397 supra should operate not only to place a duty upon the officer, but as well to place a limitation upon the court, and that if costs are incurred in such a case without the required approval, such costs can not be collected from the county treasury.

In conferring the jurisdiction upon the courts to hear and determine these cases, the legislature undoubtedly had the right to place such limitations and conditions upon the right to exercise the jurisdiction as it deemed best, and in view of the very evident purpose of the legislature to protect the county from the payment of unnecessary costs, I am forced to conclude that the language used must be interpreted as a limitation upon the court. No other interpretation will adequately accomplish such protection.

In other words, the provisions of said section 1397 affect the jurisdiction of the court and failure to comply with them has the same effect upon the payment of costs as the absence of any other element of jurisdiction, and "a court dismissing a case for want of jurisdiction has no power to render judgment for costs." Moore v. Boyer, 42 O. S. 312.

Specifically answering your question, you are advised that where a prosecution is instituted under the fish and game laws of the state by a warden or other officer authorized by law to prosecute, and the provisions of section 1397 are not observed, costs incurred therein should not be paid from the county treasury. It should be remembered that this opinion applies only to prosecutions instituted by affidavit filed by a warden or other officer authorized by law to prosecute this class of cases.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1937.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY VILLAGE OF GRANDVIEW HEIGHTS, OHIO.

COLUMBUS, OHIO, September 22, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the village of Grandview Heights in the sum of $700.00 issued in anticipation of the collection of special assessments for the improvement of Fairview avenue from the north line of First avenue to the north corporation line, by the construction of sidewalks, being three bonds of $100.00 each and two bonds of $200.00 each."

I have examined the transcript of the proceedings of the council and other officers of the village of Grandview Heights relative to the above bond issue; also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds when executed and signed by the proper officers will, upon delivery, constitute valid and binding obligations of the village of Grandview Heights.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1938.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY VILLAGE OF GRANDVIEW HEIGHTS, OHIO.

COLUMBUS, OHIO, September 22, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the village of Grandview Heights in the sum of $5,850, issued in anticipation of the collection of special assessments on benefitted property and to pay the village's portion of the cost of improving First avenue from Grandview avenue to the west corporation line by constructing sidewalks, being five bonds of $1,000, each, one bond of $200, one bond of $300, and one bond of $350."

I have examined the transcript of the proceedings of the council and other officers of the village of Grandview Heights relative to the above bond issue; also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds when properly drawn and executed by the proper officers will, upon delivery, constitute valid and binding obligations of the village of Grandview Heights.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1939.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY BELMONT COUNTY, OHIO.

COLUMBUS, OHIO, September 22, 1916.

Indutrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Belmont county, Ohio, in the sum of $20,000 for the purpose of purchasing and equipping an experiment farm, being twenty bonds of one thousand dollars each."

I have examined the transcript of the proceedings of the county commissioners and other officers of Belmont county relative to the above bond issue, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that Belmont county, by virtue of the proceedings set forth in the transcript, is authorized to issue bonds in the amount and for the purpose indicated, and that said bonds, when properly drawn and executed, will constitute valid and binding obligations of Belmont county. As no bond form has as yet been submitted for my consideration, I suggest that I have an opportunity to examine them before they are finally accepted.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1940.

JUSTICE OF PEACE, POLICE JUDGES AND MAYORS—FEES OF CONSTABLES, CHIEF OF POLICE, MARSHAL OR OTHER OFFICER UNDER SECTION 13426 G. C. REFER TO ALL CLASSES OF CASES ENUMERATED IN SECTION 13423 G. C.—IF OTHER SERVICES BESIDES MAKING ARRESTS AND SUBPOENAING WITNESSES ARE REQUIRED OF OFFICERS MENTIONED IN SECTION 13436 G. C. THEY ARE ENTITLED TO ADDITIONAL FEES.

1. *Section* 13436 *G. C. refers to all the classes of cases enumerated in section* 13423 *G. C. wherein imprisonment is a part of the punishment.*

2. *If other services besides making arrests and subpoenaing witnesses are required of officers mentioned in section* 13436 *G. C. they are entitled to fees for such additional service.*

COLUMBUS, OHIO, September 22, 1916.

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

GENTLEMEN:—I am in receipt of your letter of September 18, 1916, to the following effect:

"Kindly give us your opinion on the following propositions at an early date:

"1st. Does section 13436 G. C. refer to all the classes of cases enumerated in section 13423 or only to those originally mentioned in section 3718a R. S.?

"2nd. If other services besides making arrests and subpoenaing witnesses should be required of the officers mentioned in section 13436 G. C., are they entitled to fees for such additional service?"

Section 3718a of the Revised Statutes gave final jurisdiction to a justice of the peace, police judge or mayor of any city or village in certain offenses designated therein. When the statutory law of Ohio was codified by the codifying commission in 1910 the jurisdiction provided for in section 3718a R. S. was united with other jurisdictions, and the combination of such jurisdiction was enacted in section 13423 of the General Code. The provisions of section 13436 G. C.—which was prior to codification a part of section 3718a R. S.—were separated from said section and enacted as a general provision of law under section 13432 et seq. G. C.

A comparison of the provisions of section 13423 G. C. with the provisions of section 3718a R. S., so far as final jurisdiction is concerned, will disclose that there are many matters contained in section 13423 that were not contained in section 3718a R. S. An examination of said section will also disclose that it has since been amended in 103 O. L. 539. Section 13423 as it now exists sets forth the final jurisdiction of justices of the peace, police judges and mayors of cities and villages in the cases mentioned.

Section 13432 G. C. is general in its application and provides as follows:

"In prosecutions before a justice, police judge or mayor, when imprisonment is a part of the punishment, if a trial by jury is not waived, the magistrate, not less than three days nor more than five days before the time fixed for trial, shall certify to the clerk of the court of common pleas of the county that such prosecution is pending before him."

Section 13436 G. C., which is contained under the same chapter as section 13432 G. C., provides as follows:

"In pursuing or arresting a defendant and in subpoenaing the witnesses in such prosecutions, the constable, chief of police, marshal or other court officer shall have like jurisdiction and power as the sheriff in criminal cases in the common pleas court, and he shall receive like fees therefor."

The words "in such prosecutions," as found in section 13436 G. C. undoubtedly apply to the prosecutions mentioned in section 13432 G. C. I therefore advise, in answer to your first question, that section 13436 G. C. refers to all the classes of cases enumerated in section 13423 G. C.

Coming now to a consideration of the second question submitted:

Section 13436 G. C. provides that in prosecutions wherein imprisonment is a part of the punishment and in which final jurisdiction is granted, the constable, etc., in pursuing or arresting a defendant or subpoenaing witnesses "shall have like jurisdiction and power as the sheriff in criminal cases in the common pleas court, and he shall receive like fees therefor."

As I view the provisions of this section of the statutes it prescribes solely what the fees for pursuing or arresting a defendant or subpoenaing witnesses shall be. It does not limit in any way the payment of any other fees.

I am therefore, of the opinion, in answer to your second question, that if other services besides pursuing or arresting a defendant or subpoenaing witnesss are required of the officers mentioned they would be entitled to the fees prescribed in other sections of the statutes for such services by such officers.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1941.

APPROVAL, LEASES FOR CERTAIN CANAL AND RESERVOIR LANDS—BRIDGEWATER MACHINE COMPANY—LANCASTER LENS COMPANY— F. G. STRICKLAND—A. R. TARR—GEORGE MARTIN.

COLUMBUS, OHIO, September 22, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of September 20, 1916, transmitting to me for examination the following leases of canal and reservoir lands:

	Valuation
The Bridgewater Machine Co. for canal land at Akron	$1,000.00
The Lancaster Lens Co. abandoned canal land at Lancaster	1,250.00
Frederick Guy Strickland, cottage site in bank lot No. 5, Lake St. Marys	300.00
A. R. Tarr, driveway over reservoir bank, Indian Lake	600.00
Geo. Martin, N ½ lot No. 18 east bank, Lake St. Marys	166.66

I find these leases to be in regular form and am therefore returning the same with my approval endorsed upon the triplicate copies thereof.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1942.

CORPORATION—TAX ON INCREASE OF CAPITAL STOCK—*EXEMPTION* OF SECTION 5519 G. C. NOT APPLICABLE TO INCREASE OF ISSUED AND OUTSTANDING CAPITAL STOCK AS A PART OR ALL OF THE INCREASE IN AUTHORIZED CAPITAL STOCK OF CORPORTION MADE WITHIN SIX MONTHS PERIOD PRESCRIBED BY SAID SECTION—WHERE ARTICLES OF INCORPORATION FILED AND ORGANIZATION EFFECTED PRIOR TO SIX MONTHS PERIOD.

The exemption provision of section 5519 *G. C. is not applicable to the increase of issued and outstanding capital stock as a part or all of the increase in the authorized capital stock of a corporation made within the six months period prescribed by said section, where the articles of incorporation of said corporation were filed and its organization effected prior to said six months period.*

COLUMBUS, OHIO, September 23, 1916.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your letter of September 7, 1916, is as follows:

"The commission respectfully requests that you furnish it your written opinion upon the following question:

"The National-Acme Manufacturing Company, a corporation organized under the laws of Ohio with its principal office at Cleveland, Ohio, on the

29th day of February, 1916, increased its authorized capital stock from $2,500,000 to $9,000,000—the original $2,500,000 of stock had been subscribed and issued. On the first day of May, 1916, the company made its report to this commission showing that its authorized capital stock was $9,000,000 and that the amount of its subscribed, issued and outstanding stock was $6,500,000. The commission certified to the auditor of state the item of $6,500,000 and the company was charged upon the duplicate in the hands of the treasurer with 3/20 of one per cent upon that amount. The company now makes application to the commission for review and correction of its finding that the amount upon which it is required to pay taxes for the year 1916 is $6,500,000, claiming in its application that the amount of the increase of its capital stock over and above $2,500,000 is not subject to the franchise tax for the year 1916 by reason of the exemption provided for in section 5519 of the General Code. The company also refers to an opinion of the attorney general under date of February 5, 1903 (Volume 5, page 865).

"Since the creation of the tax commission, its ruling has been contrary to the opinion of the attorney-general above cited. It has been the uniform practice of the commission to charge corporations with the increased amount of capital stock regardless of whether it was increased within six months prior to the making of the report or not.

"Please advise the commission as to your interpretation of the law in this and in similar cases.

"If it is in accordance with your practice, Mr. W. E. Guerin, Jr., of Cleveland, attorney for the above named company, desires to submit to you his views in this matter."

I am in receipt of a letter from Mr. Guerin, of counsel for the above mentioned company, under date of September 11th, enclosing memorandum in support of the application filed with your commission by said company under authority of section 5504 G. C. Reference will hereafter be made to the argument presented in said memorandum by Mr. Guerin in support of his contention that the amount of the increase of the issued and outstanding capital stock of said company over and above the original issue of $2,500,000, which increase was made within the six months next preceding May 1, 1916, is not subject to the franchise tax for said year.

From your statement of facts it appears that The National Acme Manufacturing Company is a domestic corporation. The annual report, referred to in your letter, was filed with your commission by said company on May 1, 1916, pursuant to the requirement of section 5495 G. C., which provides:

"Between the first day of May and the first day of July, 1911, and annually thereafter during the month of May, each corporation, organized under the laws of this state, for profit, shall make a report, in writing, to the commission, in such form as the commission may prescribe."

Section 5497 G. C. provides:

"Such report shall contain * * *

"5. The amount of authorized capital stock and the par value of each share.

"6. The amount of capital stock subscribed, the amount of capital stock issued and outstanding, and the amount of capital stock paid up.

* * *

"8. The change or changes, if any, in the above particulars, made since the last annual report."

As stated by you the report of the aforesaid company shows that on May 1, 1916, the aforesaid company had an authorized capital stock of $9,000,000; that on said date the subscribed, issued and outstanding capital stock of said company was $6,500,000 and that on February 29, 1916, said company had increased its authorized capital stock from $2,500,000 to $9,000,000.

Section 5498 G. C. provides:

"Upon the filing of the report provided for in the last three preceding sections, the commission, after finding such report to be correct, shall, on the first Monday of July, determine the amount of the subscribed or issued and outstanding capital stock of each such corporation. On the first Monday in August, the commission shall certify the amount so determined by it to the auditor of state, who shall charge for collection, on or before August fifteenth, as herein provided, from such corporation, a fee of three-twentieths of one per cent. upon its subscribed or issued and outstanding capital stock, which fee shall be payable to the treasurer of state on or before the first day of the following October."

In view of the foregoing it is evident that in certifying to the auditor of state the $6,500,000 of the capital stock of said company as subscribed, issued and outstanding, your commission complied with the requirement of section 5498 G. C., supra, and it became the duty of the state auditor to charge against said company on the duplicate in the hands of the state treasurer the fee of three-twentieths of one per cent. as prescribed by said section, on or before August 15, 1916, unless it can be said that said company comes under favor of section 5519 G. C. in so far as the $4,000,000, representing the increase in the issued and outstanding capital stock, is concerned.

Section 5519 G. C. provides:

"A corporation shall not be required to file its first annual report under sections one hundred and six to one hundred and fifteen, (G. C. 5495 to 5504) inclusive, of this act, until the proper month, hereinbefore provided, for the filing of such report, next following the expiration of six months from the date of its incorporation or admission to do business in this state."

It will be observed that under the above provisions of section 5519 G. C. a corporation organized under the laws of this state, which was incorporated within the six months next preceding May 1, 1916, was not required to file for said year the annual report provided for in section 5495 G. C. et seq. of the General Code. Can it be said that this exemption applies to the increase of issued and outstanding capital stock as a part or all of the increase in the authorized capital stock of a company made within said six months period, where the articles of incorporation of said company were filed and its organization effected, as in the case under consideration, prior to said six months period? Mr. Guerin contends that this question must be answered in the affirmative and the memorandum hereinbefore referred to is submitted in support of this contention.

In said memorandum attention is first called to the cases of Emmerman v. Specialty Company, 14 O. F. D. 289, and Bank v. Altman, 14 O. F. D. 298, in which it was held that the fee or tax in question is for the privilege of exercising the corporate franchise for the ensuing and not for the preceding year.

The opinion of my predecessor, Hon. Wade H. Ellis (Attorney General's Reports 1904-1905, pages 69, 70), is cited in which it was held that the tax is for the whole year and that the statute does not provide for fractional parts of a year nor permit the return of a part of the fee where a corporation discontinues business during the year. This opinion was rendered to the then secretary of state under date of July 19, 1904, and was an interpretation of the latter part of section 1 of the so-called Willis law as originally enacted in 95 O. L. 124, requiring corporations to file annual reports with the secretary of state and to pay annual fees therefor, said part of said section providing that:

> "Upon the filing of such report, the secretary of state shall charge and collect from such corporation a fee of one-tenth of one per cent. upon the subscribed or issued and outstanding capital stock of said corporation, to be not less than ten dollars in any case."

As stated by Mr. Guerin the act as originally introduced in the general assembly provided an annual tax of one-tenth of one per cent. on the amount of authorized capital stock of a domestic corporation. But before the bill was finally passed it was amended so as to provide a tax upon the subscribed, or issued and outstanding capital stock of such corporation and was further amended by the insertion of the exemption clause which now appears in section 5519 G. C. By subsequent amendment the per centum of the tax was increased to three-twentieths of one per cent. and the statute now requires said annual report to be filed with the state tax commission instead of the secretary of state (see section 5495 G. C.).

In view of these facts it is argued by Mr. Guerin that the apparent intention of the general assembly was to permit domestic corporations incorporated within said six months period to escape the payment of this tax for the reason that in filing its articles of incorporation it had paid to the state the exact fee required by law for the purpose of exercising its corporate function within the state; that at the next period after said six months period it was required to file its report under the law as all other domestic corporations, but it was intended that each domestic corporation, new and old, should only be required to pay this tax or fee once in each year and that the purpose of the provisions of section 5519 G. C. is not only to encourage the incorporation of new companies, but to equalize the levying of the tax upon old and new corporations alike.

I am unable to concur in this reasoning. The fee of one-tenth of one per cent. required by the state to be paid at the time of the filing of articles of incorporation (section 176 G. C.) is not a fee for the privilege of exercising the corporate franchise and is not to be considered as taking the place of the annual tax, required by provision of section 5498 G. C., of a corporation for the exercise of such franchise during the first year of its corporate existence or any part of such year. Mr. Guerin observes that the exemption clause in section 5519 G. C., supra, refers to the "date of incorporation" and does not use the words "articles of incorporation." He contends that the term "incorporation" as used in said section is broad enough to include an increase of capital stock as well as the original filing of articles of incorporation.

I have already held in opinion No. 585 of this department rendered to your commission on July 3, 1915, that, within the meaning of section 5519 G. C., the date of incorporation is the date upon which the certificate is filed in the office of the secretary of state showing that ten per cent. of the capital stock of the corporation has been subscribed, and inasmuch as said section limits the exemption to the filing of the first annual report, it seems clear to my mind that the term "incorporation" cannot be said to comprehend proceedings for the increase of the capital stock of a corporation already organized. The provisions of the statutes as found

in section 8625 et seq. of the General Code, governing incorporation proceedings, are separate and distinct from the provisions of section 8698 et seq. of the General Code authorizing the increase of capital stock of a corporation and prescribing the proceedings relative thereto.

Mr. Guerin calls attention to a later opinion of my predecessor, Mr. Ellis, (Attorney General's Report 1908-9, p. 83) in which it was held that where a corporation resulting from the proper and legal consolidation of two or more corporations in this state, filed its certificate of consolidation with the secretary of state during April, 1898, said corporation was not required to make an annual report and pay the annual franchise tax for said year. In support of this conclusion Mr. Ellis cited the case of Ashley v. Ryan, 49 O. S. 504, affirmed 153 U. S. 436, the court holding in this case that the effect of the consolidation is to form a new company by the extinguishment of the old ones.

In view of this holding it is argued that an old corporation desiring to employ new capital in its business might in any year form a subsidiary corporation within said exemption period and then consolidate itself with said subsidiary corporation by filing a certificate of consolidation with the secretary of state and in this way avoid the payment of the franchise tax for said year on the increase of issued and outstanding capital stock.

I do not think the holding in the opinion above referred to supports this contention. I am of the opinion that such an evasion could not operate to defeat the foregoing requirements of the statutes governing the filing of the annual report and the charging of the franchise tax. It is sufficient to observe, however, that the validity of such proceeding is not under consideration in determining the answer to your question.

It is further contended that if the corporation in question is liable for the tax on said increase of issued and outstanding capital stock for the year 1916 by virtue of the provisions of the statutes above quoted, said statutes are in conflict with the constitutional requirement of uniformity. In other words, Mr. Guerin contends that this construction gives to a new corporation filing its articles of incorporation within said six months period an unfair advantage and places on the corporation in question an unjust burden of taxation which is prohibited by said constitutional requirement.

In view of what has already been said relative to the fee required by the statute to be paid at the time of filing of articles of incorporation and it being conceded that parts of a fractional year are not to be recognized for the purpose of determining said franchise tax and collecting the same, I do not think it can be said that any greater burden results to The National Acme Manufacturing Company from the aforesaid construction of the statute than that borne by any other domestic corporation organized prior to the six months period hereinbefore referred to. In exacting from said corporation the tax on all of its issued and outstanding stock on May 1, 1916, the statute operates the same on said corporation as on every other domestic corporation of the same class, i. e., those organized prior to said six months period. The error of Mr. Guerin is in assuming that the corporation in question belongs to the class of new corporations which were incorporated during said six months period.

In view of the foregoing, I am unable to concur in the opinion of my predecessor, Hon. J. M. Sheets, referred to in your inquiry, rendered to the secretary of state, under date of February 5, 1903, in which it was held that the Willis law does not exact an annual fee on increased capital stock of a corporation within six months from the time the increase was effected. The conclusion of Mr. Sheets is based on the mere statement that:

"There would seem to be no more reason for exacting the annual tax

on the increase of capital stock within six months from the time the increase was effected, and the initial tax paid, than to exact the annual tax on the subscribed stock of a company within six months from the time of its organization or admission into the state and the payment of the initial fee or tax of one-tenth of one per cent."

As I view it, Mr. Sheets, in making this statement, committed the same error relative to the purpose of the intial fee required at the time of filing articles of incorporation and in respect to the class in which the corporation, organized prior to the six months period in question and increasing its capital stock within said six months period, must be placed, as that committed by Mr. Guerin in the respects hereinbefore set forth.

I am of the opinion therefore in answer to your question that your commission properly charged the tax prescribed by section 5498 G. C., supra, against all of the capital stock of The National Acme Manufacturing Company, subscribed, issued and outstanding on May 1, 1916, including the $4,000,000 of the increase in said capital stock referred to in your inquiry. This ruling will, of course, apply to similar cases where increases of capital stock are made in any year within said six months period.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1943.

COUNTY AGRICULTURAL SOCIETY—COUNTY COMMISSIONERS CANNOT SUBMIT QUESTION OF BOND ISSUE TO ELECTORS UNDER SECTION 9904 G. C. UNLESS SECTION 9901 G. C. IS COMPLIED WITH —*NEW SITE* MUST BE SELECTED FOR SAID PURPOSE AND NOTICE MUST BE GIVEN TO COMMISSIONERS.

Before the commissioners of a county can submit to the qualified electors of such county the question of issuing bonds under section 9904 G. C. the county agricultural society must comply with the requirement of section 9901 G. C., i. e., must select or secure an option to purchase or lease a new site for holding county fairs and must give to said county commissioners the notice provided for in said section, containing the information therein prescribed.

COLUMBUS, OHIO, September 23, 1916.

HON. JOHN E. BETTS, *Prosecuting Attorney, Findlay, Ohio.*

DEAR SIR:—Your letter of September 15th is as follows:

"Sections 9900-04 provide the method of selling and procuring grounds for use of agricultural societies. There are grounds in this county for that purpose, and my information is the county has paid the entire costs therefor.

The agricultural society has notified the commissioners as provided by section 9900, that the present grounds are insufficient and unfit, etc., for the purposes of the society; that it is desired to purchase a new site; a certified copy of the resolution of the directors of the agricultural society

was attached to the notice. The notice further reads: 'further we would say that we do not recommend any particular site, leaving that question for further determination." This notice is dated September 6th, and has been served on the commissioners since that time, requesting that an election be ordered by the commissioners, authorizing thirty-five thousand dollars bonds for the purpose of purchasing a new site.

"It is apparent to me that a new site may be purchased before the old one is disposed of, and by section 9902, but whether or not an election can properly be authorized by the commissioners for the issuance of bonds to purchase a new site, without a new site having been selected or held under option, as provided by section 9901, is not clear. There is some indication in the kindred sections that such may be done, and also I think a stronger indication that it may not be done until a new site is selected and a definite amount designated to pay for the same, in order that a sum certain, and an amount necessary for the purpose may be provided for in the resolution authorizing the election.

"As it is desired to have this question submitted to the voters of this county, at the coming election, and as it is a matter of public interest here, I think it my duty to first obtain your opinion as to whether or not the commissioners are authorized by law to pass a resolution providing for an election, for the purpose of issuing bonds to purchase a new site, without a new site having been selected or an option obtained therefor."

Section 9900 G. C. provides:

"When a county society desires to sell its site in order to purchase another, or if for any reason such site is unfit or insufficient for the purposes for which it is used, and at a regular meeting, by a vote of at least a majority of all the members of its board of directors, upon a call of the yeas and nays, it adopts a resolution for the purpose of securing the benefits hereof and declaring a desire to sell such site in order to buy another, or that the site has become unfit or insufficient, and that it is for the best interests of the society and county that such site be sold or leased, and a new one bought or leased, the society may sell or lease such old site and buy or lease a new one for holding county fairs as hereinafter provided. But in cases where the county paid all or any portion of the purchase money for the site to be sold or leased, the written consent of the county commissioners shall first be given to such sale or lease. Within thirty days after its passage, such board of directors shall give notice in writing to the commissioners of such county of the adoption of such resolution declaring the necessity of selling or leasing such site and of buying or leasing a new site, which notice shall contain or have annexed thereto a certified copy of the resolution, signed by the president and secretary of the board of directors."

It appearing from your statement of facts that the cost of the grounds now used by your county agricultural society was paid by the county, it follows that by provision of the latter part of the statute above quoted the notice therein prescribed and the securing of the written consent of your county commissioners are conditions precedent to the valid sale of said grounds.

Section 9901 G. C. provides:

"When such society has given notice to the commissioners as above provided, and has selected or secured options for the purchase or lease of

a new site for holding county fairs in such county, its board of directors shall immediately give notice of all of such facts to the commissioners, which notice, if such old site is sold or leased before the purchase or lease of the new one, shall state the amount for which it was sold or leased, also the amount of money necessary to acquire such new site, and the terms and conditions of the purchase or lease thereof, together with a full description of the tracts or parcels of land and improvements thereon, included therein. After the filing of such notices, the commissioners may complete and carry into effect any contract or contracts which such society made for the purchase or lease of the new site."

Section 9902 G. C. provides:

"Payment for the purchase or lease of the land included in such site, and the improvements thereon, may be made by the county commissioners from any unappropriated funds in the county treasury at the time it is to be made. If no such funds are then in the treasury, the commissioners may issue the bonds of the county for such amounts as are necessary for the purchase or lease of the land and the improvements thereon. But if such old site is sold or leased before the new site is purchased or leased, in making the payment such society first shall apply the moneys realized from the sale or lease to the purchase or lease of the new site. If the old site is sold or leased after the purchase or lease of the new site, the amounts realized from such sale or lease shall be placed to the credit of the sinking fund for the redempion of bonds issued as hereinafter provided. Such bonds shall bear not more than five per cent. interest per annum, payable semi-annually, not be sold at less than their par value, and shall be payable at such place, times, and in such denominations as the commissioners determine."

Section 9904 G. C. provides:

"Before issuing such bonds, the commissioners by resolution shall submit to the qualified electors of the county at the next general election for county officers held not less than thirty days after receiving from such agricultural society the notice provided for in section ninety-nine hundred, the question of issuing and selling such bonds, in amount and denomination as necessary for the purpose in view, and shall certify a copy of such resolution to the deputy state supervisors of elections of the county."

In view of the plain terms of the foregoing provisions of the statutes it seems clear to my mind that before the commissioners of your county can issue bonds under authority of said statutes for the purpose mentioned in your inquiry, your agricultural society must have selected or secured an option for the purchase of a new site, and said county commissioners must be notified of this fact, which notice, if the old site is sold before the purchase of the new one, must state the amount for which it was sold, also the amount of money necessary to acquire such new site and the terms and conditions of the purchase together with a full description of the tract or parcel of land and improvements thereon to be included in said purchase, all as required by section 9901 G. C.

Unless this information is given to the county commissioners they will have no means of knowing what the new site will cost and determining the amount of money that will have to be provided for by said bond issue. This determination should properly be made and the qualified electors of the county, to whom the

question of issuing and selling such bonds in the amount and denomination necessary for the purpose hereinbefore mentioned, are entitled to this information.

I am of the opinion therefore in answer to your question that before your county commissioners can submit to the qualified electors of your county the question of issuing said bonds, your county agricultural society must comply with the requirement of section 9901 G. C., i. e., must select or secure an option to purchase a new site for holding county fairs and must give to said county commissioners the notice provided for in said section, containing the information therein prescribed.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1944.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY HUDSON VILLAGE SCHOOL DISTRICT.

COLUMBUS, OHIO, September 26, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Hudson village school district in the sum of $2,500 issued under authority of a vote of the electors for the purpose of completing a partially constructed school building, being five bonds of five hundred dollars each."

I have examined the transcript of the proceedings of the board of education and other officers of Hudson village school district relative to the above bond issue, also the bond and coupon form, and I find the same regular and in conformity to the provisions of the General Code.

I am of the opinion that said bonds when executed by the proper officers will, upon delivery, constitute valid and binding obligations of Hudson village school district.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1945.

STATE BOARD OF PUBLIC BUILDINGS—WYANDOTTE BUILDING—BOARD REQUIRED TO FOLLOW PROVISIONS OF SECTION 2314 ET SEQ. G. C. IN CONTRACTS OVER THREE THOUSAND DOLLARS.

The state board of public buildings comes within the provisions of section 2314 et seq. G. C. which require in contracts over three thousand dollars advertisement and securing of bids.

COLUMBUS, OHIO, September 26, 1916.

State Board of Public Buildings, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of September 22, 1916, to the following effect:

"The state board of public buildings has requested me to secure an opinion from your department as to whether it is possible for the commission to make the needed changes in the Wyandotte building by force contract? It has been suggested to the board that they employ a contractor under a contract to make these changes of partitions, etc., for the different departments, bureaus and commissions of the state government, by giving the contracor ten per cent. premium of the total cost for his services in securing men and overseeing the work.

"The board would also like to have an opinion as to whether contracts which might in the aggregate amount to over $3,000, such as making all the repairs on the Wyandotte building, could be made without advertising and the necessity of securing bids? For instance, probably all the repair work would amount to more than $3,000, now would it be necessary, in order to do this work, that board advertise for bids and select the lowest and best bidder, or could the board secure a contractor under a force contract of ten per cent. and have him go ahead and make these changes?"

Your board was created by amended Senate Bill No. 304 passed May 27, 1915, and found in 106 Ohio laws at page 463.

Section 5 of said act authorizes the board, after it has decided upon the method and plan which will efficiently and economically house the offices, etc., upon and with the approval of the governor to do various things.

Subdivision 3 of section 5 authorizes the board:

"To purchase a suitable building or site contiguous to or conveniently near the state house grounds at the prevailing market price or value, on which to erect such building or buildings."

Under the provisions of this subdivision of section 5 your board has purchased what is known as the "Wyandotte" building referred to in your inquiry.

Under subdivision 1 of section 5 your board is authorized:

"To proceed with additions to or alterations in or repair of the state house, judiciary building, or other building or buildings which may be acquired for the use of the state."

Under subdivision 5 of said section your board is also authorized:

"To employ an architect or architects to prepare the necessary drawings and specifications, and supervise the construction of such additions, improvements, building or buildings, or both."

There is no provision in the law creating your board and defining its duties which, so far as repairs or additions to any building purchased by it are concerned, exempts such alterations or repairs from the provisions of section 2314 G. C. although under section 6 of the act creating your board it is provided that the state board of administration shall furnish to your board, so far as may be found practicable, such building materials, labor and service as may be necessary for the repair of or additions "to the state house or the judiciary building or for the construction and completion of any new building or buildings for which provision is made in this act."

Your inquiry is as to whether or not your board can employ a contractor to

make changes and alterations in the Wyandotte building the contractor to be compensated for his own services by receiving an amount equal to ten per cent. of the amount paid out for such repair for material and labor.

Section 2314 G. C. provides as follows:

> "Before entering into contract for the erection, alteration or improvement of a state institution or building or addition thereto, excepting the penitentiary, or for the supply of materials therefor, the aggregate cost of which exceeds three thousand dollars, each officer, board or other authority by law charged with the supervision thereof, shall make or cause to be made the following: full and accurate plans, showing all necessary details of the work, with working plans suitable for the use of mechanics and other builders in such construction, so drawn and represented as to be plain and easily understood; accurate bills showing the exact amount of different kinds of material necessary to the construction to accompany such plans; full and complete specifications of the work to be performed, showing the manner and style required with such directions as will enable a competent mechanic or other builder to carry them out and afford bidders all needful information; a full and accurate estimate of each item of expense and of the aggregate cost thereof."

Under the provisions of section 2315 G. C. the plans, etc., required under section 2314 G. C. shall be submitted to the governor, auditor of state and secretary of state for approval; and under section 2316 G. C. publication of notice for sealed proposals for performing the work and furnishing the materials, etc., is provided for. The time of notice is provided in section 2317 G. C., and under section 2318 G. C. it is provided that "on the day named in the notice, such officer, board or other authority shall open the proposals and award the contract to the *lowest* bidder."

If I read your letter correctly the changes in the building to be made by way of partitions, etc., will amount to over three thousand dollars ($3,000), and such changes would undoubtedly constitute an alteration or at least an improvement in the building. Such being the fact, I am of the opinion that your board is without authority to proceed other than as provided in section 2314 G. C. and that consequently the method suggested in your letter cannot be followed but your board is required to proceed under the provisions of section 2314 et seq. of the General Code.

The method suggested is that your board employ a contractor under a contract to make the changes. The contract price would therefore be the amount necessary to pay for labor and material plus ten per cent., and is simply another method for arriving at the amount which would be due to the contractor under the contract. As you state in your letter the amount would be above three thousand dollars ($3,000), that method could not be followed.

Therefore, it will be necessary for you to do this work under the provisions of section 2314 et seq. of the General Code which requires advertising and competitive bidding, and upon receipt of the bids to award the contract to the *lowest* bidder unless under the provisions of section 2319 G. C. in the opinion of your board the acceptance of the lowest bid would not be for the best interests of the state, whereupon upon the written consent of the governor, auditor of state and secretary of state another bid received may be accepted.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1946.

APPROVAL, RESOLUTION FOR IMPROVEMENT OF SALEM-ALLIANCE ROAD IN COLUMBIANA COUNTY.

COLUMBUS, OHIO, September 26, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of September 15, 1916, transmitting to me for examination final resolution relating to the improvement of section "J" of the Salem-Alliance road, Pet. No. 2197, I. C. H. No. 84, in Columbiana county.

I find this resolution to be in regular form and am therefore returning the same with my approval indorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1947.

BOARD OF EDUCATION—ANY DISTRICT BOARD MAY CONTRACT WITH BOARD OF ANOTHER DISTRICT FOR ADMISSION OF PUPILS INTO ANY SCHOOL IN ANOTHER DISTRICT.

A board of education of any district may contract with the board of another district for the admission of pupils into any school in another district.

COLUMBUS, OHIO, September 27, 1916.

HON. CHARLES F. ADAMS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—Yours under date of September 19, 1916, is as follows:

"In Brownhelm township, Lorain county, the school authorities have closed three one-room schools and are transporting the pupils of two of these schools to the central building of the township. The pupils of the other closed school are being sent to schools of an adjacent township, located in Erie county, and transportation and tuition paid by the Brownhelm authorities.

"The school district from which pupils are sent to Vermillion, as above stated, is located in the northern part of the township, and through this school district runs the Lake Shore Electric Trolley line. Because of rumors that this condition would be changed and that the pupils now being sent to Vermillion would be obliged to attend the central building in Brownhelm, a petition signed by more than seventy per cent. of the electors requesting that the territory embracing the district containing the electric line, and from which district the pupils are now being sent to Vermillion, transferring this territory to the Vermillion schools has been prepared and filed. If this transfer is made it will reduce the school tax of the Brownhelm school board approximately $3,000.00.

"By the present arrangement the total cost of transportation and tuition of the pupils of the Vermillion school does not exceed $1,000.00; the less to Brownhelm township would therefore be about $2,000.00. The school

authorities desire to know whether the present arrangements can be continued legally, in which event the petition will be amicably dismissed."

While it is not so stated in your communication it is learned upon investigation that "Vermillion" is located in Vermillion township in Erie county.

As I understand from your inquiry the board of education of Brownhelm township rural school district has arranged with the board of education having control of the schools of Vermillion for the admission of the pupils of a certain part of Brownhelm district to the Vermillion schools, as authorized by the provisions of section 7734 G. C., and you inquire if such arrangement may be legally continued.

Section 7734 G. C. provides as follows:

"The board of any district may contract with the board of another district for the admission of pupils into any school in such other district on terms agreed upon by such board. The expense so incurred shall be paid out of the school funds of the district sending such pupils."

I think your question is fully answered in the affirmative in opinion No. 1880 of this department, under date of August 26, 1916, addressed to Hon. John M. Markley, prosecuting attorney of Brown county, in which it is held that:

"The board of education of a township rural school district may contract with the board of education of another such school district for the admission of the pupils of the former into the schools of the latter school district and may compel pupils, subject to the compulsory attendance statute, to attend the schools, when properly assigned thereto, of the district so contracted with, if such pupils live within one and one-half miles of such school, or do not live nearer to another school, when the distance to the school to which they are assigned is more than one and one-half miles. If the pupil who is not subject to the compulsory attendance statute chooses to attend school, he may attend the school only to which he is assigned, unless he lives more than one and one-half miles therefrom, in which case such pupil may, under the provisions of said section 7735 G. C., attend any other nearer school in his district, or if there be none any other school in another district."

A copy of the above mentioned opinion is enclosed for your information and consideration.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1948.

BOARD OF AGRICULTURE—RELATION OF T. P. RIDDLE WHO CONDUCTED CORN BOYS' TRIP FOR 1915 THAT OF INDEPENDENT CONTRACTOR—BOARD ONLY AUTHORIZED TO PAY EXPENSES OF SECRETARY.

The relation of Mr. T. P. Riddle to the board of agriculture in conducting the corn boys' trip for 1915 *was that of an independent contractor.*

The board is only authorized to draw vouchers to pay for the expenses of the trip of the secretary of the board.

COLUMBUS, OHIO, September 28, 1916.

The Board of Agriculture, Columbus, Ohio.

GENTLEMEN:—Under date of September 19, 1916, your board, through Mr. G. A. Stauffer, secretary, submitted for my opinion the following:

> "I respectfully request you to render me an opinion relative to the junior contest trip that was conducted in the year 1915, upon the following questions:
>
> *"First.* Did T. P. Riddle conduct that trip as an independent contractor, or was it conducted by him as the agent of the board of agriculture?
>
> *"Second.* On that trip were T. P. Riddle, Florence Jackson, his stenographer; R. W. Dunlap, secretary of the board of agriculture, and several members of the board. Is there any provision in the law authorizing the board to pay the expenses of the trips of the individuals above named?"

From the records contained in your department it appears that on August 25, 1915, your board employed Mr. Riddle until January 1, 1916, for services in connection with the junior contest work. On September 20, 1915, your board submitted for my consideration a plan of handling the 1915 corn boys' tour, which plan was suggested in a letter received by your board from Mr. Riddle, in which letter Mr. Riddle said:

> "I respectfully recommend the following plan for handling this year's tour. Secure some person, who is not an employe of the state, to agree to handle the financial end of the tour. Require of that person that he deliver a certain service at a certain cost. Require no accounting other than the delivery of that service at that cost. Protect the state by a bond. The service should equal the service of last year's tour and the cost should not be increased materially. I believe some public-spirited citizen, financially responsible, can be secured to assume this responsibility mainly for the honor involved. If such person cannot be secured, and it becomes necessary for me to handle it, I hope some arrangement can be made so that I shall be relieved from being responsible for everything except delivering a certain service at a certain cost. The question of the legality of handling the tour on such a plan should be determined."

On September 29, 1915, an opinion was rendered on said request, in which opinion I reached the following conclusion:

> "If the plan, as suggested above, in the judgment of said board offers

any advantages over the old system, I know of no legal obstacle or objection to its adoption."

(See Opinions of Attorney-General for 1915, page 1834.)

On October 4, 1915, the chairman of the committee of your board on junior contest and club work submitted the following recommendation:

"We recommend that T. P. Riddle be allowed the sum of two hundred and fifty dollars ($250.00) for postage, to be used in advertising the coming 'corn boys' special trip' to Washington and other cities this fall."

And also the following:

"That we recommend further that Mr. T. P. Riddle, director of the 'boys' corn special trip' to Washington be required to report to Secretary Dunlap the names of such assistants as he may need in the management of that trip; also any musical bands that may be desired, and that Secretary Dunlap refer all such names to the committee on boys' and girls' contest work for their consideration before appointments are made."

both of which recommendations were accepted by the board.

On November 4, 1915, the following appears in the minutes of your board:

"Mr. T. P. Riddle appeared before the board regarding the coming trip of the Ohio corn boys to Washington and other cities, and requested that the board appoint some person who was not interested in the trip to handle the trip as he would rather be relieved, and also requested $1,100 in addition to $250 already given him to be used in paying for extra office help, postage and advertising the trip. This additional $1,100 to cover the entire cost to the state of the trip and to be used only in advertising the trip, extra help and postage."

At such meeting the chairman of the committee of your board on junior contest and club work recommended that Mr. Riddle have entire charge of the trip of the corn boys to Washington, which report, on motion duly seconded, was adopted, and it was resolved that Mr. Riddle be given entire charge of the corn boys' trip to Washington. Also on motion duly seconded, it was resolved that the sum of $1,100 in addition to $250 already granted be allowed Mr. Riddle to cover the entire cost to the state for the corn boys' trip to Washington, said sum to be expended on postage, advertising, extra help, etc., and to cover the entire cost to the state of this Washington trip.

At the meeting held on November 4, 1915, it appears that Mr. Riddle after submitting his proposition advised the board that he desired at his own expense to take certain newspaper men along on the trip, and it was stated to him at that time that none of the $1,100 which was granted to him at said meeting in addition to the $250 already granted, was to be used to pay for the trips of anybody, and was to cover all the costs the state was to have in the trip and to be used only for postage, advertising and paying for extra help, to which Mr. Riddle assented. Mr. Riddle further stated at said meeting that he was willing to render to the board an itemized account of what the $1,100 was spent for, and assured the board that it would be used for postage, advertising, extra help, etc.

It was then stated to him at that meeting that the amounts granted to him should cover everything, and that the board would expect Mr. Riddle to return

all the money over and above what was expended by him, which Mr. Riddle agreed to do. It was only after this conversation between Mr. Riddle and the board that the committee recommended that Mr. Riddle have entire charge of the trip.

The fact that Mr. Riddle was employed to have charge as director of the junior contest from August 25, 1915, to January 1, 1916, would make it appear that Mr. Riddle was contracted with solely in the capacity of an employe of the state, and if so, of course would not be an independent contractor.

However, so far as the corn boys' trip proper is concerned it appears that Mr. Riddle wrote to the board recommending a plan for handling the tour wherein it was distinctly stated that the board should not require any accounting from the person handling the same other than the delivery of a certain service at a certain cost; that his plan was submitted to this department for an opinion as to its legality, and this department advised that it was legal; and furthermore on this basis Mr. Riddle entered into the negotiations with the board on November 4th wherein the matters considered are as hereinbefore set forth.

Taking into consideration the fact that your board submitted Mr. Riddle's plan for approval as to legality, and that it was distinctly stated at the meeting on November 4th that the state should be at no expense whatever save and except the sum of $1,350, which was granted to Mr. Riddle by way of preliminary expenses, leads me to believe, in spite of the entry of his employment to January 1, 1916, that so far as the conducting of the corn boys' trip was concerned he did so as an independent contractor. Otherwise, if Mr. Riddle were acting solely as an agent of the board, it seems to me there would have been no discussion relative to the liability of the board over and above the $1,350.

I therefore conclude, in view of the facts as above stated, that the matter of Mr. Riddle's employment by the board, so far as the actual conducting of the corn boys' trip is concerned, was that of an independent contractor and not as an employe of the board. That is to say, he was to furnish a certain service at a certain cost, and having done so would have performed the contract on his part to be performed.

Specifically answering your first question, therefore, I advise that Mr. Riddle conducted the corn boys' trip of 1915 as an independent contractor and not as the agent of the board of agriculture.

Your second question is as to the right of the board to pay the expenses of Mr. Riddle, Miss Florence Jackson, his stenographer, R. W. Dunlap as secretary of the board of agriculture, and several members of the board.

I understand that there was a resolution placed on the minutes of your board at some meeting authorizing said persons to take said trip. But the question then arises as to whether or not the attempted authorization by the board was legal. Mr. Riddle being an independent contractor required to furnish a certain service at a certain price, and his stenographer taken along to act as secretary, would not, as I view it, be entitled to their expenses from the state.

Section 1081 G. C. provides:

> "Each member of the state board of agriculture shall be paid his necessary expenses while engaged in the discharge of his official duties, but he shall receive no compensation for his services."

I do not find any provision in the law governing the duties of the members of the board of agriculture which could be construed to in any way authorize them to take at state expense a trip to Washington on the corn boys' tour. It may be since the secretary is given general powers that his expenses of the trip might

properly be included as an expense to be paid for by the state for the reason that it was necessary that somebody should go along, on behalf of the board, to see that the contract made by Mr. Riddle with the board was properly carried out.

Answering your second question, therefore, I am of the opinion that the only expense referred to therein that is a proper expense to be borne by the state is the expense of the secretary of the board.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1949.

COUNTY DETENTION HOME—CONSTRUCTION OF SECTIONS 2434 AND 5638 G. C.—PURCHASE OF LAND AND ERECTION OF SUCH HOME—SECTION 1670 G. C. CONFERS NO AUTHORITY ON COUNTY COMMISSIONERS TO CONSTRUCT OR ERECT DETENTION HOME—MAINTENANCE OF SUCH HOME AUTHORIZED BY SECTION 1671 G. C.—COUNTY COMMISSIONERS APPOINT PERSONS NECESSARY TO CARE FOR CHILDREN THEREIN WHERE COUNTIES HAVE POPULATION LESS THAN FORTY THOUSAND.

The county commissioners may not under authority of the last paragraph of section 2434 *G. C. in any year make a tax levy, for any or all of the purposes therein named, which tax levy will continue over a number of years.*

The power conferred by the first paragraph of section 2434 *G. C. with a vote of the electors is subject to the fifteen mill limitation of section* 5649-5*b G. C.,* 103 *O. L., on the combined maximum rate in any year for all taxes and further limited to the amount approved by the vote of the electors for any of the purposes therein named.*

The authority to borrow money and issue bonds under the first paragraph of section 2434 *G. C. without a vote of the electors, for the purpose of purchasing a site and erecting, or acquiring a detention home is subject to the* $15,000 *limitation of section* 5638 *G. C. except where, upon the recommendation and advice of the judge referred to in the last paragraph of section* 2434 *G. C. in writing a levy of two-tenths of one mill to be applied exclusively to any one or more of the purposes mentioned in the last paragraph of section* 2434 *G. C., in a single year will produce an amount in excess of* $15,000, *in which case the amount so produced controls to the exclusion of the provisions of section* 5638 *G. C. Such authority is further subject to the three mill limitation of section* 5649-3a *for county purposes and to the ten mill limitation of section* 5649-2 *G. C.,* 103 *O. L.* 552, *for all purposes.*

The exemption of a tax levy for the purpose of purchasing land and erection of a detention home, from a vote of the electors under the provisions of the last paragraph of section 2434 *G. C. operates in preference to and to the exclusion of the limitations of section* 5638 *G. C. on the expenditures for a detention home in those cases only in which the judge referred to in section* 2434 *G. C. advises and recommends, in writing, the purchase of land for and the erection of a detention home.*

Section 1670 *G. C.,* 103 *O. L.,* 875, *confers no authority on the county commissioners to construct or erect a detention home.*

The expense of the maintenance of a detention home is required to be paid from the fund a levy for which is authorized by section 1671 *G. C. after the funds produced by such levy are available.*

In counties having a population of less than forty thousand the county commissioners shall employ or appoint persons necessary to the care of the children therein and the maintenance of the detention home.

COLUMBUS, OHIO, September 29, 1916.

Board of State Charities, Columbus, Ohio.

GENTLEMEN:—Yours under date of September 20, 1916, is as follows:

"This board, through its appointed officers, has been called into consultation in three counties in regard to the question of establishing a county

detention home, as is authorized by section 1670 of the General Code (105 O. L. 875). Some of these counties are contemplating the submission of the question to popular vote at the November election. As the whole matter is coming before the board at its meeting on September 26, and in order that it may be able to declare a policy in regard to a number of matters, which are related to the establishment of such homes, we hereby submit to you, with the hope of an early opinion, the following proposition:

"1. May the commissioners under section 2434 of the General Code levy a tax for a series of years when the rate of two-tenths of one mill will not in one year produce an adequate amount for the purchase of land and the erection of a detention home?

"2. What limitation should govern the county commissioners in borrowing money, as authorized in the first paragraph of section 2434, for the erection of a detention home?

"3. Does the exemption from referendum vote in section 2434 take precedence over the limitations set forth in section 5638, the latter section having been amended more recently than the former?

"4. Does section 1670 in itself give the commissioners any authority to construct a detention home, except as in the manner described in the other sections mentioned above?

"5. Is it not the meaning of the last sentence of section 1671 that the expenses for maintenance of a detention home shall be included in the levy for 'the expenses of the court'?

"6. What legal authority is there for the appointment of caretakers and other necessary employes of a detention home in a county having a population less than 40,000 and who shall make such appointments, if allowable, the judge of the juvenile court or the county commissioners?

"As an example of one county's trouble the following data is submitted: It has a population of about 30,000 and a tax duplicate of $54,000,000. The commissioners desire to submit a vote on bond issue for $25,000 for a detention home. Two-tenths of one mill tax levy in one year will yield only $10,800."

Section 2433 G. C., 106 O. L. 423, confers upon county commissioners authority to purchase sites for certain public buildings therein enumerated, among which is a detention home.

Section 2434 G. C., to which you refer in your first, second and third inquiries, provides as follows:

"For the execution of the objects stated in the preceding section, or for the purpose of erecting or acquiring a building in memory of Ohio soldiers, or for a court house, county offices, jail, county infirmary, detention home, or additional land for an infirmary or county children's home or other necessary buildings or bridges, or for the purpose of enlarging, repairing, improving, or rebuilding thereof, or for the relief or support of the poor, the commissioners may borrow such sum or sums of money as they deem necessary, at a rate of interest not to exceed six per cent. per annum, and issue the bonds of the county to secure the payment of the principal and interest thereof.

"Provided, that if the judge designated to transact the business arising under the jurisdiction provided for in section 1639 of the General Code of the state of Ohio, shall advise and recommend in writing to the county commissioners of any county the purchase of land for and the erection

of a place to be known as a detention home, or additional land for an infirmary or county children's home, the commissioners without first submitting the question to the vote of the county may levy a tax for either or both of such purposes in an amount not to exceed in any one year two-tenths of one mill for every dollar of taxable property on the tax duplicate of said county."

Section 1670 G. C., 103 O. L. 875, provides as follows:

"Upon the advice and recommendation of the judge exercising the jurisdiction provided herein, the county commissioners shall provide by purchase or lease a place to be known as a 'detention home' within a convenient distance of the court house, not used for the confinement of adult persons charged with criminal offenses, where delinquent, dependent or neglected minors under the age of eighteen years may be detained until final disposition, which place shall be maintained by the county as in other like cases. In counties having a population in excess of forty-thousand, the judge may appoint a superintendent and matron who shall have charge of said home, and of the delinquent, dependent and neglected minors detained therein. Such superintendent and matron shall be suitable and discreet persons, qualified as teachers of children. Such home shall be furnished in a comfortable manner as nearly as may be as a family home. So far as possible delinquent children shall be kept separate from dependent children in such home. The compensation of the superintendent and matron shall be fixed by the county commissioners. Such compensation and the expense of maintaining the home shall be paid from the county treasury upon the warrant of the county auditor, which shall be issued upon the itemized voucher, sworn to by the superintendent and certified by the judge. In all such homes the sexes shall be kept separate, so far as practicable."

Your first question involves a construction of the last paragraph and sentence of section 2434 G. C., supra. The language of this proviso of section 2434 G. C., relative to the authority of the county commissioners to levy a tax for the purposes therein mentioned without submitting to the vote of the county, is ambiguous and apparently susceptible of more than one interpretation. The language "in any one year" would seem to give foundation for argument at least that this provision contemplated a continuance of this levy for more than one year.

It will be observed that the last paragraph of section 2434 G. C., supra, is operative only upon the recommendation and advice of the judge designated to transact the business arising under the jurisdiction provided for in section 1639 G. C. in writing, that is to say such recommendation and advice is a condition precedent to the operation of the proviso in section 2434 G. C. in every case.

In view, however, of the purpose to which the tax referred to in this proviso is to be applied, I am of opinion that this provision contemplates the levying of a tax not in excess of two-tenths of one mill as therein provided for a single year. The answer to your first question is, therefore, in the negative.

It should not be overlooked that the levy of two-tenths of a mill in any one year may be made for any one or all of the purposes named in the proviso of section 2434 G. C., supra. If such levy is made for more than one of such purposes it may not exceed two-tenths of one mill in any one year. A levy for any one of the objects named in one year would not preclude the right to make a levy in a subsequent year for any or all of the other purposes mentioned therein under the proviso of section 2434 G. C.

All that is meant to be said in the above answer to the first question is that

the proviso of section 2434 G. C. does not authorize the making in a single year a levy which will continue for a number of years subsequent to the first year for which it is made.

Your second question is in its terms limited to the first paragraph of section 2434 G. C., supra. The first paragraph of this section is a general grant of authority to borrow money for the purposes therein mentioned and to issue bonds to secure the payment thereof. The provisions of this paragraph comprehend the borrowing of money and issuance of bonds both with and without a vote of the electors of the county.

The authority to borrow money and issue bonds, pursuant to the authority here conferred upon the approval of a majority of the electors of the county, is subject only to the limitation of fifteen mills for the combined maximum rate for all taxes prescribed by section 5649-5b G. C., 103 O. L. 57, and to the further limitation to the amount approved by the vote of the electors.

The limitations of the power to borrow money and issue bonds for the purchase or erection of a detention home pursuant to section 2434 G. C., without a vote of the electors of the county, is somewhat more difficult to determine.

Under section 11 of Article XII of the Constitution of Ohio, no bonded indebtedness of any political subdivision of the state may be incurred unless provision is made in the legislation under which such indebtedness is incurred for levying and collecting a tax sufficient to pay the interest and provide a sinking fund for the redemption of the bonds at maturity.

By section 5649-1 G. C., 104 O. L. 12, it is provided that every taxing district shall, within the limits prescribed by law, levy a tax sufficient for interest and sinking fund purposes for all bonds issued by any political subdivision, which levy shall be placed before and in preference to all other items. Section 5649-3a G. C. provides that the maximum levy for all county purposes shall be three mills and section 5649-2 G. C., 103 O. L. 552, provides that, with certain exceptions, within which that under consideration does not fall, the aggregate amount of taxes that may be levied in any county, township, city, village, school district or other taxing district shall not in any one year exceed ten mills on each dollar of taxable property therein. So that any bonded indebtedness incurred, pursuant to said section 2434 G. C., without a vote of the electors of the county, will at all events be subject to the three mill limitation in any year for county purposes and the ten mill limitation in any year for all purposes above referred to.

Section 5638 G. C. must also be considered in connection with secion 2434 G. C. The former section provides as follows:

> "The county commissioners shall not levy a tax, appropriate money or issue bonds for the purpose of building county buildings, purchasing sites therefor, or for land for infirmary purposes, the expenses of which will exceed $15,000.00, except in case of casualty, and as hereinafter provided; or for building a county bridge, the expense of which will exceed $18,000.00 except in case of casualty, and as hereinafter provided; or enlarge, repair, improve, or rebuild a public county building, the entire cost of which expenditure will exceed $10,000.00; without first submitting to the voters of the county, the question as to the policy of making such expenditure."

This latter section was enacted in its present form May 31, 1911, 102 O. L. 447, but is not now materially different, so far as concerns the present consideration, from section 2825 R. S., 99 O. L. 456, which it superseded and which was in operation at the time of the enactment of section 2434 G. C., 102 O. L. 55, March 28, 1911.

Section 2434 G. C., which was, prior to its amendment in 102 O. L. 55, a part of section 871 R. S., contained no such proviso as that found in the last paragraph of section 2434 G. C. It seems manifest that the purpose of the amendment of section 2434 G. C. in this respect was to modify the provisions of section 5638 G. C., carried into the code from section 2825 R. S., supra, in so far as the same would otherwise have been applicable to the authority to levy taxes and appropriate money for a detention home or the purchase of additional land for infirmary or county children's home under section 2434 G. C.

Thus the proviso of section 2434 G. C. was plainly intended in its enactment as an exception to section 5638 G. C.

Section 5638 G. C., supra, is a general provision and limitation in its terms applicable to the levying of taxes, appropriation of money or issuance of bonds for the purpose of building county buildings, purchasing sites therefor or for land for infirmary purposes in every case, the expenses of which will exceed $15,000.00, except in case of casualty.

As above stated, the proviso of section 2434 G. C. is special in character and therefore operates as a further exception to section 5638 G. C., and under familiar rules of construction as to its subject matter will control to the exclusion of the general provision in so far as they may be found to conflict notwithstanding the later enactment of the general provisions of section 5638 G. C.

Fosdick v. Perrysburg, 14 O. S. 472;
Shunk v. Bank, 22 O. S. 508;
State v. Kelly, 25 O. S. 29;
State v. Newton, 26 O. S. 200;
State v. Board of public Works, 39 O. S. 629.

Applying to the proviso of section 2434 G. C., the maxim *expressio unius est exclusio alterius,* it may be argued with much force that this provision operates to reduce in certain cases and to increase in others the $15,000.00 maximum expenditure, without a vote and is exclusive in every case. On the other hand, it may be said that the purpose of the special provision of section 2434 G. C. was only to authorize an expenditure for detention homes and land for infirmaries and children's homes in excess of $15,000.00, without a vote, when a levy not in excess of two-tenths of one mill for any one year would produce more than that amount. This latter theory was apparently adopted in an opinion of my predecessor, Hon. Timothy S. Hogan, addressed to Hon. David F. Griffith, probate judge, under date of January 24, 1912, found at page 1041 of the report of the attorney-general for that year, in which it was held:

> "The county commissioners have authority under section 2434 General Code to purchase land to establish a detention home without the vote of the electors within the limitations of this section and also those of section 5638 General Code."

In the course of the above opinion, in discussing the above mentioned sections and their limitations on the power conferred by the first paragraph of section 2434 G. C., and stating the conclusion, it is said:

> "Stated in a word, whichever of those two limitations is the greater, governs."

This statement modifies to some extent the language of the syllabus of the opinion above quoted.

I therefore hold, in accordance with the opinion above referred to, that the power to borrow money and to issue bonds to secure the payment thereof conferred by the first paragraph of section 2434 G. C., supra, for the purpose of purchasing a site and erecting or acquiring a detention home without a vote of the electors of the county, is subject to the limitations following:

The $15,000.00 limitation of section 5638 G. C., except where, upon the recommendation and advice of the judge referred to in the last paragraph of section 2434 G. C. in writing, as therein provided, a levy of two-tenths of one mill to be applied exclusively to any purpose or purposes mentioned in the last paragraph of section 2434 G. C. in a single year will produce an amount in excess of that sum, in which case the amount produced by such levy controls to the exclusion of the limitation of section 5638 G. C. The levy for interest and sinking fund for such purpose is subject to the three mill limitation of section 5649-3a G. C. for county purposes and to the ten mill limitation of section 5649-2 G. C., 103 O. L. 552, for all purposes.

From the above answer to your second question it follows that the exemption of a tax levy from a vote of the electors under the provisions of the last paragraph of section 2434 operates in preference to and to the exclusion of the limitations of section 5638 G. C. on the expenditures for a detention home in those cases only in which the judge referred to in section 2434 G. C. advises and recommends in writing the purchase of land and erection of a detention home and to that extent only is the answer to your third question in the affirmative.

From an examination of section 1670 G. C., 103 O. L. 875, it will be readily disclosed that it confers no power or authority whatever to construct a detention home. In specific terms the authority conferred therein is limited to providing a place to be known as a "detention home" by purchase or lease.

In answer to your fourth question, I am of opinion that section 1670 G. C., supra, confers no authority to construct a detention home.

Section 1671 G. C., to which reference is made in your fifth question, provides as follows:

> "When such detention home is provided by the county commissioners, and upon such home being recommended by the judge, the commissioners shall enter an order on their journal transferring to the proper fund from any other fund or funds of the county, in their discretion, such sums as may be necessary to purchase or lease such home and properly furnish and conduct it and pay the compensation of the superintendent and matron. The commissioners shall likewise upon the appointment of probation officers, transfer to the proper fund from any other fund or funds of the county, in their discretion, such sums as may be necessary to pay them, and such transfers shall be made upon the authority of this chapter. At the next tax levying period, provision shall be made for the expenses of the court."

The last sentence of this section is indeed an awkward expression, but reading it with the remainder of the section and in view of the provision of the previous section, that detention homes "shall be maintained by the county as in other like cases," and being unable to find further provision for levying taxes for the maintenance of such home, I am of opinion that the answer to your fifth question must be in the affirmative.

Coming to consider your sixth question, I note that in an opinion of my predecessor, Hon. U. G. Denman, addressed to Hon. R. H. Patchin, prosecuting attorney, under date of November 29, 1910, found at page 701 of the report of the attorney-general for that year, it was held that in a county having a population of less than forty thousand, the county commissioners may, pursuant to sections

1670 and 1671 G. C., establish a detention home and provide, from time to time, as necessity warrants, the necessary persons to care for the same and to care for the children in said home, but that such county is without power to provide a superintendent and matron for such home.

In this opinion I fully concur, as above indicated, from reading the above mentioned sections together, in view of the purposes thereof.

By section 1670 G. C., supra, it is provided that a detention home established thereunder "shall be maintained by the county as in other like cases." It is difficult to point to a very like case. Both the infirmary and children's home have some similarity to a detention home and the county jail in some respects as well. No two of these are exactly similarly maintained. I am, however, of opinion, in consideration of the duty of maintenance being imposed upon the county commissioners, and in the absence of specific authority being conferred upon the judge of the juvenile court by statute, to appoint the persons necessary to the care of the children and maintenance of the home, that the authority to do so in counties having a population of less than forty thousand rests in the county commissioners.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1950.

ROADS AND HIGHWAYS—FORM OF NOTICE TO BE GIVEN UNDER SECTION 7204 G. C.—METHOD OF SERVING SAME—ENCROACHMENT BY OHIO ELECTRIC RAILWAY COMPANY ON NATIONAL ROAD—SEE OPINION NO. 1888, AUGUST 31, 1916.

Form of notice to be given under Section 7204 G. C. and method of serving such notice, with especial reference to the encroachment by The Ohio Electric Railway Company on the National road in Licking County.

COLUMBUS, OHIO, September 29, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication under date of September 7, 1916, which communication reads as follows:

> "I am in receipt of your opinion No. 1888, under date of August 31, dealing with the removal of the Ohio Electric Railway Company's property from the improved portion of the National road in Licking county.
>
> "The properties of the above named company which it is necessary to move in order to permit of the proper construction of the highway are all poles, wires, rails, ties and other appurtenances of the electric railway which is operated by the Ohio Electric Railway Company within the following described limits:
>
> "Beginning at the point where the east corporation line of the village of Kirkersville intersects the highway known as the National road in Licking county, said point being noted as station 343+20 on the plan for improving the National road. (The plan here referred to is the plan, now on file in the office of the state highway commissioner and the office of the commissioners of Licking county for improving the National road from the

Franklin county line to the south fork of the Licking river, about one mile east of the village of Hebron, in Licking county. A print of this plan was furnished the Ohio Electric Railway Company through their chief engineer, Mr. J. H. Sundmaker, about the first of September, 1915.) Thence following in an easterly direction along the National road a distance of 2.16 miles to the concrete arch bridge of the Ohio Electric Railway Company over Licking Creek.

"The east line of said bridge is at station 229+30 as shown on the road plan referred to above.

"Within these limits the north end of the ties of the railway track are now distant from the center of the highway from 11 to 15 feet and the poles supporting the power line and trolley wire for the track are distant from the center of the highway from 7 to 11 feet.

"The line outside of which the ties, rails, poles and other appurtenances of the Ohio Electric Railway Company must be moved, in order to permit of the proper completion of the improvement, is a line parallel with the center line of the highway and 20 feet to the south thereof.

"A print of the proposed improvement, showing the present position of the road, poles, track, etc., will be prepared to accompany your notice to the Ohio Electric Railway Company if you so desire."

The order which you should prepare and serve upon the Ohio Electric Railway Company should be drawn in the following form:

"OFFICE OF THE STATE HIGHWAY COMMISSIONER OF THE STATE OF OHIO.

"Columbus, Ohio,----------, 1916.

"To The Ohio Electric Railway Company:

"You are hereby notified that your poles, wires, rails, ties and other appurtenances as now located within the bounds of the following described public highway, towit:

"Beginning at the point where the east corporation line of the village of Kirkersville intersects the public highway known as the National road, in Licking county, Ohio, which point is noted as station 343 plus 20 on a plan for improving said public highway, which plan is on file in the office of the state highway commissioner of the State of Ohio and in the office of the county commissioners of Licking county, Ohio; thence following in an easterly direction along said National road a distance of 2.16 miles to the concrete arch bridge of The Ohio Electric Railway Company over Licking creek, the east line of said bridge being at station 229 plus 30 as shown on the road plan referred to above;

constitute an obstruction in said public highway.

"You are therefore ordered to relocate your poles, wires, rails, ties and all other appurtenances upon said public highway above described, and place said poles, wires, rails, ties and all other appurtenances to the south of a line parallel with the center line of said highway and twenty (20) feet to the south thereof.

"You are required to proceed within five days after the receipt of this notice to re-locate said poles, wires, rails, ties and all other appurtenances upon said public highway above described in the manner above indicated and to complete said work of re-location within a reasonable time.

"A print showing the present position of the road, poles and tracks, the

center line of said public highway and the line parallel with said center line and twenty (20) feet to the south thereof is hereto attached.

"Respectfully,

"----------

"State Highway Commissioner of the State of Ohio."

As to the method of serving this order and making a record of your action, I suggest that you prepare and sign duplicate copies of the order and then through a representative of your department serve one of the copies upon the president of The Ohio Electric Railway Company, if he be found in the state, but if he be not found in the state that service be made upon the highest officer of the company found at its principal office.

The representative of your department making the service should then indorse upon the other copy of the notice the date of service and the name and official position of the person served, and if service be not made on the president of the company the indorsement should further state that the president was not found within the state and that the person served was the highest officer of the company found in charge of its principal office. The indorsement should further show that personal service was made and should be signed and sworn to by the person serving the notice. The copy of notice should then be placed on your files.

As pointed out in opinion No. 1888 of this department, referred to by you, your department is the proper authority to make an order for the re-location of the tracks of the company, in view of the fact that this highway is being improved by the state.

I understand, however, that Licking county is contributing the sum of $11,620.00 toward this improvement, all of said sum being applied toward the construction of drainage structures, and in view of this fact and in view of the provisions of section 161 of the Cass Highway law, section 7204 G. C., which section is quoted in full in opinion No. 1888, I recommend that in order to avoid all future question as to proper notice, the cooperation of the county authorities of Licking county be invited in the premises and that if it is possible to secure such cooperation the county officials be requested to take the action pointed out by the first paragraph of section 7204 G. C. This action would involve a notification or report to the county commissioners by the county highway superintendent and a notice by the county commissioners to The Ohio Electric Railway Company.

I understand that the county highway superintendent of Licking county shares your views in reference to the nature of the obstructions maintained by the company, and the fact that the commissioners have already made a written request upon the company indicates that their cooperation may be secured.

I am not advised as to the character of the written request previously made by the commissioners upon the company or as to the method of service, and if the further assistance of the county officials of Licking county may be secured would suggest that the county highway superintendent of that county make a written report to the county commissioners in the following form:

"OFFICE OF THE COUNTY HIGHWAY SUPERINTENDENT OF LICKING COUNTY, OHIO.

"Newark, Ohio,----------, 1916.

"To the Honorable Board of County Commissioners of Licking County, Ohio:

"You are hereby notified that The Ohio Electric Railway Company has obstructed and is obstructing with its poles, wires, rails, ties and other appurtenances, as now located, the following described public highway, towit:

"Beginning at the point where the east corporation line of the village of Kirkersville intersects the public highway known as the National road in Licking county, Ohio, which point is noted as station 343 plus 20 on a plan for improving said public highway, which plan is on file in the office of the state highway commissioner of the state of Ohio and in the office of the county commissioners of Licking county, Ohio; thence following in an easterly direction along said National road a distance of 2.16 miles to the concrete arch bridge of The Ohio Electric Railway Company over Licking creek, the east line of said bridge being at station 229 plus 30 as shown on the road plan referred to above.

"In order that said obstruction may be removed from said highway, it will be necessary for said The Ohio Electric Railway Company to relocate its said poles, wires, rails, ties and all other appurtenances upon said public highway and place the same to the south of a line parallel with the center line of said highway and twenty (20) feet to the south thereof.

"Respectfully submitted,

"----------

"County Highway Superintendent of Licking County, Ohio."

Upon receipt of this notice the county commissioners should order the same spread upon their minutes and should thereupon adopt and place upon their journal a resolution in the following form:

"RESOLUTION.

"WHEREAS, The board of county commissioners of Licking county, Ohio, has been notified by the county highway superintendent of Licking county, Ohio, that The Ohio Electric Railway Company has obstructed and is obstructing, with its poles, wires, rails, ties and other appurtenances as now located, the following described public highway, towit:

"Beginning at the point where the east corporation line of the village of Kirkersville intersects the public highway known as the National road in Licking county, Ohio, which point is noted as station 343 plus 20 on a plan for improving said public highway, which plan is on file in the office of the state highway commissioner of the State of Ohio and in the office of the county commissioners of Licking county, Ohio; thence following in an easterly direction along the said National road a distance of 2.16 miles to the concrete arch bridge of The Ohio Electric Railway Company over Licking creek, the east line of said bridge being at station 229 plus 30 as shown on the road plan referred to above: and

"WHEREAS, Said county highway superintendent has notified this board that in order for said The Ohio Electric Railway Company to remove said obstructions, it will be necessary for said company to re-locate its said poles, wires, rails, ties and all other appurtenances upon said public highway above described, and place the same to the south of a line parallel with the center line of said highway and twenty (20) feet to the south thereof.

"NOW, THEREFORE, BE IT RESOLVED, by the board of county commissioners of Licking county, Ohio, that the following notice be served upon said The Ohio Electric Railway Company:

"OFFICE OF THE COUNTY COMMISSIONERS OF LICKING COUNTY, OHIO.

"Newark, Ohio, ----------, 1916.

"To The Ohio Electric Railway Company:

"Your are hereby notified that you are obstructing with your poles,

wires, rails, ties and other appurtenances, as now located, the following described public highway, towit:

"Beginning at the point where the east corporation line of the village of Kirkersville intersects the public highway known as the National road in Licking county, Ohio, which point is noted as station 343 plus 20 on a plan for improving said public highway, which plan is one file in the office of the state highway commissioner of the state of Ohio and in the office of the county commissioners of Licking county, Ohio; thence following in an easterly direction along said National road a distance of 2.16 miles to the concrete arch bridge of The Ohio Electric Railway Company over Licking creek, the east line of said bridge being at station 229 plus 30, as shown on road plan referred to above.

"You are therefore ordered to remove your said poles, wires, rails, ties and other appurtenances, as now located within the bounds of said public highway above described, and to re-locate said poles, wires, rails, ties and all other appurtenances upon said public highway and place said poles, wires, rails, ties and all other appurtenances to the south of a line parallel with the center line of said highway and twenty (20) feet to the south thereof.

"You are required to proceed within five days after the receipt of this notice to re-locate said poles, wires, rails, ties and all other appurtenances upon said public highway above described in the manner above indicated and to complete said work of re-location within a reasonable time.

"A print showing the present position of the road, poles and tracks, the center line of said public highway and the line parallel with said center line and twenty (20) feet to the south thereof is hereto attached.

"Respectfully,

"_____

"_____

"_____

"County Commissioners of Licking County, Ohio.

"Attest:

"_____

Clerk of the Board of County Commissioners of Licking County, Ohio.

"BE IT FURTHER RESOLVED, That the county highway superintendent of Licking county, Ohio, be directed to forthwith serve a copy of the notice above set forth upon said The Ohio Electric Railway Company."

Upon the passage of the above resolution by the county commissioners, a copy of the notice as therein set forth should be prepared and signed by the county commissioners and the county highway superintendent should thereupon serve the same upon the company in the same manner suggested for the service of the notice signed by you. The county highway superintendent should then report his action to the county commissioners, which report should be in writing and may be in the following form:

"OFFICE OF THE COUNTY HIGHWAY SUPERINTENDENT OF LICKING COUNTY, OHIO.

Newark, Ohio,_____, 1916.

"To the Honorable Board of County Commissioners of Licking County, Ohio:

"In compliance with your order contained in a resolution passed by you on the_____day of_____, 19____, I served upon the

The Ohio Electric Railway Company a copy of the notice set forth in said resolution by (here set forth the manner of service.)

"_____

"County Highway Superintendent of Licking County, Ohio."

This written report should be verified by the affidavit of the county highway superintendent and presented to the county commissioners and they should spread the same upon their minutes, in order that a record of the service of the notice may be preserved.

If the cooperation of the county officials may be had in this matter, I suggest that the service of the notice to be given by you be deferred until the county highway superintendent and the county commissioners have taken the necessary preliminary steps and the county highway superintendent is ready to serve the notice signed by the county commissioners. The representative of your department designated by you to serve the notice signed by you and the county highway superintendent may then deliver to the president or other officer of The Ohio Electric Railway Company the notices from the state and county authorities at the same time.

If the company fails to act in the premises after being notified in the manner herein pointed out, I will take the necessary action, upon being advised by you of that fact.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1951.

COUNTY COMMISSIONERS—BONDS SOLD UNDER AUTHORITY OF SECTION 6929 G. C.—PROCEEDS IN COUNTY TREASURY—COMMISSIONERS NOT AUTHORIZED TO ADVANCE SUCH PROCEEDS TO TOWNSHIP TRUSTEES—EVEN UPON AGREEMENT TO LATER REIMBURSE COUNTY.

When bonds have been sold under authority of Section 6929 G. C. and the proceeds have come into the county treasury, the county commissioners are not authorized to advance such proceeds to township trustees, even upon an agreement to later reimburse the county.

COLUMBUS, OHIO, September 29, 1916.

HON. E. A. SCOTT, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR:—Your request for an opinion under date of September 20, 1916, received at this office on September 27, 1916, reads as follows:

"A levy of three mills has been made on the property of Green township, Adams county, Ohio, under section 6927 for road purposes and to be paid by township.

"The money available from this levy will not be ready for use until March and September of next year or 1917. Can or can not the county commissioners borrow the township's proportion for said township and

advance same to township trustees and then later let township trustees reimberse said county? Has your department rendered an opinion on this question? I am aware that the statute says that bonds can be issued for such purposes."

Section 6927 G. C., being section 106 of the Cass law (106 O. L. 603), reads as follows:

"For the purpose of providing by taxation a fund for the payment of the proportion of the costs and expenses of such improvement to be paid by the township or townships interested, in which such road may be in whole or in part situated, the county commissioners are hereby authorized to levy a tax not exceeding three mills in any one year upon all the taxable property of such township or townships. Such levy shall be in addition to all other levies authorized by law for road purposes, but subject to the limitation on the combined maximum rate for all taxes now in force."

This section is a part of Chapter VI of the Cass highway law relative to road construction and improvement by county commissioners.

The funds produced by the levy provided for in this section are to be used by the county commissioners in the payment of that part of the cost and expense of constructing a road improvement apportioned to the township in which the road in question is situated. Township trustees have no power to levy taxes under this section and no control whatever over the funds produced by such a levy.

The issue and sale of bonds of the county, in anticipation of the collection of levies made under this section, is expressly authorized by section 6929 G. C., but there is no authority whatever for advancing to township trustees any part of the proceeds of bonds sold in anticipation of the collection of levies made under section 6927 G. C. The proceeds of such bonds must be used by the county commissioners, and until such funds are used by the county commissioners they must remain in the county treasury.

Answering your question specifically, I advise you that county commissioners are authorized by section 6929 G. C. to issue and sell the bonds of the county in anticipation of the collection of taxes levied under section 6927 G. C., but that when such bonds have been sold and the proceeds have come into the county treasury, the county commissioners are not authorized to advance such proceeds to township trustees, even upon an agreement to later reimburse the county.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1952.

APPROVAL, SALE TO THE AUSTIN POWDER COMPANY OF CLEVELAND, OHIO, PORTION OF ABANDONED OHIO CANAL BASIN.

COLUMBUS, OHIO, September 29, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication of September

27, 1916, transmitting to me a resolution providing for the private sale to The Austin Powder Company of Cleveland, Ohio, of a portion of an abandoned Ohio canal basin for a consideration of $500.00.

I find that this resolution recites the proper jurisdictional facts and that under those facts the sale of the land in question is authorized by the statutes. I am therefore returning the duplicate copies of the resolution in question, with my signature attached thereto.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1953.

COUNTY COMMISSIONERS—BOND OF COUNTY TREASURER—HOW REDUCED DURING TERM OF OFFICE.

When county commissioners deem it advisable to reduce the official bond of the county treasurer during the term of office for which said bond is given, they may, by the mutual consent of the treasurer, his surety and themselves, surrender said bond and accept a new bond for the reduced amount to cover the remainder of his said term of office. Such action should be by resolution of said commissioners duly entered on their journal, which resolution must fully protect all the rights of the county under said first bond for the time during which it subsisted as a legal indemnity of the county against loss by reason of any default of said treasurer, which time will be from the date of its acceptance and continuing until the acceptance of the new bond.

COLUMBUS, OHIO, September 29, 1916.

HON. HENRY W. CHERRINGTON, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—I have you letter of September 18, 1916, as follows:

"The county treasurer of this county gave a bond in the sum of $100,000 before entering upon the duties of his office, the county commissioners having previously fixed the amount. Prior to the expiration of the first year of the treasurer's term, the commissioners, by resolution, fixed the treasurer's bond at $40,000. The surety on the treasurer's bond is a surety company. The bond is for the term of office of the treasurer. The surety company claims that if the bond is reduced, that it will still be liable for the full $100,000. Section 12195 provides one way in which the company could be released. Would the action of the county commissioners release the surety from liability? If not, is there any way they can be released except by compliance with the provisions of section 12195, et seq.?"

Section 12195 G. C., to which you refer, provides as follows:

"A surety of any county officer, except a commissioner, may notify the county commissioners by giving at least five days' notice that he is unwilling to continue as surety for such officer, and will at a time to be then named make application to them to be released from further liability upon his bond. He also shall give at least three days' written notice to each of such officers of the time and place at which his application will be made."

It is provided in the succeeding section that if the commissioners in the hearing of such application find there is good reason therefor they may require the officer in question to give a new bond.

It is apparent that the action contemplated by your county commissioners, under the facts stated in your letter, is not covered by the provisions of said section 12195 aforesaid, because said provisions may apply only in cases wherein a surety is unwilling to continue as such surety and desires to be wholly released from any further responsibility on a bond.

There is nothing, however, to prevent your county commissioners from surrendering the present bond of $100,000 and accepting a new bond in the sum of $40,000 to cover the remainder of the term of said county treasurer. This action of the commissioners should be by resolution duly entered upon their journal, which resolution should state the reasons for surrendering the old bond and accepting the new bond and said resolution should also carefully protect the county from any waiver or release of any claim which it might have resulting from any default of said treasurer made during the term of the bond surrendered.

In answer therefore to your inquiry I must advise that your county commissioners by the mutual consent of the treasurer, his surety and themselves may surrender the present bond of $100,000 and accept a new bond for $40,000 to cover the remainder of the term of said county treasurer, but such surrender must be made under a resolution that will fully protect all the rights of the county under said first bond for the time during which it subsisted as a legal indemnity of the county against loss by reason of any default of said treasurer and the time so specified will be that period beginning from the date of the acceptance of the first bond and continuing until the acceptance by the county commissioners of the second bond.

In this connection it must be remembered that in this and all other cases in which the amount of the official bond of the treasurer is sought to be reduced, due regard must be had to the requirements of section 2633 G. C. as amended 103 O. L., 540, that said bond must be sufficiently adequate in amount to cover all moneys that may come into the possession and control of said treasurer.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1954.

COUNTY BOARD OF EDUCATION—WHERE JUDGMENT RENDERED AGAINST BOARD—LIABLE FOR COSTS INCLUDING WITNESS FEES—HOW COLLECTED.

When a judgment of a court is rendered in a civil cause against a county board of education for the cost of the plaintiff in such action such defendant county board of education is liable for all the costs of the cause including lawful witness fees, which may be collected in the same manner as the judgment is collected.

COLUMBUS, OHIO, September 30, 1916.

HON. MILTON HAINES, *Prosecuting Attorney, Marysville, Ohio.*

DEAR SIR:—I have the communication addressed to me under date of September 19, 1916, by yourself and Honorable D. M. Cupp, prosecuting attorney of Delaware county, Ohio, as follows:

"Early in the year 1915, the Union county board of education filed a petition in the common pleas court of Delaware county, Ohio, against the board of education of Delaware county, Ohio, in which the prayer was that a writ of mandamus issue commanding the county board of education of Delaware county, to place certain resolutions and maps upon its records and to file a certified copy of said resolutions and maps with the auditors of Union and Delaware counties, and to certify a copy of said resolutions and maps to the presidents and clerks of each the Union county board of education, the Delaware county board of education, the Magnetic Springs board of education, the Thompson township board of education (Del. Co.), the Scioto township board of education (Del. Co.), and to place the determination of the funds and indebtedness of the Magnetic Springs board of education, the Thompson township board of education, and the Scioto township board of education upon its minutes as of August 3d, 1914, and to certify the same to the said different boards, and to direct the payment of said funds and indebtedness thereof accordingly.

"The order as prayed for in the petition of the plaintiff board was granted in full by Judge Jewell and costs taxed against the Delaware county board.

"This action grew out of a transfer of territory from Scioto and Thompson township, Delaware county, to the Magnetic Springs board of education of Union county, the transfer being by joint action of the two county boards.

"There were court costs and quite a large amount of witness fees assessed against the Delaware county board and it has refused to pay all costs especially the witness fees.

"Under section 4749 of the General Code, boards of education shall be a body politic and corporate, and as such capable of suing and being sued, contracting and being contracted with, is not the Delaware county board liable for all costs made and by order of the court assessed against it? And will not that order hold good as to the fees of witnesses duly subpoenaed to appear in said court?

"This matter being in dispute, we would greatly appreciate an opinion from you relative thereto."

From the above communication it is observed that an action in mandamus was begun in the common pleas court of Delaware county, Ohio, against the county board of education of that county in which the writ sought was issued to the defendant board of education and judgment of the court entered against the defendant board for the costs, including witness fees.

Section 3012 G. C. provides in part as follows:

"Each witness in civil causes shall receive the following fees: For each day's attendance at a court of record to be paid on demand by the party at whose instance he is summoned, and taxed in the bill of costs, one dollar, and five cents for each mile from his place of residence to the place of holding such court, and return; for testifying before an officer authorized to take depositions, under a subpoena, seventy-five cents, and five cents for each mile from his place of residence to the place of taking depositions, to be paid on demand by the party at whose instance he is summoned; * * * * No mileage shall be allowed if the distance from the place of residence of the witness to the place where called to testify is less than one mile."

Section 3026 and section 3027 of the General Code provide as follows:

"Sec. 3026. G. C.: On the rendition of judgment, in any cause, the cost of the party recovering, together with his debt or damages, shall be carried into his judgment, and the costs of the party against whom judgment is rendered shall be separately stated in the record, or docket entry. No party in whose favor judgment for costs is rendered in a cause, may release, satify, or discharge, in whole, or in part, any of such costs, unless previously paid by him to the clerk of the court, or to the person entitled thereto, or they shall have been legally assigned, or transferred to such party by the person, or persons in whose name or names such costs stand taxed upon the record or docket."

"Sec. 3027 G. C.: The clerk or justice of the peace, issuing execution for such judgment, shall indorse thereon the amount of the costs of the party condemned, which costs shall be collected by the officer to whom such writ is directed, in the same manner and at the same time as the judgment mentioned in the execution."

It is thus required that the costs of the party recovering, in the above case the plaintiff, including witness fees prescribed by section 3012 G. C., shall be carried into the judgment and the costs of the defendant, the county board of education of Delaware county, are required to be separately stated in the record or docket entry and in issuing execution for the judgment the clerk of the court is required to endorse thereon the amount of the costs of the defendant, the county board of education of Delaware county, and it is the duty of the officer to whom such execution is directed to collect the costs of such defendant at the same time and in the same manner as the judgment including the costs of the county board of education of Union county. That is to say, answering the questions submitted by you specifically, the Delaware county board of education is liable under the judgment of the court for the costs of the Union county board including witness fees and is liable under section 3027 G. C., supra, for its own costs including witness fees which may be collected in the same manner as the judgment and the answer to your questions must therefore be in the affirmative.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1955.

INSTITUTIONS OF PUBLIC CHARITY—WHEN PART OF REAL ESTATE OF SUCH INSTITUTION IS RENTED FOR COMMERCIAL PURPOSES, SAID PART NOT EXEMPT FROM TAXATION — YOUNG MEN'S CHRISTIAN ASSOCIATION.

When a part of the real estate of an institution of public charity only is rented for commercial purposes, said part being certain rooms of a building owned and occupied by said institution, such rooms so rented may not be exempt from taxation under the provisions of section 5353 G. C.

Authority for the enactment of that part of section 5349 G. C. which provides "public colleges and academies and all buildings connected therewith and all lands connected with public institutions of learning not used with a view to profit shall be exempt from taxation" may be found in the provisions of section 2 of article XII of the constitution which exempts from taxation the property of institutions of public charity.

COLUMBUS, OHIO, September 30, 1916.

HON. CHARLES E. BALLARD, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—I have your letter of September 20, 1916, submitting the following statement and inquiries:

"The Young Men's Christian Association of Springfield, Ohio, is a corporation not for profit organized under the laws of this state. It owns a tract of real estate on which a building stands, the value of both being probably $150,000.00. Said association conducts its affairs along the usual lines of such associations. It is supported largely by voluntary contributions, gifts and bequests for permanent endowment. It charges a membership fee ranging from $5.00 to $8.00 per year. There are two classes of members, active and associate. All active members must be at least eighteen years of age and a member in good standing of a Protestant evangelical church, and pay such fees as are fixed by the board of directors, and sign the constitution. Associate members need not belong to any church or may belong to a church other than a Protestant evangelical church, and enjoy all the privileges of the association except voting in the election of the directors. Only active members are allowed to vote for the directors. Worthy young men may be admitted as associate members in the association by the board of directors if said board of directors find that such young men are financially unable to pay the annual fee. Two of the rooms of the building are rented for commercial purposes, the income being used to support the association, and a number of rooms in the building are rented to members as living rooms and fees are charged therefor. Said association maintains reading rooms, swimming pool, baths, pool and billiard tables. Night school for the use of its members is conducted in said building. Those who attend such school are required to pay if able.

"Neither the ground nor the building is on the tax duplicate of Clark county, Ohio, for the purpose of taxation.

"(1) Should they be placed on the tax duplicate for taxation as other commercial property?

"(2) If the ground and building of the association are exempt from taxation, what section of the General Code exempts the same?

"(3) Does the phrase, 'public school houses, * * * may, by general laws, be exempted from taxation,' found in section 2 article XII of the con-

stitution authorize the legislature to exempt, as it has undertaken to do by section 5349 General Code, 'public colleges and academies and all buildings connected therewith, and all lands connected with public institutions of learning, not used with a view to profit?'

"(4) Would the real estate and building of said association be exempt under section 5353 General Code, on the theory that it is 'property belonging to institutions of public charity only?'

"Throwing light upon the questions proposed, I refer to *Kenyon College* v. *Schnebly*, 12 O. C. C. (N. S.) 1, affirmed without report in *Schnebly* v. *Kenyon College*, 81 O. S. 514, *The Benjamin Rose Institute* v. *Myers*, 92 O. S. 252, and cases therein cited."

It is provided in section 5353 G. C. as amended 103 O. L. 549, that:

"Lands, houses and other buildings belonging to a county, township, city or village, used exclusively for the accommodation or support of the poor, or leased to the state or any political subdivision thereof for public purposes, and property belonging to institutions of public charity only, shall be exempt from taxation."

In an opinion reported in volume II at page 1298 of the opinions of the attorney-general for the year 1915, I considered and fully discussed what constitutes an "institution of purely public charity" as contemplated by the provisions of section 2 of article XII of the constitution as they stood prior to the amendment of 1912. Under the authorities cited and collated in said opinion to which I refer without further discussion, I am of the opinion that the institution named in your inquiry is one of public charity only and its property is therefore exempt from taxation under the provisions of said section 5353 aforesaid, except in the particulars hereinafter noted. In reaching this conclusion I am amply sustained by former opinions of this department.

In an opinion under date of June 8, 1894, found in volume IV of the opinions of the attorney-general, the Hon. J. K. Richards held:

"Under the rule generally adopted in this state Y. M. C. A. buildings are exempted from taxation."

There is no other or further comment made in said opinion in respect to the matter in question.

Again, on page 897, in the same volume is found an opinion by the Hon. Frank S. Monnett, in answer to the following question:

"Should Young Men's Christian Associations' real estate and real estate of like societies be exempted from taxation where it is in part used for secular purposes?"

In answer to said question reference is made to the case of Library Association v. Pelton, 36 O. S. 253, from which the following quotation is made:

"It may be said, that the entire building may become necessary for the objects of the association. When this shall become the case, and the entire building or any additional parts are so used, the parts thus withdrawn from renting, cease to be leased or otherwise used with a view to profit, and fall within the exemption.

"The fact that the building is so constructed that the parts leased or otherwise used with a view to profit cannot be separated from the residue by

definite lines, is no obstacle to a valuation of such parts for purposes of taxation, having due reference to the taxable value of the entire property."

The opinion then further states:

"If, as is implied by your questions, that portion of the building is used for other purposes than those provided by section 2732 of the Revised Statutes, such parts of said building and the appurtenances thereto as are rented or otherwise used would not be exempt from taxation, and the value of such part can be found by the taxing officer by comparing such part of said building with the taxable value of the entire property. I would, therefore, hold in answer to this question, that such building, if used entirely for public charity, or for similar purposes, as are mentioned in subdivision 1 of section 2732 Revised Statutes, the same would be exempt from taxation, but if any portion of it is used for other purposes than those contemplated by that section, I would hold that such part so used for any other purpose would be liable for taxation."

In volume V of the opinions of the attorney-general at page 709, a like conclusion is announced by Hon. J. M. Sheets. I quote from said opinion as follows:

"I am in receipt of your communication of this date in which you seek an opinion as to whether certain property in the city of Cleveland is exempt from taxation. The first tract mentioned is the property of the Young Men's Christian Association of that city, consisting of the ground and the building erected thereon. Part of the building is used as quarters for the association, and a part of it is leased as business rooms to persons engaged in mercantile pursuits—the money received from the leases, however, is used in supporting and maintaining the organization.

"That part of the building used with a view to profit, i. e., from which rentals are received, is clearly taxable, and, as it appears that the whole property has escaped taxation for a number of years the part leased should be placed on the tax duplicate, not only for the current year, but for previous years back to the last decennial appraisement."

In this opinion reference is also made to the case of Library Association v. Pelton supra, and the opinion further continues as follows:

"The Young Men's Christian Association can claim no exemption unless its property can be classed as either an 'institution of purely public charity,' or a 'house used exclusively for public worship.' Surely it cannot be claimed that that part of the property occupied by merchants is used as an 'institution of purely public charity,' or as a 'house used exclusively for public worship.' It matters not that the proceeds of the leases are used for the purpose of maintaining the organization."

It appears from the statements made in your inquiry that two rooms of the building owned by the association in question are rented for commercial purposes. In view of the observations in the opinions heretofore quoted, with which I concur, and particularly under the authority of the recent case of Rose Institute v. Myers, 92 O. S. 252, wherein it is held that:

"It is the use of the property which renders it exempt or non-exempt, not the use of the income derived from it."

I conclude that so much of said building as is rented for commercial purposes, said part being the two rooms specified, should be assessed by the proper officers for taxation purposes and placed on the tax duplicate.

In answer therefore to your first, second and fourth inquiries, I advise that only that part of the property of the association named which is rented for commercial purposes, said part being the two rooms specified in your letter, should be placed upon the tax duplicate, and that the residue of said property is exempt under the provisions of section 5353 aforesaid.

In answer to your third inquiry, wherein you ask if the provisions

> "* * * 'public school houses * * * may, by general laws, be exempted from taxation;' found in section 2 article 12 of the constitution, authorize the legislature to exempt, as it has undertaken to do by section 5349 General Code, 'public colleges and academies, and all buildings connected therewith, and all lands connected with public institutions of learning, not used with a view to profit."

it must be observed that the provisions of said section 5349, as quoted in said inquiry are ordinarily considered as applying to institutions of public charity, and that, therefore, said provisions are referable more particularly to that clause of the constitution found in section 2 of article XII, which exempts from taxation institutions of public charity.

In the opinion first referred to herein, being the opinion found at page 1298 of volume II of the Attorney-General's Opinions for 1915, I held that

> "* * * schools, colleges and hospitals are charities in the legal sense of the term, as well as homes and asylums for indigent and afflicted persons."

This conclusion is fully supported by the case of Gerke v. Purcell, 25 O. S. 229, wherein it is held that by the term "public school house," referred to in your inquiry "is meant such as belong to the public, and are designed for schools established and conducted under public authority."

It was further held in said opinion that:

> "A charity, in a legal sense, includes not only gifts for the benefit of the poor, but endowments for the advancement of learning, or institutions for the encouragement of science and art, without any particular reference to the poor."

And, further

> "Schools established by private donations, and which are carried on for the benefit of the public, and not with a view to profit, are 'institutions of purely public charity' within the meaning of the provision of the constitution, which authorizes such institutions to be exempt from taxation."

The supreme court thus clearly distinguishes between what is a public school house, as contemplated in the constitutional provisions aforesaid, and what institutions of learning may be considered as institutions of public charity, and it is apparent from the distinction thus made that the institutions included within the last clause of section 5349 are institutions of public charity, and that said provisions of said section are intended to apply to institutions of that character.

In answer, therefore, to your third inquiry, I am of the opinion that the provisions of section 5349 G. C., therein referred to, are authorized by that clause of said section

2 of article XII of the constitution which exempts from taxation the property of institutions of public charity.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1956.

APPROVAL, ORDER OF STATE BOARD OF HEALTH IN REGARD TO POLLUTION OF OTTAWA RIVER BY SEWAGE FROM CITY OF LIMA.

COLUMBUS, OHIO, October 2, 1916.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Enclosed herewith you will find an order of the state board of health to the city of Lima, Ohio, in regard to the pollution of the Ottawa river by sewage from said city of Lima.

I have examined said order, which is issued pursuant to section 1251 G. C., and find the same to be regular.

It is my opinion that it should be approved and I have therefore approved the same and am transmitting it to you for your approval.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1957.

BOARD OF DEPUTY STATE SUPERVISORS AND INSPECTORS OF ELECTIONS—WHEN NIGHT WATCHMAN CAN BE EMPLOYED——PAID FROM COUNTY TREASURY.

When it is necessary for the board of deputy state supervisors and inspectors of elections to employ a night watchman the employment of such employe is required to be paid from the county treasury upon the allowance of the county commissioners.

COLUMBUS, OHIO, October 2, 1916.

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

GENTLEMEN:—Yours under date of September 21, 1916, is as follows:

> "We would respectfully ask your written opinion upon the following question:
>
> "In the event that a board of deputy state supervisors and inspectors of elections find it necessary to employ a night watchman at the office of the board, how is the compensation of such employee to be paid?"

Numerous special provisions will be found for the payment of specific election expenses necessary to the proper conduct of elections. It is unnecessary to refer to each of such provisions but it is deemed sufficient to say that a careful examination of the statutes will fail to disclose any specific statutory provision by which the method of payment of the compensation of a night watchman as such is prescribed.

Section 4946 G. C., 103 O. L. 545 provides among other things in reference to election expenses in registration cities that the "cost for the rent, furnishings and supplies for rooms hired by the board for its offices and as places for registration of electors in the holding of elections in such city shall be paid by such city from its general fund." This provision, however, does not include within its terms the employment of a night watchman.

Section 4821 G. C. provides as follows:

> "All proper and necessary expenses of the board of deputy state supervisors shall be paid from the county treasury as other county expenses, and the county commissioners shall make the necessary levy to provide therefor. In counties containing annual general registration cities, such expenses shall include expenses duly authorized and incurred in the investigation and prosecution of offenses against laws relating to the registration of electors, the right of suffrage and the conduct of elections."

It is here provided that all proper and necessary expenses of the boards of deputy state supervisors of elections, which by virtue of section 4802 G. C. include as well deputy state supervisors and inspectors of elections, shall be paid from the county treasury as other county expenses.

If then, the employment of a night watchman is necessary, a question to be determined in the first instance by the board of deputy state supervisors of elections, the compensation of such employe, would then constitute a necessary and proper expense of the board and is required to be paid from the county treasury as other county expenses. That is to say, upon the allowance of the county commissioners and the warrant of the county auditor.

It may be observed, however, that it is not conceived that the employment of a night watchman by a board of deputy state supervisors and inspectors of elections would be necessary in any case except in the larger counties for the short time in which the official ballots are in the custody of the board prior to the delivery of the same to the precinct election officers, and for the period of time after the election prior to the completion of the canvass of the returns, where the facilities for the safe keeping of the ballots and returns are insufficient without personal attendance at all times and the city fails or refuses to provide proper police protection for the safe keeping of the ballots and returns which I am informed the cities in many, if not most cases do.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1958.

APPROVAL, PROPOSED ARTICLES OF INCORPORATION OF "THE AMERICAN MUTUAL LIFE INSURANCE COMPANY."

COLUMBUS, OHIO, October 2, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I return to you herewith with my approval endorsed thereon the proposed articles of incorporation "THE AMERICAN MUTUAL LIFE INSURANCE COMPANY."

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1959.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY WASHINGTON TOWNSHIP RURAL SCHOOL DISTRICT.

COLUMBUS, OHIO, October 2, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Washington township rural school district in the sum of $3,500.00, to improve the public school property of said district, being seven bonds of five hundred dollars each."

I have examined the transcript of the proceedings of the board of education and other officers of Washington township rural school district; also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code of Ohio.

I am of opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of Washington township rural school district.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1960.

TOWNSHIP TRUSTEES—TOWN HALL OR TOWNSHIP HOUSE TO COST IN EXCESS OF $2,000—QUESTION MAY BE SUBMITTED TO ELECTORS AT NOVEMBER ELECTION, 1916—ELECTORS OF VILLAGE SITUATED WITHIN SAID TOWNSHIP HAVE RIGHT TO VOTE ON SAID QUESTION.

The question of building a town hall or township house, the estimated cost of which is in excess of $2,000, may be submitted to the qualified electors of said township at the November election, 1916. The qualified electors of a village situated within said township have the right to vote on said question.

COLUMBUS, OHIO, October 3, 1916.

HON. J. W. WATTS, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR:—In your letter of September 28th you request my opinion upon two questions which may be stated as follows:

"1. May the question of building a town hall or township house, the estimated cost of which is $3,000, be submitted to the qualified electors of said township at the coming November election?

"2. Have the qualified electors of a village situated within said township the right to vote on said question, the proposed site of said township house being located outside the corporate limits of said village?"

Section 3260 G. C. provides in part:

"* * * If a majority of the electors of the township or a precinct thereof, voting at any general election vote in favor thereof, the trustees

may purchase a site and erect thereon a town hall for such township or precinct and levy a tax on the taxable property within such township or precinct to pay the cost thereof, which shall not exceed two thousand dollars. * * *"

It is evident that the above provision of the statute does not afford the authority to the trustees of the township referred to in the first question above stated to secure the proposed building in the manner therein provided, upon the approval by the electors of such township of the tax levy authorized by the latter part of said section, as it appears that the estimated cost of said building is in excess of $2,000. This authority is found in sections 3395 to 3398, inclusive, of the General Code and must not be confused with the authority conferred upon the electors of a township and a village situated therein to jointly enlarge, improve or erect a public building as found in section 3399 et seq. of the General Code.

Section 3395 G. C. provides:

"If in a township, it is desired to build, remove, improve or enlarge a town hall, at a greater cost than is otherwise authorized by law, the trustees may submit the question to the electors of the township, and shall cause the clerk to give notice thereof and of the estimated cost, by written notices, posted in not less than three public places within the township, at least ten days before election."

Section 3396 G. C. provides:

"At such election the electors in favor of such hall, removal, improvement or enlargement shall place on their ballots 'Town Hall—Yes,' and those opposed 'Town Hall—No.' If a majority of all the ballots cast at the election are in the affirmative, the trustees shall levy the necessary tax, but not in any year to exceed four mills on the dollar valuation. Such tax shall not be levied under such vote for more than seven years. In anticipation of the collection of taxes, the trustees may borrow money and issue bonds for the whole or any part therefor, bearing interest not to exceed seven per cent. payable annually."

It will be observed that the question of the policy of expending the funds of the township for the purpose under consideration is to be submitted to "the electors of the township," and the condition precedent to the valid levy of the necessary tax for said purpose is that "a majority of all the ballots cast at the election" are in favor of said expenditure.

The statutes do not by their terms exclude the electors of the village referred to in your second inquiry from voting on the question referred to in your first inquiry, I have already held in former opinions that in the absence of an express provision of a statute excluding from the tax levy therein authorized to be made on the taxable property of a township, the taxable property of an incorporated village located in such township, said tax must be levied upon all the taxable property of such township including that within the corporate limits of said village.

In keeping with my former holding I am of the opinion in answer to your second question that the tax levy mentioned in section 3396 G. C. supra, when authorized as therein provided, must be made on all of the taxable property in the township, referred to in your first inquiry, including that located in the incorporated village therein situated, and that the qualified electors of said village have the right to vote on the question of the policy of the expenditure of the funds of said township for the aforesaid purpose.

As I understand your first question you desire to be advised as to whether or not, in my opinion, the election to be held Novmber 7th, of this year, is an election within the meaning of sections 3395 and 3396 of the General Code, as above quoted.

In this connection my predecessor, Hon. Timothy S. Hogan, in considering the provisions of said sections in an opinion found in the annual report of the attorney-general for the year 1913, Vol. II, page 1252, observed that said sections do not expressly provide for a special election on the question therein mentioned, and held that said question must be submitted at a regular election as required by section 4840 G. C., which provides:

> "Unless a statute providing for the submission of a question to the voters of a county, township, city or village provides for the calling of a special election for that purpose, no special election shall be so called. The question so to be voted upon shall be submitted at a regular election in such county township, city or village, and notice that such question is to be voted upon shall be embodied in the proclamation for such election."

I concur in this holding of my predecessor, and it only remains to be determined whether the coming November election is a "regular election" within the meaning of section 4840 G. C. supra.

I quote the following from opinion No. 778 of this department, referred to in your letter, rendered to Hon. John C. D'Alton, prosecuting attorney of Lucas county, on August 28, 1915:

> "Elections are throughout the statutes termed general, regular and special elections. These terms are deemed to have a fairly well established meaning, and unless used with special application or qualifying terms, 'general election' is understood to mean the regular recurring November election, at which state and county officers are elected. The term 'regular elections' includes all those elections at which public officers are elected to fill the vacancies occurring by reason of the expiration of the terms of such officers as established by law, whether such officers be state, county, township or other officers whose terms of office are definite and determinate, the time of holding which election is definitely fixed by law. A special election is generally understood to mean an election held at a time not definitely fixed by law for the election of an officer to fill a vacancy occasioned by some exigency other than the expiration of the term fixed, or an election which is held for the submission to the electorate of a question usually other than the selection of an officer, and at a different time from that at which a regular or general election is being held."

Reference was made in said opinion to the provisions of section 4840 G. C. supra, as distinguishing between the terms "special election" and "regular election" as above defined.

In view of the foregoing it is evident that the election to be held on November 7, 1916, will be both a general election and a regular election within the meaning of those terms as defined in my former opinion above referred to.

Answering your first question specifically, I am of the opinion that the question of building a town hall or township house, the estimated cost of which is $3000.00, may be submitted to the qualified electors of such township at the coming November election.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1961.

ROADS AND HIGHWAYS—TELEPHONE COMPANIES—MUST PLACE POLES IN HIGHWAY SO AS NOT TO INCOMMODE PUBLIC IN USE THEREOF—SEE OPINIONS NOS. 1888, AUGUST 31, 1916, AND 1950, SEPTEMBER 29, 1916.

Telephone companies must so place their poles in the highway as not to incommode the public in the use thereof. If this result cannot be accomplished by a telephone company without acquiring the rights of adjoining owners in the overhanging limbs of shade trees, it will be necessary for such company to acquire said rights.

COLUMBUS, OHIO, October 3, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of September 20, 1916, which communication reads as follows:

"I am transmitting herewith a letter submitted to me by Mr. H. M. Sharp, our chief highway engineer, relative to difficulties we are having where we have requested The Ohio State Telephone Company to move back its poles and the telephone company has been enjoined from interfering with trees in front of certain property.

"We are not interested in the adjustment of differences between the telephone company and property owners other than to have the poles removed and as this must be done, I respectfully request that you advise me what course to pursue in the matter cited by Mr. Sharp and on similar occasions which may arise in the future."

The attached communication from Mr. Sharp is as follows:

"Since July 24, 1916, we have been troubled with the telephone poles owned by the Ohio State Telephone Company interfering with the contractor's work on the Springfield-Urbana road, I. C. H. No. 187, section 'I,' Clark county.

"We have ordered the telephone company to move back their poles but they have encountered serious difficulties with the property owners on account of the poles and lines interfering with trees to such an extent that if the poles are moved back the trees will have to be cut and trimmed to a considerable extent.

"Some of the property owners have objected very seriously to this, and in one case the telephone company has been enjoined by a property owner from interfering with the trees in front of his property, although the trees are in the right-of-way or project over the right-of-way.

"While I realize that the statutes provide that in such cases the telephone company shall be given notice to move such obstructions that interfere with the road work, yet the telephone company represents to us that they are unable to move because of the opposition from property owners owning trees which interfere with the moving back of the poles and lines, and it would seem that it is a proposition for the telephone company to fight out with the property owners in the matter of interference with trees. However, in this particular case the telephone company claims that they are not able to move their poles and lines for the reason cited above and at the present time the poles are seriously interfering with the carrying on of the work.

"I am submitting this proposition to you with a view of having your judgment in the matter, to the end that something may be done so as to get the telephone poles out of the contractor's way."

Owners of lands adjoining a public highway and whose title extends to the center thereof enjoy certain rights therein, subject, of course, to the convenience of public travel. This matter was before the court in the case of Daily, et al. v.State, 51 O. S. 348. The facts in this case and the holding of the court, as set forth in the syllabus, is as follows:

"1. An owner of land adjoining a public highway whose title extends to the center of the road, who has cultivated shade trees, planted partly on his own land and partly in the line of the highway within the bounds of his deed, has a property interest in such trees, and the right to their enjoyment subject only to the convenience of public travel.

"2. The legislature may authorize the construction of a telegraph line by a telegraph company upon a public highway, in such manner as not to incommode the public in the use of such highway, but authority so given does not empower such company to injure the property of an adjoining landowner, nor to appropriate any of his property rights in the highway except upon the condition that compensation be first made. Nor is warrant given to injure such property, nor to appropriate such property rights without compensation, by the act of congress of July 24, 1866, known as section 5263 et seq. of the Revised Statutes of the United States.

"3. The property right of such owner in trees thus cultivated by him is a proper subject of legislation for its protection. And one who, having knowledge of the rights of such landowner in the trees, proceeds against the protest of such owner heedlessly, recklessly and carelessly to injure them, may be prosecuted under section 6880 of the Revised Statutes for a wrongful injury to property.

"4. The simple fact that the landowner did not, at the time the telegraph line was built, although aware of the purpose to build, object and prevent its construction by injunction proceedings, will not estop him, after the expiration of ten years from the date of such construction, from asserting his property interest in the highway and in the trees growing upon and in front of his premises."

See also the case of Callen v. The Columbus Edison Electric Light Company, 66 O. S. 166.

Telegraph and telephone companies, in their occupancy of public highways, are not authorized to inconvenience the public in the use thereof.

Section 9170 G. C. provides as follows:

"A magnetic telegraph company may construct telegraph lines, from point to point, along and upon any public road by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires; but shall not incommode the public in the use thereof"

The terms of the above quoted section are made applicable to telephone companies by the provisions of section 9191 G. C. found in the same chapter of the General Code, and which section reads as follows:

"The provisions of this chapter apply also to a company organized to

construct a line or lines of telephone; and every such company shall have the powers and be subject to the restrictions herein prescribed for magnetic telegraph companies."

You correctly state the position which should be taken by your department when you observe that you are not interested in the adjustment of differences between the telephone company and property owners. If the poles of the telephone company, as at present located, incommode the public in the use of the highway or constitute an obstruction in such highway, it is the duty of the company to relocate its poles and so place the same that they will not obstruct the highway. If this result cannot be accomplished by the company without acquiring the rights of adjoining owners in the overhanging limbs of shade trees, it will be necessary for the company to acquire such rights, but this is a matter solely between the company and the owners of the abutting lands and one in which the public officials have no interest whatever. The fact that the company is unable to move its poles without acquiring such rights from the owners of abutting real estate does not excuse the company from relocating its pole line and so placing the same that it will not constitute an obstruction in the public highway.

The form of notice to be given the company, the method of serving such notice and the manner of making a record of your action in the premises has been pointed out in opinion No. 1950 of this department, rendered to you on September 29, 1916, and relating to certain obstructions maintained by the Ohio Electric Railway Company in the National road in Licking county. The form of notice prescribed in that opinion will suggest the form that should be served upon the Ohio State Telephone Company in the present instance and the method of service of the notice and manner of preserving a record of your action will be the same as that suggested in the opinion in question. I also suggest that, as in the case of the Ohio Electric Railway Company and for the purpose of avoiding all future question as to proper notice, the co-operation of the county authorities of Clark county be invited and that if it is possible to secure such co-operation the county officials be requested to take the action pointed out by the first paragraph of section 7204 G. C. and set forth in detail in opinion No. 1950 of this department, referred to above. If after this action has been taken and the proper notice given the company fails to act in the premises, I will take the steps necessary to secure the removal of the poles in question upon being advised by you of the facts.

Respectfully,
EDWARD C. TURNER
Attorney-General.

1962.

STATE LIQUOR LICENSING BOARD—ONE EMPLOYED AS COUNSEL FOR VILLAGE NOT PUBLIC OFFICER—IS NOT INELIGIBLE TO APPOINTMENT AS COUNTY LIQUOR LICENSING COMMISSIONER.

One employed as counsel for a village or a department or an officer thereof, pursuant to section 4220 G. C. is not a public officer within the meaning of section 1261-22 G. C. 103 O. L. 218, and is not therefore ineligible to appointment as county liquor licensing commissioner.

COLUMBUS, OHIO, October 3, 1916.

State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—In your communication under date of September 26, 1916, you submit for an opinion the question which may be stated as follows:

"May a county liquor license commissioner hold the position of or be employed as legal counsel for a village or any department or official thereof?"

Section 1261-22 G. C. (103 O. L. 218) provides in reference to county liquor license commissioners that:

"The said license commissioners shall not hold any other public office for profit except that of notary public, * * *."

and it is presumably in view of this provision that your question is submitted.

Section 4220 G. C., in which is found the authority for providing counsel for villages or the departments or officers thereof, provides as follows:

"When it deems it necessary, the village council may provide legal counsel for the village, or any department or official thereof, for a period not to exceed two years, and provide compensation therefor."

The question then resolves itself into whether counsel for a village, a department or officer thereof is a "public officer" within the terms of section 1261-2 G. C. (103 O. L. 218)supra.

In section 7 of Throop on public officers it is said:

"One appointed or elected in a manner prescribed by law, having a designation or title given to him by law, and exercising functions concerning the public assigned to him by law, is a public officer."

It is stated in 29 Cyc. 1366, as to the distinction between an office and an employment, that:

"While an office is based upon some provision of law, an employment is based upon a contract entered into by the government with the employe."

In support of the above proposition, there is cited by the authority mentioned the case of state v. Jennings, 57 O. S. 415, in which it is held:

"To constitute a public office against the incumbent of which *quo warranto* will lie, it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law, to be exercised by the incumbent, in virtue of his election or appointment to the office, thus created and defined, and not as a mere employe, subject to the direction and control of some one else."

The above was a case in which it was sought to oust city firemen employed by the city council, upon the theory that such firemen were officers. The court in the course of the opinion by Minshall, J, said:

"But the character of an office can not be attached to a position by a name merely. Whether it be an office or not, will depend upon the nature and character of the duties attached to it by law.

"Many efforts have been made to define a public office; and it is only the incumbent of such an office whose rights can be challenged in a proceeding in *quo warranto*. But it is easier to conceive the general requirements of such an office, than to express them with precision in a definition that shall be entirely faultless. It will be found, however, by consulting the cases and the authorities, that the most general distinction of a public office is, that it embraces the performance by the incumbent of a public function

delegated to him as apart of the sovereignty of the state. Thus in Meachem's Offices and Officers, section 4, it is said: 'The most important characteristic which distinguishes an office from an employment or contract, is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public; that some portion of the sovereignty of the country, either legislative, executive, or judicial, attaches, for the time being, to be exercised for the public benefit. Unless the powers conferred are of this nature, the individual is not a public officer.' So in High on Extraordinary Legal Remedies, section 625, it is said: 'An office, such as to properly come within the legitimate scope of an information in the nature of a *quo warranto*, may be defined as a public position, to which a portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being, and which is exercised for the benefit of the public.'"

In consideration of the foregoing statement of the character of the public office, I am of the opinion that counsel provided for a village, a department or officer thereof, pursuant to section 4220 G. C. supra, is not a public officer.

I believe none of the essential attributes of a public officer, as above indicated, attach to one who pursuant to law stands in the relationship of a legal counsel to a village, its departments of officers. One acting as such counsel exercises no function of government imposed upon him by law. He is required to take no oath of office nor to give an official bond. His duties are such only as the council may choose to impose and he stands in a contractual relationship to the village council. His functions are neither legislative, executive nor judicial.

A partnership may not hold public office; yet I think it would not be seriously contended that under section 4220 G. C. the council of the village would not be authorized to enter into a contract for the services of a firm of attorneys as counsel for the village, its departments of officers; neither could it be maintained that such services so contracted for would not be wholly subject to the control of the council itself and that there would devolve upon counsel so employed no duty which is imposed by law.

That the relationship of a person chosen under section 4220 G. C. is, in contemplation of the legislature, contractual, is rendered conclusive from the provision of section 3809 G. C. (103 O. L. 526), that the requirement of a certificate that the necessary money is in the treasury shall not apply to "contracts made by a village for the employment of legal counsel."

It was held in opinion No. 217, addressed to the bureau of inspection and supervision of public offices, found at page 412 of the Opinions of the Attorney-General for the year 1915, "that the position of village solicitor is not an office within the meaning of section 5617 G. C.;" and in an opinion of my predecessor, Hon. Timothy S. Hogan, addressed to Hon. Frank W. Miller, found at page 487 of the report of the attorney-general for the year 1912, it was also held that "the village solicitor is not an 'official' within the meaning of section 4762, General Code."

Answering specifically your question whether a county liquor licensing commissioner may be employed as counsel for a village or any department or official thereof, I am of opinion that employment as legal counsel for a village or a department or an officer does not render a person, otherwise qualified, ineligible to appointment as county liquor licensing commissioner. In other words, one may be at the same time county liquor licensing commissioner and counsel for a village or a department or an officer thereof.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1963.

BOARD OF EDUCATION—BONDS—MAY NOT BE ISSUED FOR PURPOSES MENTIONED IN SECTION 7630-1 G. C. EXCEPT UPON APPROVAL OF ELECTORS OF SCHOOL DISTRICT IN MANNER PROVIDED BY SECTIONS 7625 AND 7626 G. C.—BONDS MAY NOT BE ISSUED IF PRACTICABLE TO SECURE FUNDS BY SECTION 7625 G. C. ET SEQ. AND SECTION 5649-5b G. C.—ERECTION OF SCHOOL BUILDINGS.

Bonds may not be issued for the purposes mentioned in section 7630-1 *G. C. except upon the approval of the electors of the school district in the manner provided by sections* 7625 *and* 7626 *G. C.*

Bonds may not be issued for the purposes therein mentioned pursuant to section 7630-1 *G. C. if it is practicable to secure necessary funds for such purposes, pursuant to section* 7625 *G. C. et seq., and within the fifteen mill limitation of section* 5649-5b *G. C.,* 103 *O. L.* 57.

COLUMBUS, OHIO, October 5, 1916.

HON. H. C. FISH, *Prosecuting Attorney, Pomeroy, Ohio.*

DEAR SIR:—Yours under date of September 25, 1916, is as follows:

"I wish your opinion on the following, viz.:

"On May 24, 1915, the state department of inspection issued order No. 954, Success school building.

" 'Discontinue the use of this building for school purposes as it is old, unsafe and unsanitary, and is not fit for school purposes any longer, this order to be complied with at once.'

"Also to make repairs on other school buildings.

"Last fall the board of education submitted the proposition to the voters of the township for the right to issue bonds in the sum of $3,000.00, and make levy to take care of the same (which would be over and above the 5 mill levy), for the above purposes, and the same was voted down.

"Again on August 8, last, the same proposition was submitted to the voters and was again defeated.

"Now, can the board of education, under section 7630-1 and 5649-4, Vol. 103, page 527 O. L., issue bonds for the purpose?

"I am of the opinion that they now have such right, but I want your opinion, as it would have the effect to make the bonds sell higher, and probably they would not sell at all without such opinion."

Section 7630-1 G. C. (103 O. L. 527) and section 5649-4 G. C. (103 O. L. 527), to which your question refers, provide as follows:

"Section 7630-1 G. C. If a school house is wholly or partly destroyed by fire or other casualty, or if the use of any school house for its intended purpose is prohibited by any order of the chief inspector of workshops and factories, and the board of education of the school district is without sufficient funds applicable to the purpose with which to rebuild or repair such school house or to construct a new school house for the proper accommodation of the schools of the district, and it is not practicable to secure such funds under any of the six preceding sections because of the limits of taxation applicable to such school district, such board of education may, subject to th provisions of sections seventy-six hundred and twenty-six and seventy

six hundred and twenty-seven, and upon the approval of the electors in the manner provided by sections seventy-six hundred and twenty-five and seventy six hundred and twenty-six, issue bonds for the amount required for such purpose. For the payment of the principal and interest on such bonds, and on bonds heretofore issued for the purposes herein mentioned, and to provide a sinking fund for their final redemption at maturity, such board of education shall annually levy a tax as provided by law.

"Section 5649-4 G. C. For the emergencies mentioned in sections forty-four hundred and fifty, forty-four hundred and fifty-one, fifty-six hundred and twenty-nine. seventy-four hundred and nineteen, and 7630-1 of the General Code, the taxing authorities of any district may levy a tax sufficient to provide therefor irrespective of any of the limitations of this act."

Of the six preceding sections referred to in section 7630-1 G. C. supra, particular consideration need be given only to sections 7625 and 7629 G. C., which provide as follows:

"Section 7625. When the board of education of any school district determines that for the proper accommodation of the schools of such district it is necessary to purchase a site or sites to erect a schoolhouse or houses, to complete a partially built schoolhouse, to enlarge, repair or furnish a school house, or to purchase real estate for playground for children, or to do any or all of such things, that the funds at its disposal, or that can be raised under the provisions of section seventy-six hundred and twenty-nine and seventy-six and thirty, are not sufficient to accomplish the purpose, and that a bond issue is necessary, the board shall make an estimate of the probable amount of money required for such purpose or purposes, and at a general election or special election called for that purpose submit to the electors of the district the question of the issuing of bonds for the amount so estimated. Notices of the election required herein shall be given in the manner provided by law for school elections."

"Section 7629. The board of education of any school district may issue bonds to obtain or improve public school property, and in anticipation of income from taxes for such purposes, levied or to be levied from time to time, as occasion requires, may issue and sell bonds under the restrictions, and bearing a rate of interest specified in sections seventy-six hundred and twenty-six and seventy-six hundred and twenty seven. The board shall pay such bonds and the interest thereon when due, but provide that no greater amount of bonds be issued in any year than would equal the aggregate of a tax at the rate of two mills for the year next preceding such issue. The order to issue bonds shall be made only at a regular meeting of the board, and by a vote of two-thirds of its full membership, taken by yeas and nays, and entered upon its journal."

Section 7629 G. C. authorizes the issuance of bonds for the improvement of school property in anticipation of income from taxes for such purposes, levied or to be levied. From the submission of the question of issuing bonds, it is assumed that it is not practicable to secure sufficient funds for the purposes mentioned in your inquiry, pursuant to the provisions of this section.

It appears that the school building referred to comes within the terms of section 7630-1 G. C., in that its use is prohibited by an order of the chief inspector or workshops and factories. It is inferred that your inquiry contemplates the issuance of bonds for the purposes mentioned therein, without a vote of the electors of the school district, and it is to the authority therefor that the same is directed.

Section 5649-4 G. C. supra, operates to take a levy made for any of the purposes mentioned in section 7630-1 G. C. out of all the limitations of the Smith law upon the rate of taxes which may be levied. It does not, however, operate to abrogate or suspend all conditions and restrictions upon the authority to issue bonds for the purposes mentioned in section 7630-1 G. C., otherwise prescribed. In short, the only force which may be given to section 5649-4 G. C. in the present consideration is, that if bonds are issued pursuant to section 7630-1 G. C., the levy for interest and sinking fund purposes is not subject to any of the tax limitations of the Smith law.

It is yet to be determined, however, what the conditions are as prescribed therein under which bonds may be issued for the purposes mentioned in section 7630-1 G. C. supra, and upon consideration of the provisions of the same it is found that bonds may be issued pursuant thereto only upon the approval of the electors in the manner provided by sections 7625 and 7626 G. C., so that if all of the further conditions of section 7630-1 G. C. are fully met, bonds may not be issued pursuant thereto in any case except upon the approval of the electors, and if your question contemplates the issuance of bonds, pursuant to that section, without a vote of the electors, it must in any event be answered in the negative, notwithstanding the provisions of section 5649-4 G. C. which, as pointed out, does not operate to remove any of the conditions and limitations imposed upon the authority to issue bonds found in section 7630-1 G. C. itself.

Section 7625 G. C. et seq. serves to confer upon boards of education authority to issue bonds for all the purposes mentioned in section 7630-1 G. C., subject only to the fifteen mill limitation on the combined maximum rate of taxes to be levied, prescribed by section 5649-5b G. C., 103 O. L. 57. It therefore follows that if a sufficient levy for interest and sinking fund may be made within the fifteen mill limitation for the purposes mentioned in your inquiry, there is neither occasion nor authority to proceed under section 7630-1 G. C., which by its terms is limited to those cases in which it is impracticable, by reason of the tax limitations, to secure the necessary funds under the provisions of certain sections, among which is section 7625 G. C.

It is not stated by you whether a sufficient levy for interest and sinking fund may be made for the purposes referred to by you within the fifteen mill limitation of section 5649-5b G. C. supra, but I think it is only fair to assume, from all the facts, that such levy could be made within the fifteen mill limitation and that it was pursuant to section 7625 G. C. that the question of issuing bonds was heretofore submitted. That is to say, it is assumed that the resolution of the board of education, declaring the purpose and necessity of issuing bonds and providing for the submission of the question to the electors of the district in either case, did not show, in addition to the fact that the use of the school house in question was prohibited by an order of the chief inspector of workshops and factories, that it was then impracticable to secure sufficient funds, under sections 7625 to 7630 G. C., both inclusive, because of the limitation of taxation applicable to school districts—that is, within the fifteen mill limitation—and hence the elections were held pursuant to section 7625 G. C. et seq.

Section 7630-1 G. C., by its terms, is not available so long as funds necessary for the purposes mentioned in section 7630-1 G. C. may be secured, pursuant to the provisions of section 7625 G. C. et seq. If it is a fact that a sufficient levy for interest and sinking fund may not be made within the fifteen mill limitation, rendering it thereby impracticable to secure the funds necessary under section 7625 G. C., and the board of education so finds, it may then proceed to submit the question of issuing bonds pursuant to section 7630-1 G. C., all the other conditions thereof being fully met.

From the foregoing it follows, and I am of opinion, in answer to your question whether the board of education, under the facts stated by you, may issue bonds pur-

suant to section 7630-1 G. C. and section 5649-4 G. C., 103 O. L. 527, that it may do so only where it is found that a levy for interest and sinking fund, for the payment of the interest and discharge of the principle of such bonds, when they become due, can not be made within the fifteen mill limitation of section 5649-5b, 103 O. L. 57. In no case may bonds be issued pursuant to section 7630-1 G. C., except upon the approval of the electors of the district in the manner provided by sections 7625 and 7626 G. C.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1964.

TEACHERS' PENSION FUND—WHERE TEACHER RETIRES PURSUANT TO PROVISIONS OF SECTION 7882 G. C.—ELIGIBLE TO PENSION UNDER SECTION 7883 G. C.—RIGHT TO PENSION NOT DEFEATED BY SUBSEQUENT EMPLOYMENT.

Where a teacher who retires pursuant to the provisions of section 7882 G. C. is eligible to a pension as provided by section 7883 G. C., the right of such teacher to such pension is not defeated or affected by his or her subsequent employment in a college or academy not supported in any way by the state.

COLUMBUS, OHIO, October 6, 1916.

HON. FRANK B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Yours under date of October 2, 1916, is as follows:

> "The department of public instruction wishes to submit to your department the following question involving an interpretation of section 7882 G. C.:
>
> "A teacher has stated the circumstances of his case thus:
>
> " 'I am now beginning my thirty-first year of teaching in the public schools and have been contributing to the pension fund for about twelve years. In case I wish to resign and accept a position in a college or academy not supported in any measure by the state may I go on the pension list when thus engaged?'
>
> "Under the circumstances as described above will the teacher be considered as having retired from teaching in the sense that he will be entitled to a pension according to section 7882 G. C.?"

Mr. Cook, of your department, advises that the question sought to be submitted may be stated thus:

> "May a teacher, who is eligible to retire under the provisions of section 7882 G. C., voluntarily retire and subsequently be entitled to a pension under section 7883 G. C., although employed in a college or academy not supported in any measure by the state?"

Section 7882 G. C., to which reference is made in your inquiry, provides as follows:

> "Any teacher may retire and become a beneficiary under this chapter

who has taught for a period aggregating thirty years. But one-half of such term of service must have been rendered in the public schools or in the high schools of such school district, or in the public schools or high schools of the county in which the district is located, and the remaining one-half in the public schools of this state or elsewhere."

Under the provisions of this section a teacher who has taught for a period aggregating thirty years, one-half of which service has been rendered in the public schools or in the high schools of the school district in which a teacher's pension fund is provided, or in the public schools or high schools of the county in which such district is located, and the remaining one-half in the public schools of this state or elsewhere may voluntarily retire and become a beneficiary of the teacher's pension fund. If, then, the teacher referred to meets all the requirements of the above section, he or she is eligible to retire voluntarily and become a beneficiary of the pension fund. Provision is also found in section 7880 G. C. for the retirement of teachers who have taught for a period aggregating twenty years, by the board of education.

Section 7883 G. C. provides as follows:

"Each teacher so retired or retiring shall be entitled during the remainder of his or her natural life to receive as pension, annually, twelve dollars and fifty cents for each year of service as teacher, except that in no event shall the pension paid to a teacher exceed four hundred and fifty dollars in any one year. Such pensions shall be paid monthly during the school year."

In an opinion of my predecessor, Hon. Timothy S. Hogan, under date of April 24, 1914, addressed to Hon. George M. Hoaglin, member of the house of representatives, found at page 496 of the Report of the Attorney-General for the year 1914, it was held that:

"If a teacher is forced to retire by virtue of the provisions contained in section 7880 supra, and also comes within the provisions of said section as to the length of time such teacher has taught, then such teacher can teach in other public schools of the state than the one from which such teacher has retired, or in the public institutions of the state and continue to draw her pension.

"If a teacher requests to voluntarily retire from teaching in accordance with the provisions contained in section 7882 and provided further that such teacher comes within the requirement as to the length of time taught in such school from which such teacher so voluntarily retires, then such teacher may teach in other public schools of the state than the one from which such teacher so voluntarily retires, or in public institutions of the state, and continue to draw her pension."

As oberved by my predecessor in the above mentioned opinion, it is provided by section 7883 G. C., without qualification, limitation or further condition than those found in section 7880 and section 7882, that a teacher retired or retiring, in accordance and full compliance with the provisions of said last mentioned section, shall be entitled, during the remainder of his or her natural life, to receive the pension provided by section 7883 G. C., without regard to the employment of such teacher after such retirement. That is to say, the employment of a teacher after retirement is immaterial to the continuance of the right of such teacher to a pension, and if the teacher referred to in your inquiry meets all the conditions of section 7882 G. C., and pursuant to the provisions thereof voluntarily retires from service in the schools, whereby he is entitled to the pension provided by section 7883 G. C., his right thereto will not

in any way be effected by his future employment in any college or academy not supported by the state.

I concur in the above mentioned opinion of my predecessor.

In answer to your question whether a teacher who is eligible to retire under the provisions of section 7882 G. C. may voluntarily retire from the service of the school district and subsequently be entitled to a pension under the provisions of section 7883 G. C., although employed in a college or academy not supported in any measure by the state, I am of opinion that a teacher who has taught for a period aggregating thirty years, in full compliance with all the provisions of section 7882 G. C., he or she may voluntarily retire from the service of the school district in which he or she has been employed and be entitled to the pension provided by section 7883 G. C. if there is in such school district a teacher's pension fund, and that the employment of such teacher subsequent to such retirement in a college or academy, not in any measure supported by the state, will not defeat or in any way affect the right of such teacher to such pension.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1965.

ROADS AND HIGHWAYS—CASS HIGHWAY LAW—LEVIES FOR ROAD PURPOSES UPON TAXABLE PROPERTY OF TOWNSHIP, DISTINGUISHED.

Distinquishment of the several levies that may be made for road purposes under the provisions of the Cass highway law upon the taxable property within a given township or part thereof.

COLUMBUS, OHIO, October 6, 1916.

HON. P. A. SAYLOR, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—I have your request for an opinion under date of September 26, 1916, which request reads as follows:

> "A question has been raised as to the proper construction of section 3298-18 General Code of Ohio, the same being section 239 of the Cass highway act, which is as follows:
>
> " 'Section 239. After the annual estimate for each township has been filed with the trustees of the township by the county highway superintendent, they may increase or reduce the amount of any of the items contained in said estimate, and at their first meeting after said estimate is filed, they shall make their levies for the purposes set forth in the estimate upon all of the taxable property of the townships, not exceeding in the aggregate two mills in any one year upon each dollar of the valuation of such taxable property in said township, outside of any incorporated village or city. Such levies shall be in addition to all other levies authorized by law for township purposes, but subject, however, to the limitation upon the combined maximum rate for all taxes now in force. The amount levied to cover the estimate made for the construction, improvement, maintenance and repair of highways, shall be known as the township highway fund. The provisions of this section shall not prevent the expenditure of any portion of the regular levy of

two mills for township purposes, but the levies herein provided for are in addition thereto. Such levy shall amount to at least twenty dollars for each mile of township road within such township.'

"The township trustees of Monroe township in Preble county, Ohio, raises the question as to whether the amount of $20.00 to be levied for each mile of township road within such township is for the sole use and purpose of the township's share of the cost of said highway. If it is not used, or to be used, for the township proportion or portion of the cost of said highways that are being put through some of our townships, then how is the township to raise the funds necessary to meet the township portion?

"I will give you an example. There has been put through Jackson township in Preble county, Ohio, such a road. Jackson township levied for their general road purpose, one and nine-tenths mills. This rate raised just about enough money to pay the township's portion of the said road and left the township nothing to apply on the balance of the roads in the township. The township has a centralized high school and this left the roads in a pretty bad shape. Is 3298-18 intended to cover just such a case as Jackson township, or is the minimum of $20.00 that is to be levied there to be applied on all the roads of the township, and in figuring this $20.00 would you adhere strictly to the definition of township roads?"

I note your reference in the first sentence of your letter following your quotation of section 3298-18 G. C. to "said highway," but observe that prior to the use of this term you do not refer to any highway. I gather from your letter, however, that you have in mind two classes of road work in which townships may be interested, to wit.; (1) improvements of considerable magnitude, the cost of which is being met in part by the township and in part from other sources, and (2) minor repairs, the entire cost of which it is desired shall be met out of township funds. It is somewhat difficult to determine from your communication the exact question upon which the township authorities in your county are in doubt and upon which you desire my opinion, and I have concluded that your inquiry may be best answered by a brief reference to the several road levies which may be made upon the taxable property within a township or part thereof, either by the township trustees or other authorities, and the purposes for which such levies may be used.

It should first be observed that there cannot at the present time be, either in the county or township treasury, any funds produced by a levy made under the Cass highway law. Under the terms of section 304 of the Cass highway law that act went into effect on the first Monday in September, 1915. It will thus be seen that all tax levies for road purposes made in the year 1915 were made under the statutes in existence prior to the taking effect of the Cass highway law. Levies under the Cass highway law were made for the first time in the year 1916 and the funds produced by such levies will not be available for appropriation and expenditure until the beginning of the fiscal half year commencing on March 1, 1917. It was held by this department, however, in opinion No. 1910, rendered to Hon. Dean E. Stanley, prosecuting attorney of Warren county, on September 9, 1916, that where in the year 1915 a tax levy was made by county commissioners upon the grand duplicate of the county for the purpose of paying the county's share of road improvements or repairs carried forward by the county commissioners under any one of the several statutes under which the same might have been made, such levy being general in character and designed to produce funds for the payment of the county's share of the cost and expense of improving or repairing roads generally, the proceeds of such levy, coming into the county treasury and being available for appropriation and expenditure after the taking effect of the Cass highway law, are available for the purpose of paying the county's share of the cost and expense of improving roads under chapter VI of the Cass highway law. The

same principle would apply in the instance of funds produced by a levy made by township trustees for road purposes. As an illustration, a levy made by township trustees in the year 1915, under authority of section 7019 G. C., now repealed, for the purpose of improving by macadamizing and graveling the public highways in the township and coming into the treasury after the repeal of said section 7019 G. C. and the succeeding sections, is to be expended by the township trustees for the purpose for which it was levied but the machinery provided by the Cass highway law is to be used in making such expenditure. I am enclosing for your information a copy of the opinion rendered to Mr. Stanley and referred to above and believe that the same, together with the further explanation herein added, will be a sufficient guide in the expenditure of funds levied prior to the taking effect of the Cass highway law and coming into the treasury of the county or any given township, after the taking effect of such act.

Coming now to consider the several levies which, under the provisions of the Cass highway law, may be levied by the township trustees or other authority upon the taxable property of a township or part thereof for road purposes, section 60 of the Cass highway law, section 3298-1 G. C. should first be considered. The levy provided for by this section is to be made by the township trustees on all the taxable property of a township, including that within any municipal corporation or corporations therein situated. The proceeds of this levy may be used for improving, dragging, repairing or maintaining public roads where the work is carried forward by the township trustees. Funds produced by this levy should not be used by the township trustees in co-operation either with the county or with the state.

The levy provided for by section 72 of the act, section 3298-13 G. C., is to be made by township trustees on all the taxable property of the township, including that within any municipal corporation or corporations therein situated. This levy is purely for sinking fund purposes and the proceeds thereof can be used only for the payment of the principal and interest on bonds issued by the township trustees under the preceding sections of the Cass highway law.

The levy provided for by section 106 of the act, section 6927 G. C., is to be made by the county commissioners upon all the taxable property of a township or townships interested in any specific improvement, including that within any municipal corporation or corporations therein situated and the proceeds of this levy are to be expended by the county commissioners in the manner provided in chapter VI of the Cass highway law. The township trustees have no authority whatever in connection with this levy either in the making of the same or in the expenditure of the proceeds.

The levy provided for by the second paragraph of section 215 of the act, section 1222 G. C., is to be made by the township trustees on all the taxable property of a township interested in the construction of an inter-county highway or main market road carried forward by the state highway department, including the taxable property within any municipal corporation or corporations therein situated. Funds produced by this levy are to be expended under the supervision of the state highway department.

The levy provided for by section 239 of the act, section 3298-18 G. C., is to be made for the purposes set forth in the annual estimate of the county highway superintendent, which estimate, under the provisions of section 144 of the act, section 7187 G. C., is to cover the improvement, maintenance and repair of roads, bridges and culverts and the construction of new roads. This levy is to be made by the township trustees on the taxable property of a township outside of any incorporated village or city therein situated and must amount to at least twenty dollars for each mile of township road within such township. This last named provision sets forth a minimum requirement and not a limitation on the size of the levy, and in construing the same the expression "township road" is to be given the meaning set forth in the definition of "township roads" found in section 241 of the act.

The proceeds of this levy should not be used in co-operating either with the county or state, and while the proceeds of such levy may be used for construction work, if construction work be covered in the annual estimate of the county highway superintendent, yet the primary purpose of the levy, at least to the extent of its minimum requirement, is the creation of a maintenance and repair fund to be applied by the township trustees upon township roads, as defined in section 7464 G. C.

The levy provided for by section 257 of the act, section 3298-20 G. C., is to be made by the township trustees on all taxable property of the township, including that within any municipal corporation or corporations therein situated, for the purpose of purchasing real property containing suitable stone or gravel and the necessary machinery for operating the same and can be made only in the event of a favorable vote by the qualified electors of the township had in the manner provided for in the section in question.

I am sending you under separate cover, and for your further information, copy of a pamphlet containing, at page 105 thereof, opinion No. 1408 of this department, rendered to the bureau of inspection and supervision of public offices, on March 22, 1916, and relating to the limitations upon the several levies herein discussed. As previously stated, the character of your inquiry has rendered necessary a general discussion of tax levies for road purposes upon townships or parts thereof, but I trust that this opinion, read in connection with opinion No. 1408 and opinion No. 1910 of this department, will constitute a complete answer to the questions confronting the township authorities in your county.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1966.

APPROVAL, ARTICLES OF INCORPORATION, "THE SHOE MUTUAL INSURANCE COMPANY."

COLUMBUS, OHIO, October 6, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I herewith return the articles of incorporation of "The Shoe Mutual Insurance Company" with my certificate of approval attached.

I also return the check for $25.00 which was attached to your letter.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1967.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY VILLAGE OF CRESTLINE.

COLUMBUS, OHIO, October 6, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the village of Crestline, Ohio, in the sum of $4,044.24,

issued in anticipation of the collection of special assessments for the improvement of North Seltzer street, being one bond of $444.24 and nine bonds of $400.00 each."

I have examined the transcript of the proceedings of the council and other officers of the village of Crestline, Ohio, in reference to the above bond issue; also the bond and coupon form attached; and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted, and executed by the proper officers will, upon delivery, constitute valid and binding obligations of said village.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1968.

APPROVAL, CONTRACT BETWEEN BOARD OF CONTROL OF OHIO AGRICULTURAL EXPERIMENT STATION AND FIRM OF LONG & BOGNER FOR CONSTRUCTION OF ANIMAL HUSBANDRY BUILDING.

COLUMBUS, OHIO, October 6, 1916.

Ohio Agricultural Experiment Station, Wooster, Ohio.

GENTLEMEN:—I have examined the contract entered into on August 17, 1916, between the board of control of your station and the firm of Long & Bogner for the construction and completion of an animal husbandry building for the sum of four thousand four hundred and eighty-seven dollars ($4,487.00), together with the personal bond securing the performance of said contract, and find the same to be within the estimate and in compliance with law.

I have likewise received from the auditor of state a certificate that there is money available under an appropriation made to your board.

Therefore, I have this day noted my approval upon the contract and caused the same to be filed in the office of the auditor of state.

I am herewith returning to you a duplicate of said contract together with the other papers which you have submitted in this matter.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1969.

SALE OF WOOD AND DENATURED GRAIN ALCOHOL——STATUTES REGULATING SALE OF INTOXICATING LIQUORS AND ALSO THOSE GOVERNING ADULTERATED FOOD AND DRUGS HAVE NO APPLICATION—MAY BE SOLD BY GARAGE MEN AND HARDWARE DEALERS—CONTAINERS—HOW LABELED.

Statutes regulating the sale of intoxicating liquors and those governing the sale of adulterated food and drugs have no application to the sale of wood and denatured grain alcohol.

Wood and denatured grain alcohol may be sold by garage men, hardware dealers and other persons who are not registered pharmacists, or regular druggists, and by persons who have neither a saloon nor a wholesale liquor license.

The containers and packages in which wood or denatured grain alcohol are sold are not required to be so labeled as to show the percentage of purity, strength and quality thereof when below the standard laid down in the United States Pharmacopoeia.

COLUMBUS, OHIO, October 7, 1916.

The Board of Agriculture, Columbus, Ohio.

GENTLEMEN:—I am in receipt of a communication from Mr. T. L. Calvert, chief dairy and food division, as follows:

> "Complaints have come to me that dealers are selling alcohol and are not registered pharmacists. Owing to the large amount of alcohol used in automobiles in winter it has become a practice of many garages and other dealers to sell alcohol. I therefore request an opinion as to whether alcohol, either wood or grain, can be lawfully sold by garage men, hardware dealers or any firm or person not a registered pharmacist, also if each container or package should be labeled as to kind of alcohol, giving the percent. if it does not come up to the standard required by the United States Pharmacopoeia. An early opinion will be greatly appreciated."

Reference is made in the above inquiry to both wood and grain alcohol, but in view of the purpose mentioned for which the same is to be used, it is assumed that the grain alcohol contemplated is necessarily only denatured grain alcohol, and it is upon this assumption that the questions submitted are considered.

Manifestly the above inquiry is directed to the application of the statutes regulatory of the sale of intoxicating liquors and to those governing the sale of food and drugs within this state.

It is impracticable to here refer to and give particular consideration to all the statutes in operation regulating the sale of intoxicating liquors.

The phrase "intoxicating liquor," is defined, for the purpose of the statutes regulating the sale of the same, by section 6064 G. C. as follows:

> "The phrase 'intoxicating liquor,' as used in this chapter and in the penal statutes relating thereto, means any distilled, malt, vinous or any intoxicating liquor except in sub-divisions II and VI of this chapter, entitled 'taxation' and 'local option in municipal corporations' respectively, and the penal statutes relating thereto, in which cases such phrase means any distilled, malt, vinous or any other intoxicating liquor."

This definition of "intoxicating liquor" must, however, be considered in the light of, and in connection with, the statutory provisions to which it is to be applied, and particularly with a view to the purpose of such statutory provisions.

That the sole purpose of the liquor license law, the local option laws and further statutes regulatory of the sale of intoxicating liquors as defined by section 6064 G. C. supra, is the regulation of the sale of those liquors only which are intoxicating and which are or may be used as a beverage, it is believed would not be controverted. The primary, if not the only, purpose of section 6064 G. C. is to set at rest all questions of fact as to the intoxicating property of those classes of liquors therein referred to manifestly having in contemplation their use as a beverage. In short, the term liquor, throughout the law of the state regulatory of the sale of intoxicants comprehends only those liquids or liquors which are used as beverages.

In the case of Pennell v. State, 141 Wis., 35, the court in the course of the opinion said:

> "The word 'liquor' and the associated word 'drinks' in the statutes regulating or forbidding the sale of intoxicants, should be taken to mean an alcoholic beverage."

The force of this interpretation of the term "liquor" is to confine its application, where found in that class of statutes referred to, to beverages.

While both wood alcohol and denatured grain alcohol are distilled liquors, neither is used as a beverage. Though wood alcohol may have in some degree the intoxicating properties of grain alcohol, it is of so highly a poisonous nature that it may not be used as a beverage and though grain alcohol, when denatured, may retain its intoxicating property, it also may no longer be used as a beverage.

Since then neither wood nor denatured grain alcohol is a beverage and therefore not within contemplation of the statutes regulating the sale of intoxicating liquors, including the provisions for such sales by registered pharmacists, those statutes have no application to the sale thereof.

We may next consider whether the sale of wood or denatured grain alcohol are subject to the statutes governing the sale of food and drugs.

That neither wood nor denatured alcohol is a food is too palpable to necessitate discussion. Whether either or both are drugs within contemplation of the statutes applicable to the sale of drugs involves a consideration of the definition of the term "drug" for the purposes of the food and drug laws, as found in section 5775 G. C., which provides in part as follows:

> "The term 'drug' as used in this chapter includes all medicines for internal or external use or inhalation, antiseptics, disinfectants and cosmetics."

There seems no ground for argument that as a matter of common understanding neither wood nor denatured grain alcohol comes within any of those classes of articles mentioned in the above definition. Neither is a medicine for internal or external use nor inhalation, an antiseptic, a disinfectant or a cosmetic, and hence not a drug as that term is used in the chapter of the statutes regulating the sale of drugs, viz., chapter 1, title II of part second of the General Code.

Section 5777 G. C. defines the adulteration of drugs and makes reference to the standard of strength, quality and purity of drugs as laid down in the eighth decennial revision of the United States Pharmacopoeia. The term "drug," as here used, is subject to the above definition in section 5775 G. C. and hence comprehends neither wood nor denatured grain alcohol. That is to say, chapter I, title II of part second of the General Code has no application to the sale of wood or denatured grain alcohol.

Coming to answer your first question, whether either wood or (denatured) grain alcohol can be lawfully sold by garage men and hardware dealers or persons or firms not registered pharmacists, specifically, I am of opinion that wood and denatured alcohol may be sold by garage men, hardware dealers and other persons who are not registered pharmacists, or regular druggists, and by persons who have neither a saloon nor wholesale liquor license.

As to your second question as to whether each container or package should be labeled as to kind of alcohol, giving the per cent. if it does not come up to the standard required by the United States Pharmacopoeia, I am of opinion that the statutes regulating the sale of adulterated food and drugs have no application to the sale of the articles mentioned and that the containers or packages of same are not required to be so labeled as to show the percentage of purity, strength and quality of the alcohol sold when below the standard laid down in the United States Pharmacopoeia.

While your inquiry, perhaps, does not contemplate the same, it should here be observed that in the sale of wood alcohol and denatured grain alcohol, which by the process of denaturing becomes highly poisonous, regard must be had to the provision of section 12666 G. C. et seq.

Said section 12666 G. C. provides in part as follows:

> "Whoever, knowingly sells or delivers to any person otherwise than in the manner prescribed by law, or sells or delivers in the manner prescribed by law but without the written order of an adult, to a minor under sixteen years of age, any of the following described substances or any poisonous compounds, combinations or preparations thereof, to wit: the compounds and salts of antimony, arsenic, chromium, copper, * * * or other virulent poison, shall be fined not less than ten dollars nor more than fifty dollars for each offense."

The manner of the sale and delivery of the articles mentioned in section 12666 G. C., "provided by law" as therein referred to, is found in sections 12667 to 12671 G. C., both inclusive, and in the sale of wood alcohol and denatured grain alcohol the provisions of said sections above mentioned should be complied with.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1970.

COMMON PLEAS JUDGES—ADDITIONAL SALARY—HOW PAID—SOURCE —SEE OPINIONS OF ATTORNEY-GENERAL FOR YEAR 1915, PAGE 206.

The provisions of section 2252-2 G. C. as enacted 104 O. L. 250, apply to common pleas judges appointed prior to the date when the act became effective, as well as to such judges elected by the people prior to such date. Accordingly, after said act became effective, the additional salary of a common pleas judge, serving under such an appointment, should have been paid solely from the treasury of the county in which such judge resided.

The principles of the opinion of March 1, 1915 (Opinions of the Attorney-General, 1915, 206) applied to the determination of the salaries payable to judges in (original) subdivision 2 of the fourth judicial district, from July 1, 1913, to July 1, 1915, and the sources from which such additional salaries should have been paid.

COLUMBUS, OHIO, October 7, 1916.

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

GENTLEMEN:—I acknowledge receipt of your letter of September 30, requesting my opinion as follows:

"Following is a statement showing the dates of election, appointment and resignation of the judges of the common pleas court of the second subdivision of the fourth judicial district as originally constituted, in office at any time during the period from July 1, 1913 to July 1, 1915, and similar facts as to the immediate predecessors of some of them.

County.	Judge.	Term Began.	
Lorain	Stroup	Jan. 1, 1911	Resigned Aug. 31, 1914.
Lorain	Redington	Sept. 1, 1914	Expires Dec. 31, 1916.
Summit	Wanamaker	May 2, 1911	Resigned Dec. 31, 1912.
Summit	Ahern (by appointment)	Jan. 2, 1913	Expired Dec. 8, 1914.
Summit	Ahern (by election)	Dec. 9, 1914	Expires May 1, 1917.
Summit	Doyle	Jan. 1, 1913	Expires Dec. 31, 1918.
Summit	Rogers	Feb. 9, 1913	Resigned Nov. 9, 1914.
Summit	Fritch (by appointment)	Nov. 17, 1914	

"At the November, 1914, election, Hon. N. H. McClure, of Medina County, Ohio, was elected resident judge of Medina county, Ohio, (section 1532 G. C. as amended Ohio Laws 243) and after qualifying, assumed the duties of his office January 1, 1915.

"Please advise to what additional salaries each of said judges in office during such period were entitled during the same, and from what sources such salaries should have been paid."

For the sake of brevity I shall not retrace the steps taken by me in dealing with similar questions in the opinion to the bureau under date of March 1, 1915, Opinions

of the Attorney-General for that year, page 206. All but one of the questions presented by your inquiry are answered by that opinion, which embodied an interpretation of sections 2252, 2252-2 and 2253 of the General Code as amended 104 O. L. 250; section 1532 G. C. as amended 104 O. L. 243; article IV, section 3 of the constitution as amended in 1912; the general schedule of the constitutional amendments of 1912, and the schedule of article IV of the constitution as then amended.

Without repeating either the general conclusions or the underlying reasoning therefor, expressed in that opinion, I shall proceed first to apply its principles to so much of the situation described by you as is governed thereby.

Judge Stroup was on January 1, 1913, holding office as a regularly elected judge. On June 8, 1914, when the amendments in 104 O. L. 250 became effective, he was a "judge of the court of common pleas heretofore elected," and thenceforth, until the end of his term, he was entitled to the additional salary provided for by law at the time of his election, payable, however, on and after June 8, 1914, from the treasury of the county in which he resided, viz., Lorain county; that is to say, Judge Stroup was entitled, for the period beginning with June 8, 1914 and ending on August 31, 1914, both days being included, to additional salary at the rate of $16.00 for each one thousand population of Lorain county, the annual salary so determined to be not less than $1,000.00 nor more than $3,000.00, payable during that period solely from the treasury of Lorain county. Prior to that date Judge Stroup was entitled to the same salary, payable, however, from the treauries of the counties of the subdivision as it then existed, in proportion to their respective populations.

During Judge Stroup's entire term the subdivision consisted of the three counties named by you: so that from July 1, 1913, to June 7, 1914, inclusive, the above described salary was payable from the treasuries of the three counties proportionally, and during the remainder of his term he was entitled to the same salary, payable, however, solely from the treasury of Lorain county.

Judge Redington was appointed September 1, 1914, to fill out the unexpired term of Judge Stroup, and, as I am advised by the report of your examiner, he held his office until July 1, 1915, and is still holding same by virtue of such appointment, because, though an election was attempted to be held under the provisions of the constitution and statutes, for the purpose of filling out the unexpired term begun by Judge Stroup, it has been judicially determined by the supreme court that such election was void.

It thus appears that throughout Judge Redington's tenure of office during the period described by you, viz., from September 1, 1914 to June 30, 1915, inclusive, Judge Redington had the status of a judge appointed to fill out the unexpired term of a judge elected as a district judge prior to January 1, 1913. He took office after section 2252 of the General Code was amended (104 O. L. 250) and accordingly was entitled to additional salary at the rate of $25.00 per one thousand population of Lorain county, not to exceed, however, $3,000.00 per annum. His status was that of a judge of the subdivision, and accordingly at the outset of his tenure his salary should have been paid quarterly from the treasuries of the several counties of the subdivision in proportion to the population thereof.

At the time he assumed office under his appointment, viz., September 1, 1914, the subdivision still consisted of Lorain, Medina and Summit counties, but on December 9, 1914, Judge Ahern assumed office in Summit county under an election to fill out an unexpired term, and he (Judge Ahern), by virtue of such election, was "the resident common pleas judge" of Summit county and his election and qualification had the effect of taking Summit county out of the subdivision.

Similarly, on January 1, 1915, Judge McClure, who had been regularly elected under the statute as resident common pleas judge of Medina county, qualified and assumed the duties of his office; and this had the effect of taking Medina county out of the subdivision.

Therefore, Judge Redington's additional salary, at the rate of $25.00 per thousand population of Lorain county, etc., should have been paid from September 1, 1914 to December 8, 1914, inclusive, proportionally from the treasuries of the three counties from December 9, 1914 to December 31, 1914, inclusive, proportionally from the treasuries of Lorain and Medina counties, and from January 1, 1915 to July 1, 1915, both inclusive, solely from the treasury of Lorain county.

Turning to Medina county and considering the case of Judge McClure, it is clear that his case offers no special difficulty. His salary should have been paid from the outset solely from the treasury of Medina county, as he was the resident county judge of that county. The amount of his salary was fixed of course by section 2252 G. C. as amended, viz., $25.00 for each one thousand population of Medina county, and not to exceed $3,000.00 per annum.

Coming now to Summit county, the first case which I shall consider is that of Judge Doyle. He was a common pleas judge, elected prior to January 1, 1913, and one to whom of course the provisions of section 2252-2 G. C. (as enacted 104 O. L. 250) apply. During the entire period covered by the examination then, his additional salary was determined in amount by original section 2252, viz., $16.00 per thousand population of Summit county, to be not less than $1,000.00 nor more than $3,000.00 per annum. From July 1, 1913 to June 8, 1914, that additional salary was payable to Judge Doyle from the treasuries of the three counties proportionally; but from and after June 7, 1914, it should have been paid solely from the treasury of Summit county.

The same observations apply fully to the case of Judge Rogers. Judge Fritch was appointed on November 17, 1914, and of course held under this appointment during the entire period covered by the examination, there being no opportunity to fill out Judge Rogers' unexpired term by election during that period.

When Judge Fritch took his office on November 17, 1914, Summit county was still a part of the subdivision and until Judge Ahern's qualification as an elected judge took place on December 9, 1914, it continued to be a part thereof. Therefore, from November 17 to December 8 inclusive, Judge Fritch's additional salary, which was at the rate of $25.00 for each one thousand population of Summit county, and not more than $3,000.00 per annum, was payable proportionally from the treasuries of the three counties. On and after December 9, 1914, however, Summit county ceased to be a part of the subdivision, and thereafter Judge Fritch's additional salary should have been paid solely from the treasury of Summit county.

The case of Judge Ahern offers the greatest difficulty, because it is the only case, of those brought to light by the examination, which is not explicitly covered by the previous opinion referred to. It appears that during the period of the examination up to and including December 8, 1914, Judge Ahern was serving by virtue of an appointment to succeed Judge Wanamaker, such appointment having been made on January 2, 1913, prior to the amendments in 104 O. L. 250.

From December 9, 1914, to the end of the period covered by the examination, Judge Ahern was serving, as above stated, as a regularly elected resident judge of Summit county. For this last described period his additional salary was of course determined by section 2252 as amended and he was entitled to such additional salary, at the rate of $25.00 for each one thousand population of Summit county, but not more than $3,000.00 per annum, payable solely from the treasury of Summit county.

During his tenure by appointment, however, the question as to his additional compensation must be decided by principles developed in the previous opinion, though not applied therein to any case just like that of Judge Ahern. For reasons stated in that opinion, the amount of Judge Ahern's additional compensation could not be increased or diminished during his term of office (article IV, section 14 of the constitution). Therefore, irrespective of the provisions of section 2252-2 G. C., the question of the application of which to the case of Judge Ahern will be hereinafter con-

sidered, his additional salary during his tenure by appointment remianed unchanged in amount.

The question now arises as to the source or sources from which this salary should have been paid. This question of course does not exist with respect to the period of time within the purview of the examination prior to June 8, 1914. During that time Judge Ahern's additional compensation was of course paid from the treasuries of the several counties proportionally.

On and after June 8, 1914, however, the source from which Judge Ahern's additional compensation should have been paid is to be determined by consideration of the force and effect of section 2252-2 G. C. In terms this provision applies only to judges "heretofore elected," and as to them it has the effect not only of prescribing the amount of the additional salary which they shall receive (in which respect its provision may be regarded as unnecessary, because of the existence of article IV, section 14 of the constitution), but also of changing the source from which such additional salary was to be paid.

Is the word "elected" in section 2252-2 G. C. to receive a liberal interpretation so as to make the section applicable to all judges in office at the time of its enactment; or is it to be given a strict and literal interpretation, so as to exclude from its operation such judges so in office as were holding by virtue of appointment instead of election? This question is not answered by the holding in the opinion above referred to, respecting a judge appointed after June 8, 1914; for it is manifest that whatever significance is given to the word "elected" in section 2252-2 G. C., the presence therein of the word "heretofore" precludes its application to a judge either elected or appointed after it became effective.

In my opinion this question is to be resolved in favor of a liberal interpretation. While many incongruous results are produced by an application of the plain and unmistakable terms of section 2252-2 of the General Code, as worked out in the former opinion referred to, yet such results follow only because they are unavoidable; and where the section is susceptible of more than one interpretation, I am convinced that it should receive such an interpretation as to avoid further absurdities.

I do not think that the legislature intended to discriminate between elected judges and appointed judges in section 2252-2, and I take it that the word "elected" is susceptible of both meanings. The context here shows that the primary legislativ intention was to enact the rule for the payment of salaries of judges to whom, because of the limitation of the constitution, the amendment of section 2252 G. C., then made, could not apply. I think that the form of the act is such as to evince a disposition to cover every conceivable case and to leave no case to be provided for merely by the implication resulting from the force of the constitutional provision above cited, without the aid of section 2252-2 G. C.

In other words, the legislature intended to cover the whole field in the act found in 104 O. L. 250. But in order that the whole field may be covered, it will be necessary to read the word "elected" in the broad sense, as if it included the idea of appointment as well as that of technical election by the people.

For all the foregoing reasons I advise that Judge Ahern's additional salary from January 2, 1913 to June 8, 1914, should have been paid proportionally from the treasuries of the several counties of the subdivision; and from June 8, 1914 to December 8, 1914, inclusive, solely from the treasury of Summit county. The amount to which he was entitled, while holding by virtue of his appointment, was of course to be determined, as hereinbefore stated, according to original section 2252 G. C., viz., at the rate of $16.00 for each one thousand population of Summit county, and not less than one thousand dollars nor more than three thousand dollars per annum.

I understand that your question relates exclusively to the additional salaries of

the several judges referred to and the source of payment thereof. Accordingly, I express no opinion herein as to the expenses and additional compensation receivable by any of them under section 2253 G. C.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1971.

APPROVAL, RESOLUTION FOR IMPROVEMENT OF WEST UNION-HILLSBORO ROAD.

COLUMBUS, OHIO, October 10, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of October 9, 1916, transmitting to me for examination final resolution relating to the improvement of section "A" of the West Union-Hillsboro road, petition No. 2004-T, I. C. H. No. 441.

I find this resolution to be in regular form and am therefore returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1972.

APPROVAL, RESOLUTIONS FOR IMPROVEMENT OF CERTAIN ROADS IN CLINTON, HARRISON, LORAIN, PICKAWAY, PREBLE, RICHLAND, VAN WERT, WARREN AND WASHINGTON COUNTIES.

COLUMBUS, OHIO, October 10, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication of October 9, 1916, transmitting to me for examination final resolutions relating to the improvement of the following roads:

"Clinton county—Sec. 'E,' Cincinnati-Chillicothe road, Pet. No. 2189-T, I. C. H. No. 8.

"Clinton county—Sec. 'A,' Wilmington-Hillsboro road, Pet. No. 2186-T, I. C. H. No. 254.

"Harrison county—Sec. 'J,' Bridgeport-Cadiz road, Pet. No. 2456, I. C. H. No. 100.

"Lorain county—Sec. 'P,' Milan-Elyria road, Pet. No. 2604, I. C. H. No. 288.

"Pickaway county—Sec. 'A,' Circleville-Adelphi road, Pet. No. 2807, I. C. H. No. 362.

"Preble county—Sec. ——, I. C. H. No. 210, Eaton-Greenville road, Pet. No. 2838.

"Richland county—Sec. 'J-2,' Shelby-Mansfield road, Pet. No. 2859, I C. H. No. 436.

"Van Wert county—Sec. 'G,' Van Wert-Spencerville road, Pet. No. 3032, I. C. H. No. 135.

"Van Wert county—Sec. 'A,' Van Wert-Decatur road, Pet. No. 3027, I. C. H. No. 434.

"Van Wert county—Sec. 'B,' Van Wert-Ft. Wayne road, Pet. No. 3025, I. C. H. No. 419.

"Warren county—Sec. 'A,' Dayton-Lebanon road, I. C. H. No. 64, Pet. No. 3048-T.

"Washington county—Sec. 'O,' Marietta-McConnelsville road, Pet. No. 3058, I. C. H. No. 393.

"Washington county—Sec. 'M,' Hockingport-Powhatan road, Pet. No. 3059, I. C. H. No. 7."

I find these resolutions to be in regular form and am, therefore, returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1973.

DISAPPROVAL, RESOLUTION FOR IMPROVEMENT OF WOODSFIELD-BARNESVILLE ROAD IN MONROE COUNTY.

COLUMBUS, OHIO, October 10, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of October 9, 1916, transmitting to me for examination final resolution relating to the improvement of section "E" of the Woodsfield-Barnesville road, Pet. No. 2714, I. C. H. No. 104, in Monroe county.

I am returning this resolution without my approval for the reason that it appears by the certificate of the chief clerk of the state highway department that main market road funds are to be used for the improvement in question and does not appear either by the description of the highway in question or by an attached certificate that the road to be improved is a main market road.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1974.

INTOXICATING LIQUORS—HOW PERSONS WHO TRAFFIC IN SAME CAN BE PLACED UPON DUPLICATE FOR DOW-AIKEN LIQUOR TAX WHO HAVE NOT BEEN SO CHARGED—PROSECUTING ATTORNEY'S DUTY WHEN HE HAS KNOWLEDGE OF SUCH VIOLATION.

There is no further method prescribed by statute for entering upon the assessment duplicate of the county the names of persons, firms and corporations engaged in the business of trafficking in intoxicating liquors than those found in section 6085 *G. C., section* 6087 *G. C.,* 104 *O. L.* 166, *section* 6088 *G. C. and section* 6089 *G. C.,* 103 *O. L.* 442.

There is not by statute imposed upon the prosecuting attorney the duty of causing to be entered upon the assessment duplicate of the county the names of persons, firms and corporations engaged in the business of trafficking in intoxicating liquors whose names have not already been so entered upon such assessment duplicate.

It is the duty of the prosecuting attorney, as the legal adviser of the county auditor and county treasurer, to bring to the attention of such auditor and treasurer, when the same comes to the knowledge of the prosecuting attorney, the fact that persons, firms or corporations, whose names are not already entered upon the assessment duplicate of the county, are engaged in the business of trafficking in intoxicating liquors and liable to assessment.

COLUMBUS, OHIO, October 11, 1916.

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

GENTLEMEN:—Yours under date of September 26, 1916, is as follows:

> "Aside from the methods provided by section 6085 General Code, and sections 6087, 6088 and 6089 General Code, as amended 103 O. L. 442, is there any other way provided by law to cause a person who trafficks in intoxicating liquors, to be placed upon the liquor duplicate for the Dow-Aiken liquor tax, who has not been so charged?
>
> "In the event that a prosecuting attorney secures official knowledge of violations of liquor laws by prosecuting persons for the offense of selling without license, is it his legal duty, under provisions of section 2921 General Code, or any other section of law, to see to it that such person or persons are placed upon the liquor duplicate for such tax?"

It is provided by section 6071 G. C., 103 O. L. 241, that:

> "Upon the business of trafficking in spirituous, vinous, malt or other intoxicating liquors, there shall be assessed yearly and paid into the county treasury, as provided by section 6072, and following of the General Code, by each person, corporation, or co-partnership engaged therein the sum of one thousand dollars."

By section 6072 G. C., 104 O. L. 166, it is provided, with certain exceptions not necessary here to be considered, that such assessment, with any penalty thereon, shall attach and operate as a lien upon the real property on and in which such business is conducted, as of the fourth Monday of May of each year, and that the same shall be paid at the times provided for the payment of taxes on real or personal property within this state, to-wit: one-half on or before the twentieth day of June, and one-half on or before the twentieth day of December of each year.

Section 6077 G. C. provides as follows:

> "If a person, corporation or copartnership refuses or neglects to pay the amount due under the provisions of this chapter within the time therein specified, the county treasurer shall forthwith collect such amount with the penalties thereon, and four per cent. collection fees and costs, by distress and sale, as on execution, from any goods and chattels of such person, corporation or co-partnership."

By section 6081 G. C. it is provided that each assessor shall return to the county auditor a statement as to each place within his jurisdiction where the business is conducted, showing the name of the person, firm or corporation so engaged, with a description of the premises. Section 6085 G. C. requires that the county auditor shall make and preserve duplicates of the assessments and that "upon receiving satisfactory information of such business liable to assessment or increased assessment, not returned by the assessor, he shall forthwith enter an assessment thereon and place it upon such duplicate and upon the county treasurer's copy thereof."

Under section 6087 G. C., 104 O. L. 166, and sections 6088 G. C. and 6089 G. C., 103 O. L. 442, it is required that liquor licensing inspectors appointed by the state liquor licensing board shall make investigation to secure the names of all persons, firms or corporations liable to such assessment or increased assessment, whose names are not already on the duplicate, and report such names to the state liquor licensing board; that the state liquor licensing board shall, upon the report and information submitted, determine and forthwith certify to the auditor of state the names of all persons, firms and corporations liable to such assessment or increased assessment, whose names are not already on the duplicate, together with a description of the premises, and that the auditor of state shall cause all such names to be entered upon the assessment duplicate of the proper county by the auditor thereof. There is thus provided, under the statutes referred to in your inquiry, two methods by which the assessments upon the business of trafficking in intoxicating liquor may be entered upon the assessment duplicate of the county in which such business is being conducted.

Upon careful investigation I find no further method prescribed by statute whereby the assessment upon the business of trafficking in intoxicating liquor may be entered upon the assessment duplicate required to be made and preserved by the county auditor.

As to your first question, whether there is any method prescribed by law for placing upon the assessment duplicate the names of persons, firms or corporations engaged in the business of trafficking in intoxicating liquors, whose names do not already appear on such duplicate other than those methods provided by section 6085, section 6087 G. C., 104 O. L. 166, and sections 6088 and 6089 G. C., 103 O. L. 442, I am of the opinion that there is no further statutory provision for entering or causing to be entered upon the assessment duplicate of the county, the names of persons, firms or corporations engaged in the business of trafficking in intoxicating liquors than that found in section 6085 G. C., section 6087 G. C., 104 O. L. 166, section 6088 G. C. and section 6089 G. C., 103 O. L. 442.

Section 2921 G. C. to which reference is made in your second question provides as follows:

> "Upon being satisfied that funds of the county, or public moneys in the hands of the county treasurer or belonging to the county, are about to be or have been misapplied, or that any such public moneys have been illegally drawn, or withheld from, the county treasury, or that a contract in contravention of law has been, or is about to be entered into, or has been or is being executed, or that a contract was procured by fraud or corruption, or that

any property, real or personal, belonging to the county is being illegally used or occupied, or is being used or occupied in violation of contract, or that the terms of a contract made by or on behalf of the county are being or have been violated, or that money is due the county, the prosecuting attorneys of the several counties of the state may apply, by civil action in the name of the state, to a court of competent jurisdiction, to restrain such contemplated misapplication of funds, or the completion of such illegal contract not fully completed, or to recover, for the use of the county all public moneys so misapplied or illegally drawn or withheld from the county treasury, or to recover, for the benefit of the county, damages resulting from the execution of such illegal contract, or to recover, for the benefit of the county, such real or personal property so used or occupied, or to recover, for the benefit of the county, damages resulting from the non-performance of the terms of such contract, or to otherwise enforce it, or to recover such money due the county."

It will be observed that it is here provided, among other things, that prosecuting attorneys upon being "satisfied * * * that money is due the county * * * may apply by civil action * * * to recover such money due the county." There is not, however, even indirect reference to any duty of the prosecuting attorney to cause to be entered upon the duplicate of the county any tax or assessment which may be due the county.

The general duties of the prosecuting attorney are prescribed by section 2916 G. C., 103 O. L. 419, and section 2917 G. C. as follows:

"Section 2916. The prosecuting attorney shall have power to inquire into the commission of crimes within the county and except when otherwise provided by law shall prosecute on behalf of the state all complaints, suits, and controversies in which the state is a party, and such other suits, matters, and controversies as he is directed by law to prosecute within or without the county, in the probate court, common pleas court and court of appeals. In conjunction with the attorney-general, he shall also prosecute cases in the supreme court arising in his county. In every case of conviction, he shall forthwith cause execution to be issued for the fine and costs, or costs only, as the case may be, and faithfully urge the collection until it is effected, or found to be impracticable, and forthwith pay to the county treasurer all moneys belonging to the state or county, which come into his possession as fines, forfeitures, costs or otherwise.

"Section 2917. The prosecuting attorney shall be the legal adviser of the county commissioners and all other county officers and county boards and any of them may require of him written opinions or instructions in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board may direct or to which it is a party, and no county officer may employ other counsel or attorney at the expense of the county except as provided in section twenty-four hundred and twelve. He shall be the legal adviser for all township officers, and no such officer may employ other counsel or attorney except on the order of the township trustees duly entered upon their journal, in which the compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund."

It will readily be observed from an examination of the foregoing statutes that they impose upon the prosecuting attorney no duty to cause to be entered upon the duplicate assesssments due from persons engaged in the business of trafficking in intoxicating liquor. While he is made the legal adviser of the county auditor and county

treasurer, upon whom is imposed the duty of entering upon the duplicate the names of all persons, firms and corporations engaged in the business of trafficking in intoxicating liquor and the collection of all assessments so entered, the duty of causing such assessments to be so entered is not by law imposed upon the prosecuting attorney.

I am therefore of opinion, in answer to your second question, that there is not imposed upon the prosecuting attorney by law any duty to cause to be entered upon the duplicate of the county assessments against persons, firms or corporations engaged in the business of trafficking in intoxicating liquors, although he has knowledge of the conviction of persons, firms or corporations selling intoxicating liquors without having been duly licensed. The duty of causing such assessments to be entered upon the duplicate is imposed upon the state liquor licensing board, the auditor of state and the county auditor, as pointed out in the answer to your first question herein.

While the statutes do not specifically impose upon the prosecuting attorney the duty of causing to be entered upon the assessment duplicate the names of persons, firms and corporations engaged in the business of trafficking in intoxicating liquors, yet as the legal adviser of the county auditor, whose duty it is to enter the names of such persons, firms or corporations upon the assessment duplicate, and the county treasurer, whose duty it is to collect such assessment, it would seem there could be no doubt that there is a duty imposed upon the prosecuting attorney by the general policy of the law to bring to the attention of those officers, who are specifically charged by law with duties in regard thereto, the fact, when the same comes to his official knowledge, that persons, firms and corporations, whose names have not been entered on the assessment duplicate, are engaging in the business of trafficking in intoxicating liquors and liable to the assessment charged by law upon such business.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1975.

SUBPOENA MAY ISSUE OUT OF ANY UNITED STATES DISTRICT COURT IN ANY CRIMINAL CASE FOR PRISONER IN OHIO STATE REFORMATORY TO APPEAR AS WITNESS, WHEN DULY SERVED.

A subpoena may issue out of any United States district court in any criminal case to any district in the United States and any person on whom such subpoena is duly served is required to answer the same in the court from which such subpoena issued.

COLUMBUS, OHIO, October 11, 1916.

HON. J. A. LEONARD, *Superintendent Ohio State Reformatory, Mansfield, Ohio.*

DEAR SIR:—Yours under date of October 7, 1916, is as follows:

> "The superintendent of the reformatory has been served with a subpoena issued by the United States district court for the western district of Kentucky to bring Earl Nelson, a prisoner in the reformatory, before the grand jury at Louisville, Kentucky, on October 11th, next. A subpoena has also been served upon Nelson, commanding appearance at that time.
>
> "Please advise me as to what action I should take in this matter in view of the fact that the place named in the subpoena is without the state of Ohio."

Your inquiry involves a consideration of sections 876 and 877 U. S. R. S., being sections 1487 and 1488 U. S. Comp. St. 1913, which provides as follows:

> "Section 1487. Subpoenas for witnesses who are required to attend a court of the United States, in any district, may run into any other district: Provided, That in civil causes the witnesses living out of the district in which the court is held do not live at a greater distance than one hundred miles from the place of holding the same."
>
> "Section 1488. Witnesses who are required to attend any term of a circuit or district court on the part of the United States, shall be subpoenaed to attend to testify generally on their behalf, and not to depart the court without leave thereof, or of the district attorney; and under such process they shall appear before the grand or petit jury, or both, as they may be required by the court or district attorney."

Under authority of section 1487, supra, a subpoena for a witness in a criminal cause may issue out of a United States court in any district to any other district in the United States and by section 4488, supra, any witness so subpoenaed is required to appear before the grand or petit jury, or both, in the court from which such subpoena has issued.

It therefore follows that you and the prisoner mentioned in the inquiry are required, under the subpoena of the United States district court for the western district of Kentucky, to appear in such court on the date mentioned therein, notwithstanding such court is not within the state of Ohio or the district in which the Ohio State reformatory is located.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1976.

ROADS AND HIGHWAYS—NO AUTHORITY FOR ASSESSING TWENTY-FIVE PER CENT. OF COST OF ROAD IMPROVEMENT ON PROPERTY LOCATED WITHIN ONE MILE THEREOF—WHEN TWO BOARDS OF TOWNSHIP TRUSTEES ARE AUTHORIZED TO MAKE JOINT APPLICATION FOR STATE AID ON INTERCOUNTY HIGHWAY—ONLY ON COUNTY OR TOWNSHIP LINE ROAD—BONDS CAN BE ISSUED ONLY BY COUNTY COMMISSIONERS FOR CO-OPERATION WITH STATE FOR INTER-COUNTY HIGHWAY—TAX LEVIES ARE MADE BY TOWNSHIP TRUSTEES WHERE TOWNSHIP CO-OPERATES WITH STATE.

In re: improvement under the supervision of the state highway department of an inter-county highway in Turtlecreek and Salem townships, Warren county.

There is no authority for a petition to township trustees signed by interested land owners and asking for the improvement of an inter-county highway under the supervision of the state highway department.

Joint applications by two boards of township trustees for state aid on an inter-county highway are authorized only when the highway is upon a county or township line.

Bonds issued for the purpose of raising funds for co-operating with the state in the construction of inter-county highways can be issued only by county commissioners.

Funds for the payment of the proportion of the cost of highway work carried forward by the state highway department to be paid by interested townships are to be raised by tax levies made by township trustees.

Where a township co-operates with the state, the necessary tax levies are to be made by the trustees, but if it is necessary to issue bonds, the same are to be issued by the county commissioners.

COLUMBUS, OHIO, October 11, 1916.

HON. DEAN E. STANLEY, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—I have your communication of September 23, 1916, which communication reads as follows:

> "The board of trustees of Salem and Turtlecreek townships in Warren county, Ohio, have consulted me as to the proper course for them to follow in connection with a road improvement, they having already taken certain steps. The facts surrounding this matter and the procedure they have taken in regard to it, as near as I can ascertain, are substantially as follows:
>
> "On April 22, 1916, a petition was presented to these boards, a substantial copy of which with the description of the proposed road and the signatures omitted, marked No. 1, is enclosed.
>
> "On April 24, 1916, a resolution was passed by the boards of trustees in joint session, a substantial copy of which, omitting descriptions, is enclosed on the second page.
>
> "On August 26, 1916, the board of trustees in Turtlecreek township passed what they denominated a 'final resolution,' a substantial copy of which, omitting description, is found on pages three and four of the enclosures herewith.
>
> "The state highway commissioner having divided the proposed improvement into two sections, one section that part of the road in Turtlecreek township and the other that part of the road in Salem township.
>
> "I understand that the trustees of Salem township never passed the 'final resolution.' The state highway commissioner advertised the road for

sale, but failed to receive a bid. The estimates were then revised and the road has been again advertised by the state highway commissioner. No further resolutions have as yet been passed, the state highway commissioner having requested the several boards to pass a resolution similar to the 'final resolution' above referred to.

"At this point in the proceedings, the trustees consulted me as to their duties and powers in the matter. It seems, from what I can learn of the intention of the parties, that at the time the petition was filed it was thought that the trustees could co-operate with the state under section 1178 to section 1231-4, and at the same time utilize section 3298-15 for the purpose of making assessments against the property located within one mile of the proposed improvements, it being the intention of the parties that the state highway commissioner should furnish 75% of the cost of the improvement and that the remaining 25% should be assessed, by the use of section 3298-15 above referred to, upon property within one mile of the proposed improvement. It will be observed that this course of procedure would have resulted in no money being paid by either board of trustees out of the township funds.

"I desire to inquire as follows:

"*First.* May this road be constructed by the state highway commissioner paying 75% of the cost and the remaining 25% being assessed on property within one mile?

"*Second.* If so, what resolutions, if any, should the trustees of the several townships pass in regard thereto and under what sections should they operate?

"*Third.* In the event the answer to the first question is in the negative, is there any procedure by which the trustees may complete the above proceedings in such a way that the road may be built and if so, what? (Could the state pay 75%, 10% be assessed on abutting property and the remaining 15% be paid by the trustees, considering the proceedings that have already been taken?)

"*Fourth.* If the answer to the third question is in the affirmative, what resolutions should be passed by the trustees?

"The persons who signed the petition seem to be willing to pay 25% of the cost, but of course some of the parties to be assessed did not sign the petition.

"The funds of Salem township are in such condition that the board of trustees has not in the treasury in their road fund, or in the process of collection, an amount equal to 25% of the cost of the improvement in their township and the entire road tax assessed in Salem township by the trustees, to be collected next December and next June, will not produce more than 15% or 16% of the cost of the improvement in that township.

"All of the parties interested, including the two boards of trustees, are very anxious that the road improvements be made, if it can be legally done, as the road is one of importance to a large number of people and to the public at large.

"I understand that the advertisement of the state highway commissioner provides for receiving bids on the 28th day of September, 1916, on this road, and I am writing him today and telling him that I have submitted questions to you concerning this improvement, thinking that possibly his action on the matter may be dependent upon the steps taken by the trustees in these two townships.

"I regret that the record is in the condition that it is in this matter, but the question was not submitted to me until after the various resolutions and proceedings above referred to had been had by the trustees."

The petition presented to the boards of trustees of Turtlecreek and Salem townships is as follows:

"Road Petition to Construct or Improve.

"To the Boards of Trustees of Salem and Turtlecreek Twps., Warren County, Ohio.

"The undersigned petitioners, being at least fifty-one per cent. of the land or lot owners, residents of said county, who would be specially taxed or assessed for the improvement, hereby petition you for the improvement by grading and graveling at a total cost of not to exceed $2,500 per mile of a public road on the following line, to-wit:

(Here follows description of road.)

"They ask that the following method be used for paying the compensation, damages, costs and expenses thereof, to wit: 25% of the total costs and expenses of said improvement to be assessed by the trustees, upon the real estate, within one mile of either side or terminus of said improvement, in proportion to the benefits accruing therefrom, as may be determined by the trustees, and the balance to be paid by the state highway department upon petition by the township trustees, as provided in sections 3298-15 and 1192 G.C.

"Whereupon we pray that your combined boards will take such measures to the improvement of said road as the statute requires and suggest that said improvement be designated and named the_____Road improvement.

"Dated this 22d day of April, A. D., 1916."

The resolution adopted by the boards of trustees of Salem and Turtlecreek townships, in joint session, reads as follows:

"Resolution of Township Trustees Applying for State Aid.

"Be it resolved by the boards of trustees of Turtlecreek and Salem townships of Warren county, Ohio, in joint meeting assembled, that the public interest demands the improvement, at a total cost not to exceed $2,500.00 per mile, under the provisions of sections 1178 and 1231-4 of the General Code of Ohio, of that part of inter-county highway No. 252 situate in the townships of Turtlecreek and Salem, in the county of Warren, and described as follows (here follows a description of the road):

"Further resolved that whereas the county commissioners of Warren county, Ohio, filed before January 1, 1916, an application for state aid for the construction, improvement. maintenance or repair of highways from funds which be available for said purpose during the present year, but have now, by resolution, relinquished their claim on a part of same, now therefore, we, the trustees of said Turtlecreek and Salem townships in said county, in joint meeting assembled, do hereby make application to the state highway commissioner for aid from any appropriation by the state from any fund available for the construction of inter-county highways, and we do hereby agree for and on behalf of said townships to pay in the first instance from the funds of said townships one-half of the cost and expense of survey and other expense preliminary to the construction of said highway."

The so-called final resolution adopted by the trustees of Turtlecreek township is as follows:

"Final Resolution.

"Whereas at a meeting of the trustees of Turtlecreek township of Warren county, Ohio, held in the office of said township on the 26th day of August, 1916, the improvement of that part of (inter-county highway) No. 252 hereinafter described, under the provisions of sections 1178 and 1231-4 inclusive of the General Code of Ohio, came on for further consideration; said section of road as described in the preliminary application of this board to the state highway department, on the 16th day of April, 1916, being as follows (here follows description of proposed improvement):

"Whereas the state highway commissioner has approved said application and has caused a map of the following described section of said highway to be made in outline and profile, to wit: (here follows description of road in Turtlecreek township) and has caused plans, specifications, profiles and estimates to be made for the improvement above described and has transmitted the same to this board.

"Therefore be it resolved that the section of highway above described in paragraph 2 be improved under the provision of the aforesaid law: that said work be done under the charge, care and supervision of the state highway commissioner and that said maps, plans, specifications, profiles and estimates for this improvement as approved by the state highway commissioner are hereby approved and adopted by this board.

"Resolved that the sum of $2,566, being 25% of the total estimate of the cost and expense of said improvement (which total cost and expense amounts to $10,264) be and the same hereby is appropriated for improving, under the provisions of said law, the highway described in paragraph 2 above, and the township clerk is hereby authorized and directed to issue his order on the township treasurer for said sum, or part thereof, upon the requisition of the state highway commissioner, to pay the cost and expense of said improvement, as the same may become due under the provisions of said law.

"We hereby agree to assume, in the first instance, the share of the cost and expense over and above the amount to be paid by the state and guarantee the state highway commissioner that such money shall be available at such time or times as may be needed in the construction of said highway.

"It is also hereby agreed that the state highway commissioner is relieved from the maintenance and repair of the above road after it is improved and that the trustees of said township agree to be responsible for all necessary maintenance and repair."

It should first be observed that the petition presented by interested land owners may be disregarded in the consideration of the question submitted by you. There is no authority for a petition of this character and the subsequent proceedings have no reference thereto and are not dependent upon the petition for their validity. Petitions addressed to county commissioners for the construction of inter-county highways or main market roads are authorized by section 1204 G. C., 106 O. L. 633, but there is no authority for addressing such petitions to township trustees. Even if such were not the case, the petition suggests an unauthorized method of dividing the cost, inasmuch as under the provisions of section 1214 G. C., 106 O. L. 637, only ten per cent. of the cost of a highway improvement carried forward by the state, excepting therefrom the cost and expense of bridges and culverts, may be specially assessed and such ten per cent. must be assessed upon the property abutting on the improvement.

Coming now to consider the resolution adopted by the boards of trustees of Turtlecreek and Salem townships, in joint session, it should be observed that there is no statutory authority for joint action under the facts of this case as I understand them. I am informed by representatives of the state highway department that inter-county highway No. 252 is not upon the line between Turtlecreek and Salem townships, but that it crosses the line between the two townships and is situated partly within one township and partly within the other. Under the provisions of section 1220 G. C., 106 O. L. 639, two or more townships may make application for state aid in the construction or improvement of inter-county or main market roads upon a county or township line, but there is no authority for two townships making a joint application for state aid in the construction of a road situated partly in one township and partly in the other and not on the line between the two townships. The proper method of procedure in such a case is for each township to make an application for state aid on that part of the highway within its own limits. However, in view of the fact that the joint application was made by the unanimous vote of the trustees of both townships, I am of the opinion that this informality is not fatal and that if as appears in this case the joint application is thereafter treated both by the state highway commissioner and by the trustees of the two townships as a separate application by each board of township trustees for state aid on that part of the highway within its limits, any infirmity existing by reason of the informality or irregularity of the original application may safely be regarded as cured.

Coming now to consider the final resolution adopted by the board of trustees of Turtlecreek township, I find the same to be in substantial compliance with the statute and if the township clerk was able to and did make the certificate required by section 5660 G. C., the final resolution in question is to be regarded as consummating the agreement between the township and the state and looking toward the construction of that part of the inter-county highway in question located in said Turtlecreek township. When the certified copy of this final resolution, with the approval of the attorney-general endorsed thereon as to form and legality, is filed in the office of the state highway commissioner, as provided by section 1218 G. C., 106 O. L. 638, the state highway commissioner will be authorized to enter into a contract for the construction of so much of the highway as lies in Turtlecreek township.

I have deemed it proper to consider the petition, application and final resolution before taking up the specific questions submitted by you for the reason that such petition, application and final resolution suggests certain questions not expressly raised in your letter.

Answering your first question, I advise you that there is no authority for assessing twenty-five per cent. of the cost of the improvement on the property located within one mile thereof. The assessment must be made in the manner provided by section 1214 G. C., which section provides for an assessment of ten per cent. of the cost and expense of the improvement, excepting therefrom the cost and expense of bridges and culverts upon the property abutting on the improvement.

The answer to your first question renders it unnecessary to answer your second.

Your third and fourth questions will be considered in connection with your observation relating to the condition of the funds of Salem township. It should first be observed, however, that if at the time the trustees of Turtlecreek township adopted the so-called final resolution on August 26, 1916, the clerk was able to and did make the certificate required by section 5660 G. C. the only further action necessary to be had before a contract may be let for the improvement in Turtlecreek township is the filing in the office of the state highway commissioner of a certified copy of the final resolution, with the certificate of the township clerk and the approval of the attorney-general endorsed thereon. As the construction of the improvement proceeds, the townships and property owners' share of the cost and expense, twenty-five per cent. will be paid out by the township officials on the requisition of the state highway com-

missioner. When the improvement is completed and the total cost and expense thereof ascertained and apportioned by the chief highway engineer, and certified to the township trustees, an assessment of ten per cent. will be made upon the owners of the abutting real estate and of course the other fifteen per cent. will necessarily be a charge upon the entire township. If the above condition does not obtain as to Turtlecreek township, then the further observations herein contained and in terms referring only to Salem township, will also be applicable to Turtlecreek township.

Referring to the method to be followed by Salem township in raising the necessary funds to meet the share of the township and property owners, it should be observed that under section 1222 G. C., 106 O. L. 640, the fund for the payment of the proportion of the cost and expense to be paid by a township for the construction of highways, under the supervision of the state highway department, is to be created by a tax levy made by the township trustees. Under the provisions of the next section, section 1223 G. C., bonds issued in anticipation of such taxes and in anticipation of special assessments are to be issued by the county commissioners, and there is no authority for the issuing of bonds of this class by boards of township trustees. It will be necessary, therefore, for the township trustees of Salem township to make the necessary tax levy or levies under section 1222 G. C. and certify their action to the county commissioners, who will then be authorized to issue bonds in anticipation of the collection of such levies, which levies are, of course, to be made only on the taxable property of the township in question and in anticipation of the special assessments to be thereafter made. It will also be necessary for the commissioners, in the issuance of such bonds, to observe the provisions of section 5630-1 G. C., 106 O. L. 495, and prior to the issuance of such bonds it will be necessary for the county commissioners to provide for the levying of a tax upon all the taxable property of the county to cover any deficiency in the payment or collection of the special assessment or township tax.

While the above statement is in terms limited to Salem township, yet as previously observed the statement is also to be regarded as applying in the case of Turtlecreek township, if it be a fact that the necessary funds had not been provided by the trustees of that township prior to the adoption of the final resolution on August 26, 1916.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1977.

APPROVAL, RESOLUTION FOR IMPROVEMENT OF WOODSFIELD-BARNESVILLE ROAD IN MONROE COUNTY.

COLUMBUS, OHIO, October 11, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication of October 11, 1916, submitting for examination final resolution relating to the improvement of section "E" of the Woodsfield-Barnesville road, I. C. H. No. 104, in Monroe county.

I find this resolution to be in regular form and am therefore returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1978.

APPROVAL, RESOLUTION FOR IMPROVEMENT OF MORROW-LEBANON ROAD IN WARREN COUNTY.

COLUMBUS, OHIO, October 13, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of October 9, 1916, transmitting to me for examination final resolution relating to the improvement of the Morrow-Lebanon road, section "B," I. C. H. No. 252, petition No. 3054-T, in Turtlecreek township, Warren county.

I find this resolution to be in regular form and am, therefore, returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1979.

THE BOARD OF AGRICULTURE OF OHIO—WITHOUT AUTHORITY TO ENTER INTO CONTRACT WITH COUNTY COMMISSIONERS TO PAY PORTION OF COST AND EXPENSE OF DITCH IMPROVEMENT —STATE SERUM FARM.

The board of agriculture of Ohio is without authority to enter into a contract with a board of county commissioners whereby the board of agriculture agrees to pay a portion of the cost and expense of the location and construction of a ditch improvement located, established and caused to be constructed by the county commissioners.

COLUMBUS, OHIO, October 14, 1916.

The Board of Agriculture of Ohio, Columbus, Ohio.

GENTLEMEN:—Yours under date of October 4, 1916, is as follows:

"During the time of ditching and improving the present state serum farm it appears that the superintendent of the said farm closed up the main water course passing through the farm, beginning about the center of the north side of the farm and put in a tile sewer which seemingly is too small to carry off the water, causing the water to back up on the farms on the north side of the highway, which highway lies on the north side of the serum farm.

"The farmers interested have petitioned the commissioners of Licking county to reopen this main water course. If it is reopened and an open ditch passes over the state serum farm it will greatly damage the lawn along the front of the farm and destroy the beauty thereof, and will also make it inconvenient to farm the fields at the western part of the serum farm.

"I have gone into this matter with the commissioners of Licking county and they have proposed to lay a sewer along the north side of the farm and on the south side of the public highway and not interfere with the farm, but the sum of $800.00 has been assessed against the state serum farm as a tax for this outlet. They were going to take final action on the matter today

and asked me whether the board of agriculture would sign a contract to the effect that they would pay the amount assessed and not in the future ask for a removal of the sewer laid along the north side of the farm, and to reopen the main water course through the farm.

"In my judgment this is the proper thing to do, to have the sewer on the north side of the farm between the road fence and the highway. Is there any authority whereby this board is authorized to enter into that kind of a contract with the commissioners of Licking county? And has this board the right to agree to pay the $800.00 assessment and make a contract with the commissioners to run the water along the north side of the farm instead of through the farm on the main water course?

"The commissioners of Licking county have postponed their hearing until one week from today, October 11th. Will you advise me so that I can report to them?"

I am further informed by Mr. Stauffer, in personal interview, that there is not now in the state treasury, and appropriated by the legislature, any funds which are available for the purpose referred to in the above inquiry.

This latter statement involves a consideration of the provisions of section 17 of the General Code, which are as follows:

"An officer or agent of the state or of any county, township or municipal corporation, who is charged or intrusted with the construction, improvement or keeping in repair of a building or work of any kind, or with the management or providing for a public institution, shall make no contract binding or purporting to bind the state, or such county, township or municipal corporation, to pay any sum of money not previously appropriated for the purpose for which such contract is made, and remaining unexpended and applicable thereto, unless such officer or agent has been duly authorized to make such contract. If such officer or agent makes or participates in making a contract without such appropriation or authority, he shall be personally liable thereon, and the state, county, township or municipal corporation in whose name or behalf the contract was made, shall not be liable thereon."

The state serum farm is owned, maintained and operated by the state of Ohio by and through its officers and agents who are entrusted with its improvement and management and is manifestly either a "work" or "public institution" within the terms of the above quoted section, and hence the officers and agents of the state, charged and entrusted with the management thereof, are subject to its provisions.

In view of the statement that there is not any fund in the state treasury appropriated and unexpended and applicable to the payment of the expenses of the ditch improvement in question, the provisions of section 17 G. C. supra render it conclusive that it is not within the authority of the board of agriculture to enter into any contract of the character mentioned in the above quoted inquiry.

If there were, however, funds heretofore appropriated and remaining unexpended and applicable to the purpose in question, there is no authority in the county commissioners to enter into any contract in respect to the location or construction of a ditch or drain. County commissioners may, by authority of law, apportion the costs of a ditch improvement among the several owners of private property, according to the benefits derived from such improvement and order the assessments so made placed upon the duplicate against the lands benefited, but are without authority to contract in respect to such assessments. The county commissioners are charged by law with the performance of certain prescribed duties in the location and construction of ditch improvements and the apportionment of the cost and expense there-

of and assessment of the same against the lands benefited thereby, but no provision of law relative to the location and construction of a ditch improvement operates to confer upon the county commissioners authority to enter into any contract with the owners of lands benefited by such improvement with respect to the apportionment of the cost of the same among the several owners of lots and lands. Nor is there found, upon careful examination of the statutes, any authority vested in the board of agriculture to enter into any contract whereby the board of agriculture assumes or agrees to pay any portion of the expense of the location or construction of a county ditch such as is referred to in your inquiry.

I am therefore of opinion, in answer to your question, that the board of agriculture may not lawfully enter into any contract with the county commissioners of Licking county whereby the board of agriculture would be bound to pay any part of the cost and expense of the location and construction of the ditch improvement referred to in the above inquiry.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1980.

BOARD OF AGRICULTURE—BARNYARD MANURE—INTERPRETATION OF STATUTE REGULATING SALE OF FERTILIZERS.

Barnyard manure includes "Sheep and Hog Manure" as contemplated by section 1150 G. C. The mere drying and preparing "Sheep and Hog Manure" for shipment would not rob it of its character as barnyard manure.

COLUMBUS, OHIO, October 18, 1916.

The Board of Agriculture, Columbus, Ohio.

GENTLEMEN:—Your request for an opinion as to the term "barnyard manure" is as follows:

> "Section 1150 of the Ohio fertilizer law, as per copy enclosed, exempts from registration and license the sale of barnyard manure. There is a Chicago firm shipping sheep manure into the state which they claim is exempt from license and proper labeling, as in their opinion it is *barnyard manure.*
>
> "For some years past companies have paid license fees covering shipments of sheep and hog manures and I hardly believe it was the intention of the legislature to exempt from license the sale of these materials. Possibly the term has reference more to chicken dung and stable manures than to sheep and hog manures, which are dried and mechanically prepared before shipping.
>
> "We will be pleased to have your interpretation of the term 'Barnyard Manure' and whether or not it would include *sheep and hog manures when dried* and made ready for shipments."

Section 1150 G. C. as amended (103 O. L. 319 and 320) is as follows:

> "Section 1150. Each person, firm or corporation who manufactures, sells, or offers for sale in the state a commercial fertilizer which means any substance for fertilizing or commercial purposes, except barnyard manure, marl, lime and plaster, shall affix to each package in a conspicuous place on the

outside thereof, a plainly printed certificate which shall state the number of net pounds contained therein, the name, brand or trade mark, under which it is sold, or offered for sale, the name of the manufacturer, with his or its postoffice address * * *."

The further provisions of the statute direct what the certificate shall show as to the various ingredients of the commercial fertilizer which may be offered for sale, etc.

Barnyard manure is expressly excepted from the operation of the statute, which is penal in its nature, and must, therefore, be construed strictly.

From a reading of the statute, quoted above, it is clear that its purpose is to protect the purchasers of commercial fertilizers from fraud by providing that all such commercial fertilizers, with the exception of barnyard manure, marl, lime and plaster, shall bear a certificate which will contain a chemical analysis showing that it contains certain constituent parts or elements.

By barnyard manure is meant the natural manure to be found in a barnyard, or on the farm, as the result of the keeping of animals of husbandry.

The various kinds of manure mentioned in your letter, when sold in their natural state are to be considered as barnyard manure, as it is my opinion that section 1150 supra applies only to artificially prepared fertilizers as distinguished from manure in its natural state. The mere drying and preparing "Sheep and Hog Manures" for shipment, without the addition of any other ingredient, would not rob it of its character as barnyard manure, as contemplated by the law.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1981.

APPROVAL, LEASE TO IRA M. MILLER, AKRON, OHIO, PORTION OF WATER FRONT ALONG EAST BANK OF SUMMIT LAKE.

COLUMBUS, OHIO, October 18, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication of October 10, 1916, transmitting to me for examination a lease to Ira M. Miller, of Akron, Ohio, covering a portion of the water front along the east bank of Summit Lake.

I find this lease to be in regular form and am therefore returning the same with my approval endorsed upon the triplicate copies thereof.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1982.

APPROVAL, SALE OF PORTION OF ABANDONED OHIO CANAL PROPERTY IN ROSS COUNTY TO MISS OLIVE MACE AND ALSO TO MARY A. PRATHER AND MARGARET S. STITT.

COLUMBUS, OHIO, October 18, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of September 26, 1916, relating to the sale of a portion of the abandoned Ohio canal property in Union township, Ross county, Ohio, to Miss Olive Mace, and also your communication of October 7, 1916, relating to the sale of a portion of the abandoned Ohio canal property in the same vicinity to Mary A. Prather and Margaret S. Stitt.

I find that in each instance the resolution prepared by you recites the existence of the proper jurisdictional facts and I have therefore attached my signature to the duplicate copies of the resolutions and am herewith returning the same to you.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1983.

APPROVAL, RESOLUTION FOR IMPROVEMENT OF FIVE ROADS IN LAWRENCE COUNTY.

COLUMBUS, OHIO, October 18, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of October 16, 1916, transmitting to me for examination final resolutions relating to the following roads:

"Lawrence county. Sec. 'I,' Ohio river road, Pet. No. 2566, I. C. H. No. 7.
"Lawrence county. Sec. 'I,' Ohio river road, Pet. No. 2566, I. C. H. No. 7.
"Lawrence county. Sec. 'I,' Ohio river road, Pet. No. 2566, I. C. H. No. 7.
"Lawrence county. Sec. 'J,' Ohio river road, Pet. No. 2566, I. C. H. No. 7.
"Lawrence county. Sec. 'J,' Ohio river road, Pet. No. 2566, I. C. H. No. 7."

I find these resolutions to be in regular form and am therefore returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1984.

STATE BOARD OF HEALTH—ELECTION OF SECRETARY—CONSTRUCTION OF STATUTES AND RULES AND BY-LAWS OF SAID BOARD REGULATING REGULAR AND SPECIAL MEETINGS.

The meeting of the state board of health held at Cedar Point on August 4, 1916, being held on a day other than the third Thursday of the month, the day fixed by the rules of the board for regular meetings, was a special meeting.

The only business which could be transacted at that meeting was that growing our of the conference with the boards of health for the northern half of Ohio, except by general consent of the members of the board, hence the steps taken to elect a secretary to the board were not properly before the meeting.

COLUMBUS, OHIO, October 18, 1916.

State Board of Health, Columbus, Ohio.

GENTLEMEN:—Your request for an opinion relative to the "suspension of rules and by-laws" is as follows:

"At a meeting of the state board of health, September 21, 1916, I was instructed to ask for your opinion as to the regularity of actions of the board as recorded in the minutes of the meeting of August 4, 1916.

"In the minutes referred to, a copy of which was sent you on or about August 10, 1916, you will find the following:

" 'Dr. Hasencamp moved that the rules be suspended and that the board proceed with the election of a secretary.

" 'The motion was seconded by Dr. Sutton.

" 'Those voting in the affirmative were Drs. Sutton, Miller, Hasencamp and MacIvor.

" 'In the negative, Dr. Ryall.

" 'Dr. Ryall raised the point of order that the rules could not be suspended except with the consent of a majority of the members of the board.

" 'The president ruled the point of order not well taken.

" 'Dr. Sutton nominated Frank G. Boudreau, M. D., of Columbus, as secretary.

" 'The nomination was seconded by Dr. Hasencamp. There were no other nominations.

" 'Those voting for Dr. Boudreau were Drs. Sutton, Miller, Hasencamp and MacIvor.

" 'Dr. Ryall left the room while the vote was being taken.

" 'The president announced the election of Dr. Boudreau as secretary.'

"Two questions have been raised: First, can less than a majority of the whole membership of the board suspend its rules and by-laws, there being no provisions in the rules and by-laws for a suspension of the rules?

"Second, the record shows that while the vote was being taken on the election of a secretary the member who had protested the suspension of the rules was leaving the room. Query: Was the quorum broken when that member announced his intention of withdrawing from the meeting?

"A copy of the rules and by-laws of the state board of health is attached and your attention is called to rules 7, 27 and 28.

"An early reply will oblige."

Sections 1232 and 1233 of the General Code are as follows:

"Sec. 1232. There shall be a state board of health, consisting of eight

members, seven of whom shall be appointed by the governor. Each year the governor, with the advice and consent of the senate, shall appoint a member of the board, who shall serve for a term of seven years from the thirteenth day of December. The attorney-general shall be ex-officio a member of the board.

"Sec. 1233. The state board of health shall meet in Columbus during the month of January of each year and at such other times as it may direct. A majority of its members shall constitute a quorum. The board shall choose one of its members as president, and, subject to the provisions of this chapter, may adopt rules and by-laws for its government."

It is provided in section 1234 of the General Code that the state board of health shall elect a secretary and that such secretary may be removed from office for cause "by a vote of a majority of the members of the board."

With your communication you enclose a copy of the rules and by-laws of the Ohio state board of health, and make special reference to rules 7, 27 and 28, which were adopted pursuant to the provisions of section 1233 of the General Code supra. Rule 7 is as follows:

"Five members shall constitute a quorum for the transaction of business as provided by law."

Section 28 is as follows:

"These rules and by-laws may be amended at any regular meeting of the board by a majority vote of the members of the board."

The situation referred to in the minutes of the meeting of August 4, 1916, an extract of which is presented in your letter, reduced to its simplest form, is that a meeting of the state board of health was called at which there was present a sufficient number of the members to constitute a quorum, namely, five members, or a majority of the board, which, under the provisions of section 1232 G. C. consists of eight members; further, that while the meeting was in progress a motion was made by Dr. Hasencamp that the rules be suspended and that the board proceed with the election of a secretary. The motion was duly seconded and was carried by a vote of four to one, and that following the carrying of the motion Dr. Frank G. Boudreau was nominated as secretary, a vote was taken, four members voted for the nominee, while the fifth member attending the meeting retired from the room during the progress of the voting.

Answering your question specifically, it is clear that the authority given by section 1233 to the board to adopt rules and by-laws for its government may be invoked by the board for the purpose of altering or amending rules made by it. However, the action of the board in suspending the rules was an extraordinary proceeding for which provision is not made by the statutes nor by the rules adopted by your board.

In Cushing's Manual of Parliamentary Practice, which is an authority on parliamentary procedure, it is provided in section 21 that:

"When a code of rules is adopted beforehand it is usual also to provide therein as to the mode in which they may be amended, repealed or dispensed with. Where there is no such provision it will be competent for the assembly to act at any time and in the usual manner on the question of amendment and repeal, but in reference to dispensing with a rule or suspending it in any particular case if there is no express provision on the subject it seems that it can only be done by general consent."

Sections 5 and 6 of the rules and by-laws of the Ohio state board of health are as follows:

> "Section 5. The board shall hold a regular meeting each month and when necessity demands may hold special meetings. Regular meetings shall be held on the third Thursday of the month with the exception of the meeting in December, which shall be held on or before the thirteenth of the month. The time and place for holding a regular meeting shall be fixed at a preceding regular meeting, but the time and place may be changed by the president at the request of three members of the board; provided, however, that the regular meeting in January of each year must be held in Columbus as required by law.
>
> "Section 6. A special meeting may be arranged for at a regular meeting or may be called by the secretary on the order of the president, or by four members of the board. In arranging for, or in making a call for, a special meeting, the matters to be considered at such meeting must be definitely stated and no other business shall be considered except with the unanimous consent of the board."

From a reading of section 5 it will be found that the time fixed for the holding of regular meetings is the "third Thursday of the month, with the exception of the meeting in December."

By referring to the minutes of the meeting of the board of health held June 13, 1916, it is found that the meeting of August 4, which was arranged for at that time, was for the purpose of having a conference with local boards of health of the northern half of the state and was a special meeting as it was held on a day other than the third Thursday of the month as provided for in section 5 of the rules and by-laws, supra. In the minutes of June 13, 1916, referred to above, appears the following:

> "It was moved by Dr. Brown and seconded by Dr. Ryall that the next meeting of the state board of health be held at the same place, and that this meeting be in lieu of the regular meetings of July and August."

This motion, which was carried by a vote of Messrs. MacIvor, Sutton, Miller, Hasencamp, Brown and Ryall, all the members present, followed the action with reference to the conference to be held with the representatives of boards of health referred to above, and under the provisions of section 6 of the rules and by-laws, supra, if any matters were to be considered at that meeting in addition to the holding of a conference with the representatives of the boards of health referred to such matters should have been stated in the call for the meeting, otherwise they could not be considered, except with the unanimous consent of the members of the board present.

The provisions of section 6 of the rules are clear and under that rule the only matters that could properly be considered by the board at the meeting on August 4, which was held on a day other than the time fixed by the rules for regular meetings, would be those growing out of the conference with the boards of health referred to.

It is not made clear from your minutes what rules were referred to by Dr. Hasencamp when he moved that "the rules be suspended and the board proceed with the election of a secretary" nor, in fact, is it necessary for the purposes of this opinion to enquire into that subject. In view of the absence of a unanimous consent on the part of the members of the board present to take up a question other than the particular business for which the meeting had been called, it is my opinion that the matter of the election of a secretary could not be considered at the special meeting at which only five members were present, for two reasons: First, the absence of unanimous

consent to consider business other than that for which the meeting was called; and for the further reason that a rule of the board made for the purpose of governing its deliberations should not be suspended except by the general consent of the members of the board. Therefore, the matters relating to the election of a secretary of the board were not properly before the meeting of August 4, 1916.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1985.

ELECTIONS—REGISTRARS—COMPENSATION NOT TO EXCEED SIX DAYS—QUALIFICATIONS OF ELECTOR AS TO RESIDENCE—LENGTH OF TIME HE HAS RESIDED IN WARD OF VILLAGE OR CITY DETERMINING FACTOR RATHER THAN PRECINCT.

Registrars of electors in registration cities are entitled to compensation for one day for applying to the deputy state supervisors of elections for lists, registers and maps and making and delivering the alphabetical lists of registered electors where such compensation is allowed, and ordered by the deputy state supervisors of elections according to the provisions of section 4944 G. C. and the total number of days for which compensation is so allowed does not exceed six.

The qualifications of an elector in respect to residence is determined from the length of time he has resided in the ward of a village or city as distinguished from the period of residence in the precinct in which he seeks to vote.

COLUMBUS, OHIO, October 18, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—With yours under date of October 3, 1916, you submit to me, requesting an opinion thereon, a communication from the deputy state supervisors of elections of Mahoning county, which is as follows:

> "There is some question in our minds as to the correct interpretation of the following sections of the election laws:
>
> "Under section 4944 registrars shall be allowed not more than $4.00 per day for not more than six days. Five of those days are taken up by registering and transferring of electors and in the even numbered years we allow registrars compensation for six days, the sixth day being given to them for the making of the alphabetical lists of registered voters.
>
> "Section 4864 provides among other things that no person shall be permitted to vote unless he shall have been a resident of the ward of a city for twenty days next preceding the election, making exception in the case of the head of a family. Section 5061 provides that if a person is challenged his time of residence in the precinct shall be asked as one of the questions.
>
> "In the former case, kindly inform us if registrars are entitled to the extra day for making the alphabetical lists in the latter, if the twenty days residence required is determined by ward or precinct."

In registration cities, prior to the general or regular November election held in the even numbered years, the registrars of each precinct are required by section 4893 G. C. to apply on Wednesday in the fifth week before such election to the deputy

state supervisors of elections for registers, maps, etc., for their respective election precincts.

Section 4894 G. C. provides as follows:

> "The days for the general registration of electors in cities wherein annual general registration is required and for the quadrennial general registration and yearly registration of new electors in cities where general registration is required only in presidential years, shall be Thursday in the fifth week, Thursday in the fourth week and Friday and Saturday in the third week next before the day of the general election in November in each year."

Section 4919 G. C. provides as follows:

> "On Monday, the day preceding the November election in each year, the registrars of each election precinct shall meet at two-thirty o'clock afternoon at the polling place appointed for holding elections therein, and there remain in session until five-thirty o'clock afternoon, central standard time. At this meeting they shall receive and act upon any applications for either granting or receiving certificates of removal or correction of mistakes, as herein provided for. If material error or mistake in the description of any elector in such precinct has been discovered, he may appear at this meeting and on good cause shown, the registrars may then correct it. Any change in the registers allowed by the registrars at such meeting must immediately be noted by them in the registers and also in the books containing the duplicate lists for the use of the judges, as herein provided, and, if not then and there so noted, shall be wholly null and disregarded by the judges of election."

There is thus required the services of the registrars of the several election precincts on five different days, exclusive of the Wednesday in the fifth week before the election in even numbered years, on which they are required to make applications for the registers and necessary supplies for the registration of electors of their precinct and exclusive of the days on which alphabetical lists of registered electors are required to be made under section 4916 G. C., which provides in part as follows:

> "On the day following each registration day, unless such day be Sunday or a registration day, in which event on the next succeeding day, each year, the registrars of each election precinct shall make and deliver to the board of deputy state supervisors at its office in such city a true list of the names of all the electors registered by them in their respective precincts on the preceding day or days, arranged in the alphabetical order of their surnames, followed by their full Christian names and residences, and having the registry number of each prefixed. * * *"

From the language of the foregoing provision it is clearly not contemplated that it shall be the duty of the registrars to make the alphabetical lists of registered electors therein required on the registration days named in section 4894 G. C., supra. On the contrary, these lists are required to be made on a succeeding day with the exceptions mentioned.

Section 4944 G. C., to which reference is made in the inquiry, provides, in so far as pertinent to the question under consideration, as follows:

> "The registrars of each election precinct in such cities shall be allowed and paid for their services as registrars four dollars per day and no more for not more than six days at any one election. * * * No registrar, judge

or clerk shall be entitled to the compensation so fixed except upon the allowance and order of the board of deputy state supervisors made at a joint session, certifying that each has fully performed his duty according to law as such, and stating the number of days' service actually performed by each. Such allowance and order shall be certified by the chief deputy and clerk of the board to the city or county auditor."

In view of the specific requirement of the performance of the prescribed duties on five days, exclusive of Wednesday in the fifth week before such election and the manifest contemplation of making the alphabetical lists of registered electors on other days than the registration days mentioned in section 4894 G. C., and of the provisions of section 4944 G. C. supra, fixing a maximum number of days for which compensation may be allowed in excess of five days, I am led to conclude that it was intended that there should be conferred upon the deputy state supervisors of elections authority to allow to registrars compensation, if not in excess of one day, for or in lieu of their services in making application for supplies and in making the alphabetical list of registered electors. So that in the even numbered years the aggregate number of days of service, making an allowance of one day for making application for supplies on the Wednesday in the fifth week before the election and making the alphabetical lists of electors, will be six, the maximum prescribed by section 4944 G. C. supra. I am of the opinion, therefore, in answer to your first question, whether in the even numbered years the registrars of electors in registration cities are entitled to compensation for one day in addition to the five days on which registrations and corrections thereof are required to be made, when the compensation for such additional day is allowed and ordered by the board of deputy state supervisors of elections for making the alphabetical lists of registered electors, as required by law, that registrars are entitled to compensation for one day in addition to the five days on which registrations and corrections thereof are required to be made in the even numbered years, when the same is allowed and ordered by the board of deputy state supervisors of elections, according to the provisions of section 4944 G. C. supra.

This rule would apply in any year to the November election in cities in which general registration is required each year.

While the board of deputy state supervisors of elections may in the exercise of its discretion allow compensation to registrars for six days as stated in the foregoing conclusion, this opinion may not be construed to hold that the provisions of section 4944 G. C. impose upon the deputy state supervisors of elections any duty to allow compensation for the maximum number of days therein prescribed.

Your second question involves a consideration of a number of sections of the statute hereinafter referred to. Section 4863 G. C. provides as follows:

"No person shall be permitted to vote at any election unless he shall have been a resident of the state for one year, resident of the county for thirty days, and, except as provided in the next section, resident of the township, village or ward of a city or village for twenty days next preceding the election at which he offers to vote."

Section 4864 G. C. to which reference is made in the above inquiry, provides as follows:

"A person who is the head of a family and has resided in the state and in the county in which such township, village or ward of a city or village is situated the length of time required by the preceding section, and who bona fide removes with his family from a ward to another ward in such city or village, or from a ward of such city or village to a township or village in the

same county, or from a township or village to a ward of a city or village in the same county, or from one township to another in the same county, shall have the right to vote in such township, village or ward of a city or village without having resided therein the length of time so prescribed by such section."

It will be observed that there is in neither of the above sections reference to a precinct. In connection with the above provisions consideration must be given also to the provisions of section 4906 G. C. in reference to entries required to be made in the registration of electors, that:

"In the column as to 'term of residence,' the periods of years and months of his residence in the precinct and state must both be stated."

This provision would indicate an intention on the part of the legislature that the length of time of residence in the precinct was an element to be considered in determining the qualifications of an elector. An opposite conclusion would, however, be suggested from a consideration of section 4941 G. C. relative to registration of electors for special elections, wherein it is provided in subdivision 2 thereof, that:

"2. The registrars shall deliver certificates of cancellation to any registered elector who is not the head of a family and who may apply to them to cancel his registration on account of his removal from the precinct in which he was registered to another precinct, and they shall receive such certificate from any elector presenting it, and allow him to register, if he be otherwise qualified, in the precinct to which he has removed, if on the day of election he will have been an actual resident in such ward for twenty days immediately preceding such election."

Here it will be observed that the legislature clearly recognized the distinction between a precinct and ward and specifically declared that the registrars shall receive certificates of cancellation from any elector presenting it and allow him to register if he be otherwise qualified in the precinct to which he has removed, if on the day of election he will have been an actual resident in such ward for twenty days, thus making the determinating element for consideration the period of residence in the ward as distinguished from that of a residence in the precinct.

Section 5061 G. C., 106 O. L. 323, to which reference is made in the above inquiry, requires that when an elector is challenged on the ground that he is not a resident of the county or precinct where he offers to vote, the judge, or one of them, shall put to him, among others, the following question:

"(2) Have you resided in this precinct for twenty days last past?"

The apparent conflict between the provisions of sections 4863, 4864 and 4941 G. C. supra, and those of sections 4906 and 5061 G. C., 106 O. L. 323, it is believed may be reconciled without doing violence to the language or purpose of either. It will be borne in mind that there may be more than one voting precinct in a township, yet the only statutory provision relative to the qualifications of electors in townships as to residence is the requirement that the elector shall have been a resident of the township twenty days prior to the election.

Electors in registration cities may not vote unless duly registered in the precinct in which they reside. The requirement of section 4916 G. C. supra, that the register show the term of residence in the precinct, serves to give notice that the elector has, within the period of twenty days, become a resident of the precinct, if such is the fact and gives opportunity for investigation as to the length of residence in the ward.

Likewise the answer to the second question in section 5061 G. C. above quoted, serves to show whether the elector has come into the precinct in which he seeks to vote within the period of twenty days preceding the day of the election, and in connection with other facts may be of weight in determining whether the elector has been a resident of the ward for a period of twenty days next preceding the date of the election.

In view of the absence of reference of the period of residence in the precinct in sections 4863 and 4864 G. C. supra, and the clear recognition of the distinction between wards and precincts in section 4941 G. C. supra, and the explicit declaration therein that an elector shall be allowed to register if he will have been an actual resident of such ward for twenty days immediately preceding a special election, I am of opinion, in answer to your second question, that the qualification of an elector as to residence is required to be determined from the length of time he has resided in the ward of a city, as distinguished from the period of residence in the precinct in which he seeks to vote, and that it was not the purpose of either section 4906 or of section 5061 to require that an elector should reside in a precinct the full period of twenty days next preceding the day of the election at which he seeks to vote in order that he may be qualified to vote in such precinct.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1986.

BOARD OF HEALTH—COUNCIL MAY BE COMPELLED BY MANDAMUS TO ESTABLISH SUCH BOARD—COUNCIL WITHOUT AUTHORITY TO THEN ABOLISH SUCH BOARD—BOARD IS A CONTINUING BODY—CITY OF CONNEAUT.

Under the provisions of section 4404 *G. C. council may be compelled by mandamus to establish a board of health.*

When council has exercised the power given it by section 4404 *G. C. and established a board of health it is without authority to abolish said board, and the state bocrd of health is without authority to act under the provisions of section* 4405 *G. C.*

A board of health when established is a continuing body.

COLUMBUS, OHIO, October 18, 1916.

State Board of Health, Columbus, Ohio.

GENTLEMEN:—Your request for an opinion concerning the appointment of a health officer at Conneaut, Ohio, is as follows:

> "At a meeting of the state board of health held September 21st, I was instructed to refer to you for advice, the question of complying with the request of the council of the city of Conneaut that the state board of health appoint a health officer for that city.
>
> "The general situation in Conneaut, as respects health administration, is partially explained in the enclosed letter from the city solicitor of that city. The history of proceedings, as shown by letters, etc., on file in this office, indicates that at some date prior to July 24, 1916, the Conneaut city council adopted an ordinance abolishing the board of health which had been created by an ordinance passed February 12, 1912. This ordinance was

submitted to the mayor and was vetoed by him. On July 24, 1916, the ordinance was passed over the mayor's veto, and at the same session of council the following motion was adopted:

" 'Moved by Mr. Frederick, seconded by Mr. Martin, that the council of the city of Conneaut, state of Ohio, does hereby refuse to establish a board of health in said city and recommends for appointment by the state board of health Dr. W. W. Wetmore as health officer for said city and also recommends and requests that his salary be fixed by said board at a sum not exceeding three hundred and sixty ($360.00) dollars per year, payable in monthly instalments not exceeding thirty dollars ($30.00) each, and that his term of office be fixed at a period of two years.

" 'That the clerk of this council be and he is hereby ordered and directed to certify a copy of this motion to the state board of health at Columbus, Ohio, requesting its action under section 4405 of the General Code.'

"The accuracy of this transcript is certified by the clerk of the council.

"When the matter was brought to my attention in the letter from the city solicitor, under date of July 26th, I placed the matter on the schedule for the regular meeting of the board to be held on August 4th. Owing to lack of quorum, the matter was not considered, and on August 10th, I sent to the city solicitor the attached communication.

"The view of the matter as taken by me does not agree with the views expressed by the solicitor, and at our recent meeting a request from the solicitor was presented to the board asking that the matter be referred to you for your opinion as to whether a condition exists in the city of Conneaut that gives to the state board of health the authority to appoint a health officer for that municipality and to fix his term of office and compensation.

"Your opinion in regard to this matter will be appreciated."

With your letter you enclose copies of correspondence between your office and the city solicitor of Conneaut concerning the matter, and the same has been noted in connection with the preparation of this opinion

Sections 4404 and 4405 of the General Code are as follows:

"Sec. 4404. The council of each municipality shall establish a board of health, composed of five members to be appointed by the mayor and confirmed by council who shall serve without compensation and a majority of whom shall be a quorum. The mayor shall be president by virtue of his office. But in villages, the council, if it deems advisable, may appoint a health officer, to be approved by the state board of health, who shall act instead of a board of health, and fix his salary and term of office. Such appointee shall have the powers and perform the duties granted to or imposed upon boards of health, except that rules, regulations or orders of a general character and required to be published, made by such health officer, shall be approved by the state board of health.

"Sec. 4405. If a municipality fails or refuses to establish a board of health or appoint a health officer, the state board of health may appoint a health officer therefor and fix his salary and term of office. Such health officer shall have the same powers and duties as health officers appointed in villages in place of a board of health and his salary as fixed by the state board of health, and all necessary expenses incurred by him in performing the duties of a board of health shall be paid by and be a valid claim against such municipality."

It will be noted from a reading of the provisions of the sections quoted above

that two means are provided by which a health officer may be appointed in municipalities. The provisions of section 4404 are mandatory, and it has been held in the ca e of State ex rel. v. Massillon, 2 O. C. C. (N. S.) 167, that the provisions of the section may be enforced by a writ of mandamus. On the other hand, section 4405 gives to the state board of health the authority to appoint a health officer for a municipality when it "fails or refuses to establish a board of health or appoint a health officer." This is an enabling statute which, of course, makes it discretionary with the state board of health as to whether or not it will act in the premises.

From the statements contained in the correspondence and from the verbal statements of your assistant secretary, Mr. Bauman, it appears that if resort were had to the provisions of section 4404 of the General Code supra to the exclusion of section 4405, the condition in Conneaut would not be changed materially from what it is at present; whereas, a resort to section 4405 of the General Code supra would enable the state board of health to take action and appoint a health officer, either the one now serving or some other, and thereby at least take the matter out of the chaotic state in which it has remained for some time past.

In enacting section 4405 General Code, which vests in the state board of health the power to appoint a health officer in case a municipality fails or refuses to establish a board of health or appoint such health officer, there can be no doubt but that the general assembly had in mind conditions where no board has ever been established, and this view is strengthened by the mandatory provisions of section 4404. However, the municipality having exercised its powers to establish a board of health under section 4404 General Code supra, it is without any authority of law to abolish the board of health, and consequently the alternative method of providing a health officer under the provisions of 4405 does not become operative. That the board of health in a city is a continuing body is made clear by the provisions of section 4406 General Code and succeeding sections.

Section 4406 of the General Code is as follows:

> "The term of office of the members of the board shall be five years from the date of appointment, and until their successors are appointed and qualified, except that those first appointed shall be classified as follows: One to serve for five years, one for four years, one for three years, one for two years, and one for one year, and thereafter one shall be appointed each year."

In view of the fact that the city of Conneaut has established a board of health under the provisions of section 4404 and that there is no authority for the abolition of the board, it is my opinion that the action of council referred to in your communication is without force and effect, and the state board of health is not called upon nor has it the authority to act in the premises under the provisions of section 4405 General Code supra.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1987.

BOARD OF EDUCATION—BONDS ISSUED PURSUANT TO SECTION 7625 G. C. FOR CONSTRUCTION OF SCHOOL BUILDING—TAX LEVY CERTIFIED TO COUNTY BUDGET COMMISSION AFTER ELECTORS HAD VOTED FAVORABLY FOR BOND ISSUE—WHERE BUDGET COMMISSION HAD COMPLETED WORK AND CERTIFIED ITS FINDINGS TO COUNTY AUDITOR, *IF LEVY WITHIN FIFTEEN MILL LIMITATION*, SAID BUDGET COMMISSION MAY CERTIFY SAME TO COUNTY AUDITOR—DUTY OF COUNTY AUDITOR TO DETERMINE TAX RATE NECESSARY TO PRODUCE AMOUNT NEEDED.

Where the board of education of a school district, acting under section 7625 et seq. G. C. and pursuant to the authority resulting from the favorable vote of the qualified electors of such district held at the August primary, issues bonds for the construction of a school building, and having complied with the requirement of section 11 of article No. XII of the constitution as well as of section 7628 G. C., certifies to the county budget commission a tax levy for interest and sinking fund incident to said bond issue and it appears that the combined rate for all purposes of said district, including the levy in question, does not exceed the fifteen mill limitation prescribed by section 5649-5b G. C. (103 O. L. 57). said budget commission may certify said levy to the auditor of the county in which such school district is located and it will then be the duty of said auditor to determine the rate of tax necessary to produce the amount needed for said interest and sinking fund and place the same on the duplicate of said school district for the year in which said levy is made.

COLUMBUS, OHIO, October 20, 1916.

HON. ROGER D. HAY, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—Your letter of October 6th is in part as follows:

> "As a member of the budget commission for Defiance county, Ohio, I am writing you for an opinion on the following proposition which has been put up to the commission.
>
> "The people of the city of Defiance voted for the issuance of $200,000.00 worth of bonds for the building of a high school building. The board of education has certified over to the budget commission the amount of interest necessary to take care of the bonds which will become due and payable next year.
>
> "The vote for this issue was held at the primary election in August. The law provides that all budgets must be handed in by the first Monday in June and the board of education not knowing whether or not this issue would pass could not certify the amount necessary to levy.
>
> "The board of education have asked the budget commission to place the necessary levy upon the duplicate and of course we will if the law will allow it."

From your statement of facts I understand that the board of education of Defiance city school district, acting under authority of section 7625 G. C., submitted to the qualified electors of said district the question of issuing the bonds mentioned in your inquiry for the purpose of providing the necessary funds for the construction of a high school building; that this question was submitted to said electors at the primary election in August; that a majority of the electors voting on said proposition voted in favor thereof and that pursuant to the authority resulting to said board of education from said election said bonds have been duly issued.

By provision of section 11 of article XII of the constitution as well as of section 7628 G. C., said board of education was required to provide in its resolution to issue said bonds for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds and to provide a sinking fund for their final retirement at maturity. I assume that said board complied with this requirement.

Section 7628 G. C. provides:

> "When an issue of bonds has been provided for under the next three preceding sections, the board of education, annually, shall certify to the county auditor or auditors as the case may require, a tax levy sufficient to pay such bonded indebtedness as it falls due together with accrued interest thereon. Such county auditor or auditors must place such levy on the tax duplicate. It shall be collected and paid to the board of education as other taxes are. Such tax levy shall be in addition to the maximum levy for school purposes, and must be kept in a separate fund and applied only to the payment of the bonds and interest for which it was levied."

This section must, of course, be read in connection with the several sections of the so-called Smith law subsequently enacted and is subject to the limitations of said law in so far as they affect the levy under consideration.

It may be observed, however, that inasmuch as said levy is for interest and sinking fund on account of bonds issued by a vote of the electors it is not subject to the five mill limitation provided in section 5649-3a G. C. or to the ten mill limitation contained in section 5649-2 G. C., 103 O. L. 532. Said levy is subject only to the fifteen mill limitation provided for in section 5649-5b G. C. (103 O. L. 57), and by provision of section 5649-1 G. C. (104 O. L. 12), said levy must be made by said board of education and must be placed on the duplicate before and in preference to all other items for current expenses and for the full amount thereof.

In view of the foregoing it seems clear that if the bonds in question had been issued before June 1st or thereafter during the session of the county budget commission, and said board of education had certified to said budget commission the amount necessary for interest and sinking fund for said bonds, it would have been the duty of said budget commission to certify said amount without modification and in preference to items for current expenses, to the county auditor and it would then have been the duty of said auditor to determine the rate necessary to produce said amount and place said rate on the duplicate. This conclusion is in keeping with my former opinion rendered to the Bureau of Inspection and Supervision of Public Offices on July 22, 1915, as found in the Report of the Opinions of the Attorney-General for said year at page 1314 in volume II of said report.

It is true that your budget commission has completed its work and certified its finding to the county auditor in so far as the consideration of the annual budget of said board of education is concerned. Inasmuch, however, as the levy in question is for interest and sinking fund on account of bonds issued by a vote of the electors and is therefore in addition to all other levies made by the board of education as set forth in its annual budget and is subject only to the fifteen mill limitation above referred to, the placing of said levy on the duplicate would in no way disturb the levies already made by said board of eduaction, allowed by the county budget commission and placed on said dupicate by the county auditor, providing said levy taken together with the other levies above referred to does not exceed said fifteen mill limitation.

I have just been informed by you in a conversation over the telephone that the combined rate in said school district for all purposes, including the levy in question, will not exceed said fifteen mill limitation, and it appearing that said levy represents the amount of interest that will become due and payable in the year 1917, I think

in view of the provisions of the constitution and of the statutes hereinbefore referred to, said board of education is entitled to have said levy placed in this year's duplicate.

I am of the opinion, therefore, in answer to your question, that your budget commission may at this time certify the aforesaid amount to the auditor of your county and it will then be the duty of said auditor to determine the rate of tax necessary to produce said amount and place the same on the duplicate of said school district for the year 1916.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1988.

ELECTIONS—A PERSON IS TWENTY-ONE YEARS OF AGE FOR ELECTION PURPOSES ON DAY PRECEDING THE TWENTY-FIRST ANNIVERSARY OF DAY OF HIS BIRTH.

A person is twenty-one years of age for election purposes on the day prec ding the twenty-first anniversary of the day of his birth and is entitled, if otherwise qualified, to vote at any election held on the day of his becoming twenty-one years of age.

COLUMBUS, OHIO, October 20, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Yours under date of October 16, 1916, is as follows:

> "We are herewith submitting to you for an opinion the following question, to wit:
>
> " 'A man was born on the 8th day of November, 1895. Is he entitled to vote on the 7th day of November, 1916?' "

The qualifications of electors are prescribed by section 1 of article V of the constitution of Ohio, as follows:

> "Every white male citizen of the United States, of the age of twenty-one years, who shall have been a resident of the state one year next preceding the election, and of the county, township or ward, in which he resides, such time as may be provided by law, shall have the qualifications of an elector, and be entitled to vote at all elections."

It should be here observed that the word "white," in the foregoing constitutional provision is rendered inoperative and of no effect by section 1 of article XV of the constitution of the United States.

The question above submitted involves the calculation or determination of the age of a person who was born on the 8th day of November, 1895, on the 7th day of November, 1916.

From the above constitutional provision it is conclusive that if it be determined that the person in question has all the other requisite qualifications of an elector and is on the 7th day of November, 1916, twenty-one years of age, he shall be entitled to vote at any election held on such date.

The calculation of the age of persons is subject to the general common law rule that consideration will not be given to a fraction of a day, and from the application

of this rule if it be determined that a person otherwise qualified as an elector shall become twenty-one years of age at any moment of a particular day, such person will in legal contemplation, be for all purposes twenty-one years of age for and during the entire day. So that if the person in question shall be determined to attain the age of twenty-one years at any moment within the 7th day of November, 1916, such person will, in contemplation of law, be twenty-one years of age for all purposes during that entire day.

In 1 Am. & Eng. Ency., 927 (2nd Ed.), it is stated:

> "By a large number of authorities it is said that an infant attains the age of twenty-one years on the first moment of the day next before the twenty-first anniversary of his birthday, and this doctrine has the support of the United States cases. On the contrary, it is strongly argued that the precise period when one attains the age of twenty-one years is on the first moment of the twenty-first anniversary of his birthday and not on the day preceding."

Cited in support of the first above stated rule are a number of cases, among which are those hereafter noted:

In the case of Ross v. Morrow, 85 Tex. 172, it is stated in the syllabus:

> "Edward Ross was born April 17, 1860. He became of age on April 16, 1881. Suit was filed for land adversely held in the interval April 16, 1886. HELD, that the five years adverse possession, and in which he had a right to recover, ended on the 15th of April, and that the action was barred."

In Erwin v. Benton, 120 Ky. 536, it is held:

> "One who was born on June 9, 1883, was entitled to vote at an election on June 8, 1904. In law a man is twenty-one years old on the day preceding his twenty-first birthday."

In Wells v. Wells, 6 Ind. 447, the court held:

> "A minor attains twenty-one years on the day preceeding the twenty-first anniversary of his birth."

Similar holdings of the court will also be found in the case of State v. Clarke, 3 Harr. (Del.) 557, and in the case of In re Griffiths, 1 Culp (Pa.) 157.

A different rule prevails in Louisiana, as shown by the case of State ex rel. Flemming v. Joyce, 123 La. 638, the court there following the civil law as distinguished from the common law rule adhered to in the above noted cases in the computation of the ages of persons.

I am not aware that the question submitted has been passed upon by any court in this state, but for the reasons above suggested and upon the authority cited I am of the opinion that a man born on the 8th day of November, 1895, will become twenty-one years of age on the 7th day of November, 1916. Whether he will have arrived at such age on the first moment of that day or on the last moment of that day is not material here to consider.

I am therefore of opinion, in answer to your question, that a male person who was born on the 8th day of November, 1895, and who is possessed of all the other requisite qualifications of an elector prescribed by law, will be entitled to vote at the election which will be held on the 7th day of November, 1916.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1989.

CONSTABLES—WHERE NO VACANCY, NO AUTHORITY TO APPOINT ADDITIONAL CONSTABLE—SUCH SPECIAL CONSTABLE WITHOUT AUTHORITY TO PERFORM DUTIES—NOT ENTITLED TO FEES—NO FINDING FOR RECOVERY—MOTOR VEHICLE SPEED LAWS.

After the number of constables have been designated and elected according to law in any township and no vacancy has occurred in that office, there is no authority in the township trustees to appoint an additional constable or constables for any purpose.

A person whom the township trustees have attempted to appoint as a special constable otherwise than to fill a vacancy in the office, as provided by sections 3329 and 12199 G. C., is without authority to perform the functions and duties of constable and is not entitled to the fees and costs allowed by law for the official services of regularly elected or appointed constables.

A finding for recovery may not be made for costs collected by a person who assumes to act as constable under an attempted appointment made by the township trustees which is wholly unauthorized by law.

COLUMBUS, OHIO, October 20, 1916.

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

GENTLEMEN:—Yours under date of October 13, 1916, is as follows:

"Please let us have your written opinion on the following propositions at an early date:

"Statement of facts upon which the following questions are based: It is alleged that in July, 1916, the trustees of Marion township, Franklin county, Ohio, appointed one John F. Gilson, as constable, to arrest violators of the motor vehicle speed laws, but the minutes of said board do not disclose any record of said action. Moreover, there was no vacancy existing in the office of constable.

"The bond of said appointee, which is on file with the township clerk, however, shows that it was approved by two of said trustees, evidenced by their names signed thereto, but said action of approval as indicated by the said bond does not appear of record in the minutes of said board.

"Said appointee has been arresting drivers of motor vehicles and taking them before justices of the peace in at least four townships of Franklin county, and charging them with violating the speed limit. In each instance he has taxed the fees to which constables are entitled, including an assistant; and, in addition thereto, has charged up a fee of '$2.50 for conveyance.' Said conveyance being the motor vehicle used by said appointee in chasing and arresting the alleged speeders. Said fees were allowed and collected by the justice and paid to said constable. In the hundreds of cases which we have examined no fines have been collected, only the costs.

"1. After the number of constables have been designated and elected according to law (see sections 3271 and 3327 G. C.) and there is no vacancy in said office, may the trustees legally appoint additional constables for their township?

"2. If such additional appointments be made by the trustees for the purpose of regulating motor vehicle traffic, or for any other specific purpose, may such appointed officers legally perform the functions of a regularly elected and qualified constable and be entitled to the fees provided in sec. 3347 G. C.

"3. If it should be held that such appointed constables are not legally qualified to perform the duties and receive the fees of an elected constable,

what finding should be made relative to prosecutions brought about through their efforts?"

By the provisions of section 3271 G. C., township trustees are required to meet on the last Monday of December in each year and fix and give notice of the number of constables to be elected for the township.

By section 3327 G. C. it is provided that such number of constables as directed by the trustees of the township shall be elected for a term of two years.

Section 3329 G. C. provides as follows:

> "When, by death, removal, resignation, or non-acceptance of the person elected, a vacancy occurs in the office of constable, or when there is a failure to elect, the township trustees shall appoint a suitable person to fill such vacancy until the next biennial election for constable, and until a successor is elected and qualified. If there is no constable in a township, the constable of an adjoining township in the county shall serve any process that a constable of such township is authorized by law to serve."

Under certain conditions therein prescribed the township trustees may, pursuant to sections 12198 and 12199 G. C. require a constable to give a new bond, and by section 12199 G. C. it is further provided:

> "If the constable or marshal fails to give a new bond within ten days after receiving such notice, such failure shall be deemed a resignation of his office, and the trustees or council shall proceed to fill such vacancy as in other cases."

The township trustees are authorized by the provisions of the foregoing sections to appoint a constable only when there exists a vacancy in the office by reason of the death, removal, resignation or non-acceptance of a person elected to such office or by reason of the failure or neglect of a person so elected to such office to give a new bond when directed so to do by the township trustees.

Section 3348 G. C. provides in part as follows:

> "The trustees of a township may designate any duly elected and qualified constable as police constable * * *."

The appointment of a police constable here authorized to be made is specifically limited to duly elected and qualified constables, so that township trustees would have no authority to appoint a person as police constable under the provisions of this act who was not at the time such duly elected and qualified constable.

Manifestly, the appointment referred to in your inquiry could not have been made under authority of either of the foregoing statutes.

Upon careful examination of the statutes of this state, no further authority for the appointment of constables by township trustees is found. Numerous provisions for the appointment of constables by justices of the peace may be found, but such provisions operate in no way to authorize the appointment of special or additional constables by township trustees.

I am therefore of opinion, in answer to your first question, that after the number of constables have been designated and elected according to law in any township and no vacancy has occurred in that office, there is no authority in the township trustees to appoint an additional constable or constables for any purpose.

Since the township trustees are without authority to appoint constables in addition to the number designated to be elected in the township and may appoint such

officers only in case of vacancies in such elective office, it follows that persons attempted to be appointed by township trustees in other cases are wholly without authority to exercise the functions of constable and are not entitled to the fees of such officers.

I am therefore of opinion, in answer to your second question, that township trustees may not appoint constables except to fill vacancies, as provided in sections 3329 and 12199 G. C., and that persons whom the trustees have attempted to otherwise appoint to such office are without authority to perform the functions and duties of the same and are not entitled to the fees allowed by law for the official services of regularly elected or appointed constables.

By section 284 G. C., 103 O. L. 507, it is required that upon examination of public offices, inquiry shall be made into the legality of the accounts. This provision renders it necessary to inquire into the legality of costs taxed by justices of the peace or charged by constables when examination of such offices are made.

Section 286 G. C., 103 O. L. 507, requires that:

> "The report of the examiner shall set forth * * * the result of the examination with respect to each and every matter and thing required into * * *."

From the foregoing, it follows that, if upon examination it be found that costs have been collected by a justice of the peace for and on behalf of one who assumes to act as constable without having been lawfully appointed or elected thereto, or costs have been collected by a constable whose appointment was wholly unauthorized by law, such illegal charge and collection of costs should be set forth in the report of such examiner.

In opinion No. 580, under date of July 3, 1915, addressed to Hon. A. A. Slaybaugh, prosecuting attorney, found at page 1183 of the Opinions of the Attorney-General for the year 1915, it was held:

> "The bureau of inspection and supervision of public offices is unauthorized to make a finding for recovery of fees and costs collected and received by a special constable appointed by a justice of the peace, although none of the grounds therefor as set forth in section 3331 G. C. in fact exist."

The same principle is involved in the case submitted by you and here under consideration, and the rule above stated is therefore applicable and serves to fully answer your third question.

I am therefore of opinion, in answer to your third question, that upon examination wherein it is found that costs have been charged or collected for the services of a constable assuming to act as such under an alleged appointment by the township trustees other than to fill a vacancy as provided by sections 3329 and 12199 G. C., the report of such examination should set forth all such costs so charged and collected by or on behalf of such constable, together with all the facts relating to his alleged appointment. A finding for recovery is, however, unauthorized.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1990.

CAPITOL TRUST COMPANY—CONTINUED CORPORATE EXISTENCE AT REQUEST OF STATE—MINIMUM WILLIS TAX FEE CHARGED.

The Capitol Trust Company having continued its corporate existence at the request of the state authorities, only the minimum Willis tax fee should be charged.

COLUMBUS, OHIO, October 20, 1916.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Sometime ago you submitted to me a letter to the following effect:

> "The Capitol Trust Company of Columbus, Ohio, ceased business in 1911, and its business was taken over by the State Savings Bank and Trust Company, according to the terms of an affidavit filed with the tax commission, a copy of which is hereto attached.
>
> "The amount of subscribed and issued or outstanding capital stock was $400,000. No certificate of reduction of capital stock or dissolution has been filed. Is the Capitol Trust Company liable for reports and franchise fees under the 'Willis Law?' If so, upon what amount should the fee be based?"

After the receipt of your letter I had several conferences with Mr. James M. Butler, attorney at law, representing The Capitol Trust Company, and Mr. A. W. Mackenzie, who is secretary-treasurer of The Capitol Trust Company, and have obtained from Mr. Mackenzie what is termed a plan of consolidation of The Capitol Trust Company with The State Savings Bank and Trust Company, which consolidation took place in the year 1911. In the plan of consolidation as agreed upon by the committees of the two companies in question it was agreed that The State Savings Bank and Trust Company should increase its capital stock and that The Capitol Trust Company *should go into voluntary liquidation* and that thereafter the stockholders of The Capitol Trust Company were permitted to acquire a certain amount of the capital stock of the State Savings Bank and Trust Company, and to turn over in payment thereof certain assets of The Capitol Trust Company, the remaining assets to be distributed among the stockholders. The plan of consolidation, as I construe it, clearly shows that the initial step to be taken by The Capitol Trust Company was a voluntary liquidation. That is to say, that the stockholders of The Capitol Trust Company were to take steps to voluntarily dissolve the corporation and thereafter to use the assets of said company in the purchase of the shares of capital stock of The State Savings Bank and Trust Company.

From a letter received from Mr. James M. Butler it appears that at the time the stockholders of the Capitol Trust Company had agreed to the plan proposed for the absorption of The Capitol Trust Company by The State Savings Bank and Trust Company had on deposit with the treasurer of the state of Ohio bonds aggregating in value one hundred thousand ($100,000.00) dollars, which had been deposited to secure the due performance of its trust; that The Capitol Trust Company desired to surrender the said bonds to The State Savings Bank and Trust Company, but that the then attorney-general thought that The Capitol Trust Company should defer this action so that there could be no criticism in the event that some claim arose under a trust which had been assumed by it, and that The Capitol Trust Company agreed thereto. It appears, therefore, that by request of the state authorities The Capitol Trust Company did not at that time go into voluntary liquidation, but deferred such action on account of the request made by said state authorities, and it may well be assumed that had no such request been made the stockholders of The Capitol Trust

Company would have taken such action as to voluntarily dissolve the said The Capitol Trust Company.

It further appears from the facts that I have before me that subsequent thereto, the corporation still being in existence because of the view taken by the state authorities, it was thought that, still being a corporation, a report should be made and the Willis law tax assessed, but due to the fact that the corporation remained in existence solely by request of the state authorities only the minimum fee should be charged.

Taking the question from a purely legal standpoint, there was no authority to pay over the assets of The Capitol Trust Company to The State Savings Bank and Trust Company in payment of the shares of stock subscribed for by the stockholders of The Capitol Trust Company until the said The Capitol Trust Company had been dissolved, and therefore The Capitol Trust Company, still being in existence, would be required to make a report of its entire subscribed and issued or outstanding capital stock and pay the proper fee thereon.

However, in view of the fact that the said The Capitol Trust Company was not dissolved in accordance with the plan agreed to solely because of the position taken by the state authorities at the time, I consider that it is only fair and just that the rule heretofore adopted in regard to the reports and Willis tax fees be followed. That is to say, that The Capitol Trust Company makes its report and pay the minimum fee. However, as soon as The Capitol Trust Company is discharged from the trusts imposed upon it, it should immediately dissolve and on failure so to do the rule heretofore adopted in regard to the reports and Willis tax fees should no longer be followed, but the company held upon its entire subscribed or issued and outstanding capital stock.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1991.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY MONTVILLE TOWNSHIP ROAD DISTRICT IN GEAUGA COUNTY.

COLUMBUS, OHIO, October 19, 1916.

Industrial Commis ion of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE: Bonds of Montville Township road district in the amount of $30,000 for road improvement purposes, being sixty bonds of five hundred dollars each."

I have examined the transcript of the township trustees and other officers of Montville township road district relative to the above bond issue and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds when properly drawn and executed will constitute valid and binding obligations of the Montville township road district.

As no bond and coupon form have been submitted with the transcript I should have an opportunity of examining the form of the bonds when presented to the treasurer of state for delivery.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1992.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY WARREN COUNTY, OHIO.

COLUMBUS, OHIO, October 21, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Warren county, Ohio, in the sum of $26,000.00 for repairing, improving and rebuilding bridges and culverts in said county, being 52 bonds of five hundred dollars each."

I have examined the transcript of the proceedings of the county commissioners and other officers of Warren county relative to the above bond issue; also the bond and coupon form submitted and the amendments thereto, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted, and the amendments thereto authorized by the resolution of the county commissioners, adopted October 16, 1916, and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of said county.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

1993.

MUNICIPAL CORPORATION—BUILDING OWNED BY MUNICIPALITY CONDEMNED BY STATE INSPECTOR OF WORKSHOPS AND FACTORIES—WHEN LEVY CAN BE MADE OUTSIDE OF TEN MILL LIMITATION AND WITHIN FIFTEEN MILL LIMITATION FOR SAID IMPROVEMENT.

Where the council of a municipality, acting under authority of, and for the purpose mentioned in, section 5629-1 *G. C.*, 103 *O. L.* 488, *levies a tax and issues bonds in anticipation of the collection thereof as provided in said section, said levy is subject to the five mill limitation contained in section* 5649-3a *G. C., the ten mill limitation provided for in section* 5649-2 *G. C. and the fifteen mill limitation prescribed by section* 5649-5b *G. C.* (103 *O. L.* 57).

Said municipality may issue bonds for the aforesaid purpose under authority of section 3939 *G. C.*, 106 *O. L.* 536, *and the issue of said bonds under authority of this latter section without a vote of the electors is subject to the limitations upon the creation of bonded indebtedness contained in sections* 3940 *and* 3941 *G. C. and the tax levy for interest and sinking fund incident to such bond issue will be subject to all the limitations above referred to, applicable to a levy under authority of said section* 5629-1 *G. C. If, however, the question of issuing bonds for said purpose under authority of said section* 3939 *G. C. be submitted to a vote of the electors in the manner provided in section* 3942 *et seq. G. C. and the vote of said electors is favorable to said issue, the same is subject only to the limitation upon the creation of bonded indebtedness contained in section* 3948 *G. C., and the tax levy for interest and sinking fund in connection with such bond issue will be outside of the five and ten mill limitations above referred to and subject only to the fifteen mill limitation prescribed by said section* 5649-5b *G. C.*

COLUMBUS, OHIO, October 24, 1916.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your letter of October 19th is in part as follows:

"A building owned by the municipality of Somerset, Ohio, has been condemned by the state industrial commission and certain repairs have been ordered made. The city is without funds with which to make the ordered improvements and cannot secure the same except by a rate of taxation that must be levied outside of the 10 mill limitation for current expenses, but within the 15 mill limitation of the Smith one per cent. law. Is it lawful to make this levy outside of said 10 mill limitation and within the said 15 mill limitation, or must the same come within the 10 mill limitation?"

Section 5629-1 G. C., 103 O. L. 488, provides:

"If any public building in any county, township or municipality in this state, erected from funds raised by general taxation, be condemned, by the proper officials, as unsanitary or unfit for the purposes for which it was erected, and such county, township or municipality is without the necessary funds to make said building sanitary and fit for the purposes for which it was built, the proper officials of said county, township or municipality, at a regular or called meeting, shall levy a tax that will produce the sum required to remedy the defects in said building, not to exceed in any case five thousand dollars: Provided, however, such tax shall be subject to all limitations upon interior rate, aggregate amount, maximum rate and combined

maximum rate provided by law. If the officials deem it advisable they may anticipate the collection of such special tax by borrowing not exceeding the amount so levied at a rate of interest not exceeding 6 per cent., payable semi-annually, and may issue notes or bonds therefor, payable when the tax is collected."

While the council of the village of Somerset have authority under the foregoing provisions of the statute to levy a tax for the purpose mentioned in your inquiry, it is expressly provided in said statute that said levy shall be subject to all the limitations upon interior rate, aggregate amount, maximum rate and combined maximum rate provided by law. This provision of section 5629-1 G. C. supra clearly has reference to the five mill limitation contained in section 5649-3a G. C., the ten mill limitation provided for in section 5649-2 G. C. and the fifteen mill limitation prescribed by section 5649-5b G. C. (103 O. L. 57).

If the legislature, in enacting the above statute vesting in the municipality the authority to levy a tax for the emergency mentioned in your inquiry, had made no reference to the Smith law limitations, above set forth, and had seen fit to amend section 5649-4 G. C. so as to include said statute in the list of sections therein enumerated as was done in the act supplementing section 7630 G. C. (103 O. L. 527), the levy in question would not be subject to any of said limitations.

It is sufficient to observe, however, that no such exemption was provided. On the contrary said section 5629-1 G. C. by its terms subjects said levy to all of said limitations and it cannot be said that because said section is supplemental to section 5629 G. C., which latter section is one of those enumerated in section 5649-4 G. C., the levy authorized by said section is on that account referable to said section 5649-4 G. C. and therefore outside of any of the Smith law limitations.

I am of the opinion therefore in answer to your question that if the municipality referred to in your inquiry levies a tax for the purpose mentioned in said inquiry under authority of section 5629-1 G. C. supra, and issues bonds in anticipation of the collection of said tax as therein provided, said levy will be subject to all the limitations of the Smith law hereinbefore referred to.

It must be observed, however, that the authority contained in said section 5629-1 G. C. is not exclusive and that said municipality may issue bonds for the aforesaid purpose under authority of section 3939 G. C. (106 O. L. 536). The issue of said bonds under authority of this latter section without a vote of the electors would, of course, be subject to the limitations upon the creation of bonded indebtedness contained in sections 3940 and 3941 of the General Code and the tax levy for interest and sinking fund incident to such bond issue would be subject to all the limitations hereinbefore referred to as applicable to a levy under authority of section 5629-1 G. C. supra.

If, however, the question of issuing bonds for said purpose under authority of said section 3939 G. C. should be submitted to a vote of the electors in the manner provided in section 3942 et seq. of the General Code, and the vote of said electors should be favorable to said issue, the same would be subject only to the limitation upon the creation of bonded indebtedness contained in section 3948 G. C. and the tax levy for interest and sinking fund in connection with such bond issue would be outside of the five and ten mill limitations and subject only to the fifteen mill limitation prescribed by said section 5649-5b G. C.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1994.

NAVIGABLE RIVERS—DEFINITION—LITTLE MIAMI RIVER.

Those rivers are to be regarded as navigable rivers in law which are navigable in fact. Rivers constitute navigable waters of the United States within the meaning of the acts of congress when they form in their ordinary condition, either by themselves or by uniting with other waters, a continuous highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water.

COLUMBUS, OHIO, October 24, 1916.

HON. DEAN E. STANLEY, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—I have your communication of October 5, 1916, which communication reads as follows:

> "The commissioners of Warren county, Ohio, contemp'ate some improvement of the Little Miami river within said county, under section 8443 G. C. I write to inquire whether or not the Little Miami river is considered by the state or the federal government to be a navigable stream and if so, whether or not the permission of the federal government (more especially the war department) is required before such improvement could be made.
>
> "I am not familiar, to any great extent, with the federal statutes, but would call attention to the sections found in 6 Federal Statutes Annotated 804, 805 and 818 and in the Consolidated Statutes 3540, 3541, 3545 and 698."

There are no general statutory laws in this state defining a navigable stream. As a general rule it may be said that the navigability of any given stream is a question of fact to be determined under all the circumstances and conditions of each particular case. This rule is recognized in Ohio in the case of Hickok et al. v. Hine, 23 O. S. 527. The following is quoted from the opinion of the court:

> "Having no tidal waters in the state, the word 'navigable,' as applied to our rivers, is not used in the technical sense of the common law; but is applied as in the popular sense to all rivers that are navigable in fact.
>
> "A river is regarded as navigable which is capable of floating to market the products of the country through which it passes, or upon which commerce may be conducted; and, from the fact of its being so navigable, it becomes in law a public river or highway. The character of a river, as such highway, is not so much determined by the frequency of its use for that purpose as it is by its capacity of being used by the public for purposes of transportation and commerce."

In commenting upon the foregoing the court in the case of Jeremy v. Elwell, 5 C. C. 383, made the following observation:

> "This authority is to this point that whether a certain stream is navigable or not is a question of fact and not a question of law. It was then a question for the jury to determine the fact whether this is a navigable stream."

There is ample authority for the proposition that a stream may be declared navigable by statute and in the case of Cooper v. Hall, 5 Ohio, 321, the court made the following observation:

> "There is another consideration which it may be proper to mention. The Little Miami is by statute declared to be a navigable river."

A thorough search of legislative enactments prior to the date of these remarks (1832) fails to disclose, however, the statute to which the court intended to refer.

The rule to be followed in determining the navigability of a stream, as laid down in the case of Hickok, et al., v. Hine, supra, finds ample support in the decisions of the federal courts. The following is quoted from the opinion of the court in the case of The Daniel Ball, 10 Wall. (U. S.) 557, 563:

> "The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters. There no waters are navigable in fact, or at least to any considerable extent which are not subject to the tide, and from this circumstance tide water and navigable water there signify substantially the same thing. But in this country the case is widely different. Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length. A different test must, therefore, be applied to determine the navigability of our rivers and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact, and they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary mode of trade and travel on water. And they constitute navigable waters of the United States, within the meaning of the acts of congress, in contradistinction from the navigable waters of the states when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water."

The case of The Daniel Ball, supra, was cited and followed in the case of The Montello, 11 Wall. (U. S.) 411, and in the case of Packer v. Bird, 137 U. S. 661. In the last cited case the court observed at page 667 that "those rivers are regarded as public navigable rivers in law which are navigable in fact." To the same effect see the following cases:

> United States v. Irrigation Company, 174 U. S. 690.
> Leovy v. United States, 177 U. S. 621.

In view of the foregoing I advise you that the question of whether the Little Miami river, or that part thereof within the territorial limits of Warren county, is to be regarded as navigable within the meaning of that term as used in the federal statutes referred to by you and other federal statutes of a similar character, is a question

of fact and not of law, upon which I do not feel that I should assume to pass in the absence of full and complete information as to all the facts, and is to be determined by the public officials called upon to deal with the question of river improvement by an application of the rules laid down in the cases herein cited.

If, upon a consideration of the facts, there should remain a doubt as to the navigable or non-navigable character of the stream, I would suggest that the question be referred to the war department by the county officials, together with a statement of the nature of the improvement contemplated and a request for information as to the claims of the federal government.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1995.

TAXES AND TAXATION—WHERE BY TERMS OF WILL A PERSON BECOMES SEIZED OF LIFE ESTATE IN REAL PROPERTY—HOW TITLE CAN BE TRANSFERRED ON TAX DUPLICATE FROM NAME OF TESTATOR TO LIFE TENANT.

Where, by the terms of a will, a person becomes seized of a life estate in land the title to which stands on the duplicate in the name of the testator and such person desires to have title to said land or part thereof so devised to him transferred on said duplicate from the name of the testator to his name, said life tenant may make application to the probate court for an order directing such transfer and if the court upon consideration of said application finds that the facts stated therein are true, that the applicant is entitled to such transfer and that no injury will result therefrom, and make such order, said life tenant can then make application to the county auditor as provided in the first part of section 2573 G. C. and it will be the duty of said auditor upon such application being made and upon the presentation of said order of court, to transfer said title on said duplicate in compliance with the requirement of said section 2573 G. C.

The county auditor is neither required nor authorized to make such transfer until said application is made and the proper order of court presented to him as provided in said section 2573 G. C.

COLUMBUS, OHIO, October 24, 1916.

HON. JOHN H. SCHRIDER, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR:—Your letter of October 7th is as follows:

> "Your opinion upon the following questions is respectively requested.
>
> "Facts: 'A' dies testate, leaving an estate of 1000 acres of land. 'A' specifically described and devises a 200 acre parcel of said estate to each of his five children, as and for a *life estate,* only, and upon the deaths of said children, the estate of each to vest absolutely in their children share and share alike.
>
> "The land now stands in the name of the testator 'A', upon the tax duplicates in the office of the county auditor, as one undivided parcel of land.
>
> "Question 1. Is the life estate as devised, such an estate as should be transferred to and in the individual name of the life-tenant upon the county tax duplicates?
>
> "Question 2. What documentary proof is requisite to have the auditor make such transfer, if question number 1 is answered yes?"

Section 5680 G. C. provides in part that:

> "Each person shall pay tax for the lands or town lots of which he is seized for life, * * *"

Under this provision of the statute each of the life tenants referred to in your inquiry is required to pay the taxes on the two hundred acres of land of which he is seized for life during the term of such life estate.

If said life tenant neglects to pay said taxes so that said tract of land is sold for the payment thereof, and within one year after such sale does not redeem the same according to law, section 5688 G. C. provides that:

"He shall forfeit to the person or persons next entitled to such lands in remainder, * * * all the estate which he has in such lands."

If said life tenant desires to have the title to said two hundred acre tract of land transferred on the duplicate from the name of the testator, in which said tract now stands for taxation, to his name, he can make application to the probate court for an order directing such transfer and, if the court upon consideration of said application, finds that the facts stated therein are true, that the applicant is entitled to such transfer and that no injury will result therefrom, and makes such order, said life tenant can then make application to the county auditor as provided in section 2573 G. C. and it will be the duty of said auditor, upon the presentation of said order of court to transfer said title on said duplicate in compliance with the requirement of said section 2573 G. C., which provides in part as follows:

"On application and presentation of title, with the affidavits required by law, *or the proper order of a court,* the county auditor shall transfer any land or town lot or part thereof charged with taxes on the tax list from the name in which it stands into the name of the owner, when rendered necessary by a conveyance, partition, *devise,* descent or otherwise."

It must be observed, however, that no duty is imposed upon the county auditor to make such transfer of title until the aforesaid application is made and the proper order of the court presented to him and unless the life tenants referred to in your inquiry take the initial steps in the manner above set forth the title to the acreage in question will continue to stand on the duplicate in the name of the testator referred to in said inquiry, and if said life tenants neglect to pay the taxes on said land devised to them as aforesaid and of which they are now seized for life, so that said taxes become delinquent and said land is sold for the payment thereof, said life tenants will subject themselves to the forfeiture provided for in section 5688 G. C., supra.

In view of the foregoing I am of the opinion in answer to your first question that the life estates referred to in your inquiry may be transferred on the duplicate in the manner hereinbefore set forth, but that the county auditor is neither required nor authorized to make such transfers until application is made and the proper order of court is presented to him as provided for the in first part of section 2573 G. C., supra.

Your second question has been answered in determining the answer to your first question.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1996.

CORPORATIONS—PAR VALUE OF AUTHORIZED PREFERRED STOCK CAN NEVER EXCEED TWO-THIRDS OF PAR VALUE OF ALL ITS AUTHORIZED CAPITAL STOCK—KELLY-SPRINGFIELD MOTOR TRUCK COMPANY.

The Kelly-Springfield Motor Truck Company cannot have an authorized capital stock of $7,000,000 of which $5,000,000 is preferred and $2,000,000 common stock, and the secretary of state may refuse to file a certificate of increase purporting to give it that authority.

The par value of the authorized preferred stock of a corporation can never exceed two-thirds of the par value of all its authorized capital stock.

COLUMBUS, OHIO, October 24, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of October 11, 1916, in which you request my opinion as follows:

> "We are herewith submitting to your department certificate of increase of capital stock 'preferred' of 'The Kelly-Springfield Motor Truck Company,' voucher No. 51691 and check to the amount of $3,986.
>
> "The aforesaid certificate increases the capital stock of The Kelly-Springfield Motor Truck Company to the amount of $7,000,000 divided into $5,000,000 of preferred stock and $2,000,000 of common stock.
>
> "We also beg to call your attention to section 8667 of the General Code, which provides as follows:
>
> "'If a corporation be organized for profit, it must have a capital stock, which may consist of common and preferred, or common only; but at no time shall the amount of preferred stock at par value exceed two-thirds of the actual capital paid in in cash or property.'
>
> "We kindly request an early opinion on the question of whether or not a corporation can have an amount of authorized preferred stock in excess of two-thirds of the amount of total capital stock."

Whether or not The Kelly-Springfield Motor Truck Company can have an authorized capital stock of $7,000,000 of which $5,000,000 is preferred and $2,000,000 is common stock depends upon the construction to be given to the language of section 8667 of the General Code, which is fully quoted in your letter. The pertinent part of this section is as follows:

> "* * * but at no time shall the amount of preferred stock at par value exceed two-thirds of the actual capital paid in in cash or property."

The term "actual capital paid in" must of necessity mean the amount paid in and credited upon capital stock account, from which no dividends may lawfully be paid, and the effect of the language is, therefore, that a corporation can at no time have outstanding preferred stock with a par value in excess of two-thirds of the par value of all its fully paid in capital stock, or, in other words, that the par value of outstanding preferred stock must never exceed twice the par value of the paid in common stock.

It has been suggested by counsel for The Kelly-Springfield Motor Truck Company that the phrase "actual capital paid in in cash or property" means assets including any surplus which the corporation may have. A sufficient answer to this suggestion is that if such had been the legislative intent they would doubtless have used the word "assets" and thus have shortened and simplified the sentence instead of employing several words to give doubtful expression to that intent. This suggested interpretation woud also result in uncertainty and confusion. For example: If the corporation having an authorized capital of $300,000 divided into $200,000 preferred and $100,000 common and having no surplus should suffer a loss of $50,000, it would be under the necessity of reducing the amount of its preferred stock in order to comply with the statute quoted.

It would be vain to permit The Kelly-Springfield Motor Truck Company to file a certificate of increase purporting to give it the potential authority to issue $5,000,000 of preferred stock when by the specific provisions of law it can never without first increasing its authorized common stock issue more than $4,000,000 of such preferred stock.

Therefore, I am of the opinion that the corporation can not have an amount of authorized preferred stock in excess of two-thirds of the amount of the total paid in capital stock, and advise you that you should not accept or file the certificate of increase of capital stock presented by The Kelly-Springfield Motor Truck Company.

I am returning the enclosure mentioned in your letter.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1997.

APPROVAL, RESOLUTIONS FOR IMPROVEMENT OF ROADS IN TRUMBULL, OTTAWA, FAIRFIELD, CLARK, ERIE AND FRANKLIN COUNTIES.

COLUMBUS, OHIO, October 25, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of October 23, 1916, transmitting to me for examination final resolutions relating to the improvement of the following roads:

"Trumbull County—Sec. 'E,' Warren-Meadville road, Pet. No. 2985, I. C. H. No. 330.

"Trumbull County—Sec. 'A,' Painesville-Warren road, Pet. No. 2989, I. C. H. No. 153.

"Ottawa County—Sec. 'H,' Toledo-Elmore road, Pet. No. 2772, I. C. H. No. 52.

"Fairfield County—Sec. 'E,' Logan-Lancaster road, Pet. No. 2321, I. C. H. No. 360.

"Clark County—Sec. 'G,' Springfield-Washington C. H. road, Pet. No. 2161, I. C. H. No. 197.

"Erie County—Sec. 'P,' Milan-Elyria road, Pet. No. 2312, I. C. H. No. 288.

"Erie County—Sec. 'A,' Savannah-Vermillion road, Pet. No. 2314, I. C. H. No. 149.

"Franklin County—Sec. 'F,' Columbus-Lancaster road, Pet. No. 2343, I. C. H. No. 49.

"Trumbull County—Sec. 'D,' Warren-Meadville road, Pet. No. 2985, I. C. H. No. 330.

I find these resolutions to be in regular form and am, therefore, returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1998.

APPROVAL, ABSTRACT OF TITLE AND DEED FROM LENA DE S. SLATTERY TO TRUSTEES OF OHIO UNIVERSITY.

COLUMBUS, OHIO, October 25, 1916.

DR. ALSTON ELLIS, *President, Ohio University, Athens, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of abstract of title and deed from Lena de S. Slattery to the president and trustees of the Ohio University, for the following described real estate situate in the City of Athens, Athens county, Ohio, to-wit:

"Beginning at a point two hundred thirty-two and 1-10 (232.1) feet south, and one hundred and twenty (120) feet west of the northeast corner of Inlot No. 74 in the City of Athens, Athens county, Ohio, being the southwest corner of that part of Inlot No. 77 in said city conveyed to Della B. Sleeper by John Welch and wife by their deed dated February 28, 1882, and recorded in Book 52, at page 172, of Record of Deeds in said county, and thence running west thirty-three and one-half (33½) feet, more or less, to the west line of the premises formerly owned by John Welch; thence north, along the west line of the premises formerly owned by said Welch, forty-five (45) feet; thence east thirty-three and one-half (33½) feet, more or less, to the west line of the premises conveyed to Della B. Sleeper by the said John Welch as aforesaid; thence south forty-five (45) feet to the place of beginning.

"Excepting and reserving to grantor, her heirs and assigns, a right of way ten (10) feet wide across said premises along the east side of said above described tract.

"Said tract herein above described is a part of Inlots Nos. 77, 170 and 171 in said City of Athens, and constitute the same premises conveyed to Della B. Sleeper by John Welch and wife by their deed dated April 9, 1886, and recorded in Book 61, at page 64, of Record of Deeds in said county."

I have carefully examined said abstract and beg leave to call to your attention the following:

1. That Mrs. Slattery holds the title to such part of said premises as is within Inlot No. 77 under lease for ninety-nine years, renewable forever.

2. That the premises herein described were improperly dropped from the

rental records of The Ohio University and that they do not now appear upon said records.

3. That the description in the deed for premises now owned by the Phi Delta Theta club, which first dates from May 1, 1903, overlaps for two and one-half feet the west side of the premises herein described, but that such club is without legal rights to the title of said premises and I am informed by you and by Mr. W. E. Peters, attorney at law and abstractor, of Athens, Ohio, that there has been no claim of adverse possession upon this ground.

4. That the undetermined taxes for the year 1916 are unpaid.

If, as I am informed you contemplate doing, a quit claim deed is secured from the Phi Delta Theta club for that part of the premises described in the deed above referred to wherein the description in the deed to the Club overlaps, this will in my judgment clear up the cloud on the title now resting thereon.

While the abstract shows a number of technical defects, I believe that, with the exception of the things above specifically noted, it discloses a good and sufficient perpetual leasehold in Mrs. Slattery to said premises.

The deed is in proper legal form, is duly signed, acknowledged and witnessed and conveys all the title and estate of Mrs. Slattery in said premises to The President and Trustees of Ohio University, subject of course to the above exceptions.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

1999.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY REYNOLDSBURG VILLAGE SCHOOL DISTRICT, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, October 27, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

> "RE:—Bonds of Reynoldsburg village school district, Franklin county, Ohio, in the sum of $2,000.00 for the purpose of installing heating system and erecting fire escapes on the school building in said district, being four bonds of $500.00 each."

I have examined the transcript of the proceedings of the board of education of Reynoldsburg village school district relative to the issuance of said bonds, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of the village school district.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2000.

COMBINED NORMAL AND INDUSTRIAL DEPARTMENT OF WILBERFORCE UNIVERSITY—APPROVAL OF CONTRACTS FOR ERECTION OF GYMNASIUM AND ALSO FOR ERECTION OF RECITATION BUILDING.

COLUMBUS, OHIO, October 27, 1916.

Board of Trustees, Combined Normal and Industrial Department, Wilberforce University, Wilberforce, Ohio.

GENTLEMEN:—Your architect, Frank L. Packard, has handed to me:

1. The contract between your board and The Cullen and Vaughn Company, dated September 21, 1916, for the erection of a gymnasium at Wilberforce, Ohio, the contract calling for the sum of $37,646.21.

2. The contract entered into by your board with The Cullen and Vaughn Company of Hamilton, Ohio, under date of September 21, 1916, for the erection and completion of a recitation building at Wilberforce, Ohio, for the sum of $56,989.79.

3. The bond to cover the erection and completion of both of said buildings.

I have carefully examined the contracts and the bond covering the same, and find them to be in compliance with law, and have ascertained from the auditor of state that there are sufficient moneys available in each of the appropriations to cover the amount of the contract.

The governor, secretary of state and auditor of state have granted permission to your board of trustees to enter into a contract upon the combined bid of said The Cullen and Vaughn Company for the gymnasium and recitation buildings.

I have this day approved the said contracts and filed the same in the office of the auditor of state, and have returned to the architect the balance of the papers submitted.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2001.

BUILDING AND LOAN ASSOCIATIONS—MAY INVEST FUNDS IN SECURITIES THAT ARE ACCEPTED BY UNITED STATES GOVERNMENT TO SECURE POSTAL SAVINGS DEPOSITS IN NATIONAL BANKS.

Building and loan associations of Ohio may invest their idle funds in such securities as are accepted by the United States government to secure postal savings deposits in national banks.

COLUMBUS, OHIO, October 30, 1916.

HON. L. G. SILBAUGH, *Inspector of Building and Loan Associations, Columbus, O.*

DEAR SIR:—I have your letter of October 20, 1916, requesting my opinion as follows:

"Among the powers granted to building and loan associations in this state is the following:

"General Code section 9660. 'To invest any of its idle funds, or any part thereof, in bonds of interest bearing obligations of the United States, or of the District of Columbia, or of the state of Ohio, or of any county, township, school district, or other political division in the state of Ohio, or of any incorporated city or village, in the state of Ohio; and in such other securities as now are or hereafter may be accepted by the United States to secure government deposits in national banks. But such investments at no time shall amount in the aggregate to more than twenty per cent. of the assets of such corporation.'

"Does this section of the General Code authorize building and loan associations of this state to invest their idle funds in such securities as are accepted by the United States government to secure postal savings deposits in national banks?"

Your question will be answered by determining whether or not the securities accepted by the United States government to secure postal savings deposits in national banks are, within the language of the section quoted in your letter, government deposits.

Section 9691 of the United States Compiled Statutes of 1913, relative to deposits of public moneys of the United States government, is as follows:

"All national banking associations, designated for that purpose by the secretary of the treasury, shall be depositaries of public money, under such regulations as may be prescribed by the secretary; and they may also be employed as financial agents of the government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the government, as may be required by them. The secretary of the treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the government: Provided, that the secretary shall, on or before the first of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the government for internal revenue, or for loans or stocks: Provided, that the secretary of the treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different states and sections."

This section contained substantially the same language at the time section 9660 of the General Code, quoted in your letter, was enacted.

Section 7588 of the United States Compiled Statutes of 1913, relative to the deposit of postal savings funds in banks, so far as pertinent, is as follows:

"Postal savings funds received under the provisions of this act shall be deposited in solvent banks, whether organized under national or state laws, being subject to national or state supervision and examination, and the sums deposited shall bear interest at the rate of not less than two and one-fourth per centum per annum, which rate shall be uniform throughout the United States and territories thereof; but five per centum of such funds shall be withdrawn by the board of trustees and kept with the

treasurer of the United States, who shall be treasurer of the board of trustees, in lawful money as a reserve. The board of trustees shall take from such banks such security in public bonds or other securities, supported by the taxing power, as the board may prescribe, approve, and deem sufficient and necessary to insure the safety and prompt payment of such deposits on demand. The funds received at the postal savings depository offices in each city, town, village and other locality shall be deposited in banks located therein (substantially in proportion to the capital and surplus of each such bank willing to receive such deposits under the terms of this act and the regulations made by authority thereof, but the amount deposited in any one bank shall at no time exceed the amount of the paid-in capital and one-half the surplus of such bank. * * *"

Postal savings funds deposited in banks under authority of said section 7588 of the United States Compiled Statutes above quoted, by virtue of the language of that section and other sections of the same act, are clearly government deposits within the meaning of said section 9660 of the General Code of Ohio. Such funds, strictly speaking, may not be public funds, yet they are under the custody and control of the Federal government acting through its duly authorized agency, and are deposited in banks by direct authority of the Federal government.

I am, therefore, of the opinion that building and loan associations of Ohio may invest their idle funds in such securities as may be designated by the board of trustees for the control, supervision, and the administration of the postal savings depository offices acting under the authority conferred upon them by said section 7588 of the United States Compiled Statutes herein quoted.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2002.

SECRETARY OF STATE—CERTIFICATE FOR REGISTRATION OF MARK OF OWNERSHIP OF PERSONAL PROPERTY—WHERE NAME "BOY SCOUTS" USED—EXCELSIOR SHOE COMPANY.

Secretary of state advised that he may refuse to file certificate presented by The Excelsior Shoe Company for the registration of a mark of ownership of personal property which contains as a distinguishing part of the mark and in large type the name "Boy Scouts."

The secretary of state can not be compelled to perform a ministerial duty except by one rightfully entitled to demand the performance of such act.

COLUMBUS, OHIO, October 30, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of October 17, 1916, in which you request my opinion as follows:

"We are submitting to your department certificate of registration of marks of ownership on personal property of 'THE EXCELSIOR SHOE COMPANY,' money order to the amount of $1.00, and a communication

from James Hamilton, and kindly beg to request an early opinion on the question of whether or not said certificate of registration should be filed in this department."

The following is a copy of the certificate of registration referred to in your letter:—

REGISTRATION OF MARKS OF OWNERSHIP ON PERSONAL PROPERTY.

"Application of The Excelsior Shoe Company, an Ohio Corporation of Portsmouth, Ohio.

"Witnesseth: That The Excelsior Shoe Company above named, in compliance with an 'An Act' of the General Assembly of the State of Ohio, passed May 31, 1911, and approved June 7, 1911, (102 O. L., 513), 'to provide for the registration of marks of ownership on personal property, and to make such registered mark prima facie evidence of ownership of property bearing such mark,' hereby makes application for the registration in the office of the secretary of state of the state of Ohio and in the office of the clerk of the court of common pleas of Scioto county, Ohio, said The Excelsior Shoe Company having its principal place of business in the City of Portsmouth, County of Scioto and state of Ohio, by filing this written statement or description verified by affidavit of said mark of ownership used by said The Excelsior Shoe Company, to wit:

"The trademark consists of the picture of a scout.

"The class and particular description of goods to which the said trademark has been and is intended to be appropriated are:

"Class: Footwear. Particular description of goods: Shoes.

"The said trademark has been continuously used in the business of said corporation since about the fifteenth day of October, 1910.

"The said trademark is usually applied by stamping the same directly on the goods or by means of printed labels showing the trademark or by stamping or printing the same upon the package containing the goods.

"The Excelsior Shoe Company.
"By J. W. Bannon, Jr.,
"Secretary.

"State of Ohio, Scioto County, ss:

"J. W. Bannon, Jr., being duly sworn says that he is the secretary of the above named corporation, in whose behalf the foregoing application is made; that said The Excelsior Shoe Company has the right to use such mark of ownership, and that no other person, firm, association, union or corporation has the right to use such mark of ownership either in the identical form or any such near resemblance thereto as may be calculated to deceive, and that the fac similies or counterparts filed therewith are true and correct.

"J. W. Bannon, Jr.,
"Secretary, The Excelsior Shoe Company.

"Subscribed in my presence and sworn to before me this 25th day of September, A. D., 1916.

"E. H. Hamner,
"Notary Public."

The trademark referred to in the certificate, copy of which is attached thereto, consists of a picture or representation of a boy dressed in the uniform or garb

of a scout and seated on a horse. This label has written on it, in large type, the words: "Boy Scouts," and also the words, in smaller type: "Manufactured by the Excelsior Shoe Company, Portsmouth, Ohio."

The communication from James Hamilton, who is attorney for The Excelsior Shoe Company, is a memorandum and argument advocating the right of his client to use said mark of ownership and to secure its registration in your office.

I am also in receipt of your letter of October 18th, 1916, enclosing a communication from Mr. James E. West, chief scout executive of the Boy Scouts of America, denying on behalf of that association the right of The Excelsior Shoe Company to use the name "Boy Scouts" and protesting against the proposed registration of that name in your office. To the latter communication is attached a copy of the Act of Congress approved by the president on June 15, 1916, entitled "An Act to Incorporate the Boy Scouts of America, and for other purposes."

Sections 6240-1, 6240-2 and 6240-3 of the General Code, relative to the registration of trademarks, brands, etc., are as follows:

> "Sec. 6240-1. That any and all persons or corporations who may be the owners of cans, tubs, firkins, boxes, bottles, casks, barrels, kegs, cartons, tanks, fountains, vessels or containers, with his, her, its or their names, brands, designs, trade marks, devices or other marks of ownership stamped, impressed, labeled, blown in or otherwise marked thereon, may file with the secretary of state, and also with the clerk of the court of common pleas of the county in which such person or persons or corporation may have his, her, its or their principal place of business, a written statement or description verified by affidavit of such owner or his, her or its agent, of the names, brands, designs, trade marks, devices or other marks of ownership so used by him, her, it or them, and of the said article or articles upon which the same are used; or if such principal place of business be without this state, then such written statement or description so verified may be filed with the clerk of the court of common pleas, of any county in this state."
>
> "Sec. 6240-2. The statement provided for in section one (G. C. 6240-1) of this act shall be published once a week for four successive weeks in a newspaper printed in the English language, and of general circulation in the county in which such notice may have been filed with the clerk of the court of common pleas as aforesaid; a copy of which publication proved in the same manner as proof of publication is now required to be made by law, when no special mode of proving the same is provided, shall also be filed with the secretary of state, and with the clerk of the court of common pleas of the county, where such statement is filed.
>
> "All such written statements or descriptions and all such certificates of publication so filed with the clerk of the court of common pleas, shall be recorded by him in a book to be kept by him for such purpose; and such book shall be subject, at all reasonable hours, to the inspection of all persons who may choose to inspect the same."
>
> "Sec. 6240-3. The secretary of state and the clerk of the court of common pleas, of the county where such statement is filed, shall deliver to any person who may apply therefor, upon payment of the fees herein provided, copies of all such written statements or descriptions of names, brands, designs, trade marks, devices, or other marks of ownership, and of all certificates of publication so filed with them, duly certified to by them in the usual manner; and such certified copies, so made by either the secretary of state or the clerk of the common pleas court of

the county where such statement is filed, shall be admissible in evidence in any suit, action or proceeding in law under this act, and shall be prima facie evidence that the provisions of this act have been complied with, and also prima facie evidence of the title of the owner or owners named therein, to the property upon which the name, brand, design, trade mark, device or other mark or marks of ownership of such owner or owners may appear as described therein."

Section 7 of the Act of Congress incorporating the Boy Scouts of America is as follows:

"The said corporation shall have the sole and exclusive right to have and to use, in carrying out its purposes, all emblems and badges, descriptive or designating marks, and words or phrases now or heretofore used by the Boy Scouts of America in carrying out its program, it being distinctly and definitely understood, however, that nothing in this Act shall interfere or conflict with established or vested rights."

The first question raised, therefore, is whether or not The Excelsior Shoe Company has an established or vested right in the use of the name "Boy Scouts."

The verified certificate of registration above quoted recites that the trade mark sought to be registered has been continuously used by The Excelsior Shoe Company since October 15, 1910, and I have no reason to doubt the truth of that statement. I am informed that the association known as the Boy Scouts was in active existence under that name for a number of years prior to October 15, 1910; that the association at its origin adopted and has ever since claimed and used the words "Boy Scouts" as a distinguishing part of its name. The fact that the association was not incorporated does not signify that it did not have, or could not acquire, an enforceable proprietary right in a picture, design, name or trade-mark originated and adopted by it.

Irrespective of statutory law, but upon well established equitable principles, the association could have enjoined The Excelsior Shoe Company from using the name "Boy Scouts."

I believe a further remedy is provided in Section 13155 of the General Code, which is as follows:—

"Whoever in any way uses the genuine label, union shop card, trade mark, term, design, device or form of advertisement, or the name of (or) seal, or any imitation, likeness, or counterfeit of the genuine label, union shop card, trade mark, term, design, device or form of advertisement, or name or seal, of any association or union or officer thereof, in and about the sale of goods or otherwise, not being authorized to so use the same, shall be guilty of a misdemeanor, and shall be punished by a fine of not less than twenty-five dollars ($25.00) nor more than two hundred dollars ($200.00.)"

The term "Boy Scouts" is the name adopted by the association of Boy Scouts and The Excelsior Shoe Company is now, and, according to the recital in its certificate of registration, has for several years past been using that name or term "in and about the sale of goods or otherwise, not being authorized to so use the same," and is therefore subject to the penalty prescribed in the section just quoted.

In this connection I call attention to a decision of the Court of Appeals of the District of Columbia, May 26, 1913. In re The Excelsior Shoe Company, Vol.

40 of the reports of that court, at page 480, wherein the decision of the commissioner of patents denying registration of this same trade-mark or name by this same company was sustained and confirmed. I quote the opinion of the court in full.

"These separate appeals from decisions of the commissioner of patents denying registration of a trademark involve substantially the same question, and have been heard as one.

"The trademark is the word 'Boy Scouts' applied to leather and canvas shoes for boys, youths and men. In No. 841 a representation of the mark consists of a youth on horseback, dressed in the garb of a cowboy or scout, with the words 'Boy Scouts' printed thereunder in conspicuous letters; this is stamped or printed on the sole of a shoe. It was shown in the course of the application that there was affixed to the boxes containing each pair of shoes a label in colors, on which appears not only the scout on horseback, but pictures of boy scouts engaged in various sports. The most conspicuous thing in this label is the words 'Boy Scouts' in white letters on a red back ground. It also shows that the shoes are manufactured by The Excelsior Shoe Company, of Portsmouth, Ohio. Each application states that the trademark has been 'continuously used in the business of said corporation since July 1, 1910.'

"The mark described in No. 842 is a picture of a youth dressed for an outing, who holds in his hands a line intended to represent a lasso, the noose embracing a shoe, and the intermediate convolutions forming the letters of the word 'Scout.' It does not appear what labels were used on the shoe boxes.

"The mark described in No. 843 is the figure of a fully equipped boy scout or cowboy on horseback. The accompanying label used on the shoe boxes shows this figure on a circular background with the words 'Boy Scouts' in large letters overhead, and The Excelsior Shoe Company, Portsmouth, Ohio, underneath. The trademark is claimed to be affixed to the goods or the packages containing them by means of a printed label.

"The examiner of trademarks denied registration in each case on two grounds: 1. That the mark is the name of a well-known organization. 2. That it is descriptive or deceptive. The commissioner affirmed the examiner's decision on the second ground, and declared it unnecessary to pass upon the other.

"The appellant contends that, as there was no evidence introduced to show that there is such an association or organization as the Boy Scouts, the commissioner cannot take notice of the same. The rule that a judge is not to shut his eyes to what everybody else of intelligence knows applies with peculiar force in proceedings in the patent office, for reasons that are obvious. Taking notice that the 'boy scouts' is an association comprising a great number of youths throughout the United States devoted to out-of-door exercises and sports, the commissioner was right that their name applied as a trademark for shoes was either descriptive or deceptive, or both, as indicating to purchasers that the particular shoes were of a superior quality approved by the association of boy scouts, and marked with their name by their authority.

"It is unnecessary to consider other grounds of objection. It may be remarked, also, that the several applications for the registration of these marks are fatally defective in that the accompanying affidavit does not show that the mark has been used in commerce among the states,

or with foreign nations, or with the Indian tribes, as expressly required by the trademark act, Secs. 1 and 2. We are not to be understood as holding that the applicant might not obtain registration of the figure represented on this label, provided it has not been appropriated by some other manufacturer. What we hold is that he cannot obtain registration for it with the accompanying words 'Boy Scouts.'

"The decision in each appeal is affirmed, and this decision will be certified to the commissioner of patents. Affirmed."

A motion for a rehearing in this case was overruled by the court October 9, 1913.

My information that the name "Boy Scouts" was adopted and used by the association of that name prior to its use by The Excelsior Shoe Company beginning October 15, 1910, is confirmed by the decision in the case above referred to; otherwise the association could have had no proprietary right in the name valid as against The Excelsior Shoe Company.

I, therefore, conclude that the Excelsior Shoe Company at the date of the passage of the federal act incorporating the Boy Scouts of America had no established or vested right to use the name "Boy Scouts" within the meaning of the exceptions contained in Section 7 of that act, and that the Boy Scouts of America have the sole and exclusive right to have and use the same in carrying out its purposes.

It is suggested by Mr. Hamilton in his memorandum that your duty under the sections of the Ohio General Code herein quoted are purely ministerial and that you are given no discretion in the matter and are without authority to enquire into or to determine the rights of the contending parties, but must receive and file the certificate as presented.

I recognize the fact that your duties in this connection are of a ministerial character, but the courts of this state have uniformly held that a ministerial duty cannot be enforced at the suit of one who is not lawfully entitled to demand the performance of that duty.

"A mandamus will not be awarded in the absence of a clear right, in the party seeking the writ, to the object sought to be obtained by it." State ex rel. Ban v. Yeatman, 22 O. S., 546; State ex rel. v. Smith, 71 O. S., 13."

Therefore, if you conclude, as I believe the facts warrant, that The Excelsior Shoe Company is not entitled to use the name "Boy Scouts" for the purpose recited in its certificate of registration, you will be justified in refusing to file such certificate of registration.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2003.

COUNTY BOARD OF SCHOOL EXAMINERS—WITNESSES—AUTHORITY TO ISSUE SUBPOENAS—FEES OF WITNESSES—NECESSARY EXPENSES OF SENDING FOR WITNESSES—HOW PAID—BOARD MAY REVOKE A FIVE-YEAR CERTIFICATE.

The county board of school examiners have no authority to issue subpoenas and compel attendance of witnesses upon a hearing held pursuant to the provisions of section 7827 G. C.

Witnesses sent for by the county board of school examiners may be allowed and paid such reasonable fees for their attendance upon such hearing as the examiners may determine, not in excess of the witness fees and mileage allowed by law in ordinary cases, under the provisions of section 7828 G. C.

The county board of school examiners may certify to the county auditor for payment the necessary expense of sending for witnesses as authorized by section 7827 G. C., and such necessary expense may be paid pursuant to the provisions of section 7828 G. C.

The county board of school examiners may, under the provisions of section 7827 G. C., revoke a five-year certificate heretofore issued and still in force.

COLUMBUS, OHIO, October 30, 1916.

HON. D. FINDLEY MILLS, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR:—Yours under date of October 21, 1916, is as follows:

"Written charges have been preferred and filed with the board of school examiners of Shelby county, against a certain teacher charging him with intemperance, immorality, etc., and asking for the revocation of this teacher's certificate, under the provisions of section 7827 G. C. The latter part of this section provides as follows:

" 'The examining board may send for witnesses and examine them on oath or affirmation, which may be administered by any member of the board touching the matter under investigation.'

"I would like very much to have your construction of this statute, as to whether or not the examining board is authorized to issue subpoenaes for the respective witnesses, and compel attendance; if so, who is authorized to serve the subpoenaes and what fee shall be allowed for such service. Also what if any fees shall be paid the witnesses who are compelled to attend and testify at this hearing.

"The teacher in question now holds a five-year certificate which was granted prior to the adoption of the new school code. Section 7821-1 G. C. provides as follows:

" 'All five-year and eight-year certificates now granted shall continue in force until the end of their terms, and shall be renewed by the superintendent of public instruction upon proof that the holders thereof have taught successfully until the time of each renewal. * * *'

"I would like to know as to whether or not in your opinion the fact that the county board of school examiners have no authority to grant a five-year certificate under the present school law, and the matter of renewal is left exclusively to the superintendent of public instruction, would deprive the county board of school examiners of the authority or jurisdiction to revoke such certificate under the provisions of section 7827 G. C"

Section 7827 G. C., to which reference is made in your inquiry, provides as follows:

"No certificate shall be issued to any person who is less than eighteen years of age. If at any time the recipient of a certificate be found intemperate, immoral, incompetent or negligent, the examiners, or any two of them, may revoke the certificate; but such revocation shall not prevent a teacher from receiving pay for services previously rendered. Before any hearing is had by a board of examiners on the question of the revocation of a teacher's certificate, the charges against the teacher must be reduced to writing and placed upon the records of the board. He shall be notified in writing as to the nature of the charges and the time set for the hearing, such notice to be served personally or at his residence; and be entitled to produce witnesses and defend himself. The examining board may send for witnesses and examine them on oath or affirmation which may be administered by any member of the board touching the matter under investigation."

Section 7828 G. C. provides as follows:

"The fees and the per diem of examiners for conducting such investigation at three dollars a day each and other expenses of such trial shall be certified to the county auditor by the clerk and president of the examining board and be paid out of the county treasury upon the order of the auditor."

While it is above provided that the county board of school examiners may send for witnesses, there is found no statutory provision making attendance of witnesses sent for compulsory, and no penalty is prescribed for the failure or refusal of a witness so sent for by the county board of school examiners to attend, nor is there specific provision for sending for such witnesses in any particular manner, and no fee or compensation prescribed for any person whom the examiners may send for as a witness. If, however, the sending for witnesses, as authorized by section 7827 G. C., necessitates the incurring of any expense by the county board of school examiners, the provisions of section 7828 G. C. are applicable thereto. The necessary expenses thus incurred would be of similar nature to the further expense which may be necessary to procure the attendance of witnesses.

In an opinion of this department under date of June 30, 1916, addressed to Hon. E. A. Scott, prosecuting attorney of Adams county, a copy of which is herewith enclosed, it was held that the necessary expenses of procuring the attendance of witnesses, in no case in excess of witness fees and mileage, in ordinary cases may be paid pursuant to the provisions of section 7828 G. C., supra.

There being found no statutory provision therefor, I am of opinion, in answer to your first question, that the county board of school examiners is without power to issue subpoenaes and to compel the attendance of witnesses in hearings authorized by them to be held by the provisions of section 7827 G. C., supra. Such fees as are reasonable and not in excess of the witness fees and mileage allowed by law in ordinary cases may be allowed to and paid witnesses sent for, for their attendance at such hearing, under the provisions of section 7828 G. C. Under the provisions of said section 7828 G. C., the county board of school examiners may also

allow and certify to the county auditor, for payment as an expense of such hearing, the reasonable and necessary expense incurred in sending for such witnesses.

Coming to consider your second question, it must be observed that while formerly the county board of school examiners was authorized to grant a five-year certificate, and that there is now no such authority in the board, the power to revoke certificates, under the provisions of section 7827 G. C., supra, is not to such extent dependent upon the authority to grant the same that the abrogation of the authority to grant a certificate for five years would operate as a repeal of the authority conferred by section 7827 G. C., for the revocation of such certificate. So long as such certificates continue in force, the power to revoke the same is provided by said section 7827 G. C., remains, the operation of that section not being affected by a modification of the authority to grant certificates. The terms of said section are general and applicable to any certificate which has been or may hereafter be issued by the county board of school examiners.

I am therefore of opinion, in answer to your second question, that county boards of school examiners are authorized to revoke a five-year certificate heretofore granted and yet in force, pursuant to the provisions of section 7827 G. C., supra.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2004.

TRUSTEES OF OHIO STATE UNIVERSITY—NOT AUTHORIZED TO DEDICATE LAND FOR STREET PURPOSES WITHOUT EXPRESS LEGISLATIVE AUTHORIZATION.

The trustees of the Ohio State University are not authorized to dedicate any portion of the university property for street purposes without express legislative authorization.

COLUMBUS, OHIO, October 30, 1916.

HON. CARL E. STEEB, *Secretary Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication under date of October 10, 1916, which communication reads as follows:

> "I am in receipt of a communication from the city of Columbus, asking the board of trustees to dedicate twenty or thirty feet on Tenth avenue, from Neil avenue to Perry street, to the city of Columbus, for street purposes. This communication will be presented to the board of trustees at its meeting to be held November 7th, and in order that I may be properly advised before presenting said communication, I wish to inquire whether or not legislative permission would be necessary before the trustees

could dedicate any portion of the university property to the city of Columbus for street purposes?"

Section 7950 G. C. provides that the board of trustees of the Ohio State University shall have general supervision of all lands, buildings and other property belonging to the university. Section 7951 G. C. authorizes the board of trustees to receive and hold in trust for the use and benefit of the university any grant or devise of land and donation or bequest of money or other personal property to be applied to the general or special use of the university. Section 7952 G. C. provides that the title for all lands for the use of the university shall be made in fee simple to the state of Ohio. None of these sections, however, authorizes the board of trustees of the university to dedicate for street purposes any of the real estate belonging to the state of Ohio and used for the purposes of the university. If the trustees should dedicate for street purposes land belonging to the university they would be exceeding the authority conferred on them by the statutes relating to the control and management of the university.

I am therefore of the opinion, in answer to your question, that legislative permission would be necessary before the trustees of the university could dedicate any portion of the university property for street purposes.

This situation seems to have been recognized by the legislature of the state which, by an act passed April 15, 1892, and found in 89 O. L. 301, granted to the city of Columbus the right to construct and improve a certain public road or street through the lands of the university. The opinion herein expressed is also in accordance with the general principle supporting opinion No. 1289 of this department, rendered to Hon. W. O. Thompson, president of the university, on February 21, 1916, in which opinion it was held that the trustees of the university would not be authorized to enter into an arrangement to permit a hospital owned by the city to be erected on land controlled by the university trustees, in the absence of an authorization of such an arrangement by the legislature. The same principle has been recognized by the legislature in an act found in 103 O. L. 660, authorizing the erection by an incorporated alumni association of a dormitory on the campus of the university, and by an act found in 102 O. L. 297, authorizing the construction of a high school building on the campus of the university, upon such terms as might be agreed upon by the trustees of the university and the board of education of the Columbus city school district. The legislature in these acts manifestly had in mind the principle that the trustees of the university would not be authorized to surrender their custody and control of any part of the university grounds or permit the use of any part of such grounds for any purpose other than those of the university without express legislative authorization.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

2005.

APPROVAL, RESOLUTION FOR IMPROVEMENT OF CHILLICOTHE-LOGAN ROAD IN HOCKING COUNTY.

COLUMBUS, OHIO, October 31, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication of October 30, 1916, transmitting to me final resolution relating to the improvement of section "I" of the Chillicothe-Logan road, petition No. 2500, I. C. H. No. 363, in Hocking county.

I find this resolution to be in regular form and am therefore returning the same with my approval endorsed upon the duplicate copies thereof.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2006.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, SALT CREEK TOWNSHIP RURAL SCHOOL DISTRICT, PICKAWAY COUNTY.

COLUMBUS, OHIO, October 31, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

> "RE:—Bonds of Salt Creek township rural school district, Pickaway county, Ohio, in the sum of $4,500.00 to improve public school property in said district, being nine bonds of five hundred dollars each."

I have examined the transcript of proceedings of the board of education of Salt Creek township rural school district relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted, and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of said school district.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2007.

APPROVAL, CERTIFICATE OF AMENDMENT TO ARTICLES OF INCORPORATION OF WESTERN AND SOUTHERN LIFE INSURANCE COMPANY.

COLUMBUS, OHIO, November 2, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of November 2, 1916, submitting for may approval certificate of amendment to the articles of incorporation of The Western and

Southern Life Insurance Company, together with filing fee check of $5.00, and I herewith return said certificate to you with my approval endorsed thereon.

I return herewith check enclosed in your letter.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2008.

BOARD OF EDUCATION OF RURAL SCHOOL DISTRICT WHICH MAINTAINS NO HIGH SCHOOL—HOW AMOUNT OF TUITION FOR BOARD MAINTAINING HIGH SCHOOL IS TO BE COMPUTED.

The amount of tuition to be paid by the board of education of a rural school district which maintains no high school to the board of education of the school district maintaining a high school, will be the aggregate of the per capita amounts for the several pupils residing in said rural school district and attending said high school, to be computed in the manner provided in the first part of section 7747 *G. C.*, 104 *O. L.* 125, *and to be ascertained by dividing the total expense of conducting said high school, exclusive of permanent improvements and repair, by the average monthly enrollment of all pupils attending said high school, including said non-resident as well as the resident pupils of the school district maintaining said high school.*

COLUMBUS, OHIO, November 6, 1916.

HON. D. M. CUPP, *Prosecuting Attorney, Delaware, Ohio.*

DEAR SIR:—In your letter of October 18th, which was not received at this office until October 31, 1916, you request my opinion as follows:

> "Genoa rural school district of Delaware county, Ohio, maintains no high school. This rural school district has twenty pupils who are eligible for admission to high school. These pupils are attending the high school at Westerville, Franklin county, Ohio.
>
> "(a) What tuition shall be paid the school board of the Westerville high school by the school board of the Genoa rural school district?
>
> "(b) Do you divide the total expense of conducting the high school exclusive of permanent improvements and repairs, by the enrollment in the high school including the tuition or foreign pupils, or do you divide by the monthly enrollment in the high school excluding all foreign and tuition pupils?"

Section 7747 G. C. (104 O. L. 125) provides in part:

> "The tuition of pupils who are eligible for admission to high school and who reside in rural districts, in which no high school is maintained, shall be paid by the board of education of the school district in which they have legal school residence, such tuition to be computed by the month. An attendance any part of the month shall create a liability for the entire month. No more shall be charged per capita than the amount ascertained by dividing the total expenses of conducting the high school of the district attended, exclusive of permanent improvements and repair, by the average monthly enrollment in the high school of the district."

From your statement of facts it is evident that the board of education of the rural district referred to in your inquiry has not entered into an agreement with the board of education of the Westerville village school district, as authorized by provision of the first part of section 7750 G. C. and I assume that the several pupils residing in said rural school district and attending the high school in said village school district have complied with the requirement of the latter part of said section 7750 G. C. which provides that:

> "In case no such agreement is entered into, the school to be attended can be selected by the pupil holding a diploma (or the certificate of the county superintendent issued under authority of section 7747 G. C. supra), if due notice in writing is given to the clerk of the board of education of the name of the school to be attended and the date the attendance is to begin, such notice to be filed not less than five days previous to the beginning of attendance."

The per capita tuition of said pupils is to be computed in the manner provided in the first part of section 7747 G. C. as above quoted, and by the plain terms of said part of said section the amount per capita is to be ascertained by dividing the total expense of conducting the high school in said village school district, exclusive of permanent improvements and repair, by the average monthly enrollment in said high school. This average monthly enrollment clearly includes non-resident as well as resident pupils of said village school district attending said high school.

I am of the opinion therefore, in answer to your questions, that the amount of tuition to be paid by the board of education of the rural district referred to in your inquiry to the board of education of the Westerville village school district will be the aggregate of the per capita amounts for the several pupils residing in said rural school district and attending said high school, to be computed in the manner provided in the first part of said section 7747 G. C. and to be ascertained by dividing the total expense of conducting said high school, exclusive of permanent improvements and repair, by the average monthly enrollment of all the pupils attending said high school including said non-resident as well as the resident pupils of said village school district.

The question as to what constitutes "permanent improvements and repair" was considered in opinion No. 1718 of this department, rendered to Hon. George W. Porter, prosecuting attorney of Darke county, on June 21, 1916. A copy of said opinion is enclosed.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2009.

AUDITOR OF STATE—BOND AND CERTIFICATE REQUIRED FOR SALE OF GENUINE STEAMSHIP AND RAILROAD TICKETS FOR TRANSPORTATION TO AND FROM FOREIGN COUNTRIES—HOW SAME MAY BE RELEASED AND NEW CERTIFICATE AND BOND FILED—SECTIONS 290 TO 295 G. C. CONSTRUED.

Under the provisions of sections 290 to 295 G. C., inclusive, the auditor of state, if a person holding a certificate desires to surrender same and take out a new certificate, would be authorized to accept old certificate, cancel same and issue new certificate and accept bond to cover new certificate.

COLUMBUS, OHIO, November 9, 1916.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of October 23, 1916, which is to the following effect:

> "In the above matter I am enclosing herewith letter of The American Surety Company of New York, bearing date of the 20th instant, in which I am requested to obtain 'an official ruling' from you on certain questions propounded therein, relative to this company's connection with and liability under certain bonds mentioned therein.
>
> "Our records show that the Mr. Charles Ganitch referred to on November 8th, 1912, filed with the auditor of state, in accordance with sections 290-295 General Code, a bond by the Title Guaranty and Surety Company as surety. On the same date the auditor of state issued certificate No. 306, certifying that Charles Ganitch had filed bond in accordance with the above mentioned statute.
>
> "On May 23, 1916, Mr. Ganitch surrendered the above mentioned certificate and it was cancelled on our records. On this date he filed a bond by the American Guaranty Company and another certificate—No. 452—was issued him, certifying that he had filed bond in accordance with the statute. He still retains this last mentioned certificate.
>
> "Both the above mentioned bonds are on file with this office and are available for your inspection. Certificate No. 306 is also on file here and may be seen. The copy of the bond forwarded by the American Surety Company, which is enclosed herewith, is a true copy of the bond of which it is a copy. We are also enclosing the blank form of bond and certificate which we are using so that you may have them for reference if needed.
>
> "We join with the American Surety Company in the request for an official opinion and shall be grateful for any consideration given the matter."

The letter enclosed with your inquiry and addressed to you by The American Surety Company is to the following effect:

> "The Title Guarany & Surety Company of Scranton, Pennsylvania, became surety for Mr. Charles Ganitch of Akron, by its bond of $5,000.00, dated October 25, 1912, and conditioned for his faithful and honest transmission of moneys, etc., abroad, and the sale of genuine steamship and railroad tickets for transportation to and from foreign countries, etc., under requirements of the General Code, sections 290-295, a copy of such bond is herewith attached. Under the said bond it is our understanding that a certificate was issued by the auditor of state bearing No. 306, dated November 8, 1912,

such certificate in usual form to certify that Mr. Ganitch had complied with the act of the general assembly passed May 1, 1908, upon the subject noted.

"Thereafter The American Surety Company reinsured the liability of The Title Guaranty & Surety Company upon said bond. Mr. Ganitch has now expressed his desire to supersede the bond above noted by another and different bond, given by a different surety and has taken steps to that end. It is our understanding that he has actually filed a new bond, and that the same has been accepted and approved by the auditor of state, and that on the basis thereof a new certificate has been issued to him similar to certificate No. 306 in lieu of the latter.

"Mr. Ganitch now requests the acceptance by our company of his action as constituting evidence to show our liability for him is at an end and has also requested that certain security given to the surety on the bond shall be surrendered.

"There is no stated procedure for cases of this sort which are unusual and infrequent in their occurrence, and if the request is a proper one we desire to ask that an official ruling of the attorney-general be obtained upon the following points:

"First. Has the auditor of state authority to accept the new bond given as above for and in lieu of one originally given?

"Second. If so, has the auditor of state authority then to issue new certificate effective from the date that the new bond became effective?

"Third. In the event of a claim established against the principal upon such a bond, and where he has given two or more different bonds, each covering a part of the total period during which he has been acting as ticket agent and foreign banker, is any liability which may exist against the principal on the bond and which may consequently be chargeable against the surety to be recovered under the bond in force at the time of commission of the wrongful act, or is the liability to be recovered under bond in force at the time of discovery of the act, or may recovery be had against either or both of the sureties?

"Fourth. Under a bond of the sort above described, at what time does liability on the part of the surety cease, so that no action can be maintained against such surety for liability under its bond?"

Copies of the certificate and bond furnished to us by you are as follows:

"CERTIFICATE.

"State of Ohio.

"Department of Auditor of State.

"To All Whom it may Concern:

"THIS IS TO CERTIFY that_____of the city of_____county of_____and doing business at_____street in said city, has complied with the provisions of an act of the general assembly of the state of Ohio, passed May 1, 1908, for the regulating of the taking of deposits by certain persons, firms and corporations, for transmission to a foreign country and for the regulating of the selling of steamship or railroad tickets for transporation to or from foreign countries.

"WITNESS my hand and seal of office at Columbus, Ohio, this_____day of_____ in the year of our Lord, one thousand nine hundred and_____

"_____

"Auditor of State."

"BOND.

"State of Ohio.

"KNOW ALL MEN BY THESE PRESENTS:

"That we_____residing at _____street_____doing business at _____street_____, as principal, and _____ as surety_____, are hereby held and firmly bound unto the STATE OF OHIO, in the just and full sum of FIVE THOUSAND DOLLARS, for the payment whereof well and truly to be made, we bind ourselves, and each of us, our heirs, executors, administrators, successors and assigns, and each of them firmly by these presents.

"THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That, whereas, the said_____is engaged in the business of selling steamship or railroad tickets for transportation to or from foreign countries and in the business of receiving deposits of money for the purpose of transmitting the same, or the equivalent thereof, to foreign countries.

"NOW, THEREFORE, If the said_____shall faithfully and honestly hold and transmit any money, or the equivalent thereof, which shall be delivered to_____for transportation to a foreign country, or if such steamship or railroad tickets for transportation to or from foreign countries, so sold or offered for sale by_____ shall be genuine and valid, or if_____shall faithfully and honestly perform both such obligations, if engaged in both businesses, then this obligation shall be void, otherwise to be and remain in full force and effect.

"WITNESS our hands and seals this_____day of_____ 191____"

The statutes covering the matter are sections 290 et seq. of the General Code. Section 290 G. C. provides as follows:

"No person, firm or corporation shall engage in selling steamship or railroad tickets for transportation to or from foreign countries, or in the business of receiving deposits of money for the purpose of transmitting the same, or the equivalent thereof, to foreign countries, until it has obtained from the auditor of state a certificate of compliance with the provisions of the two sections next following. The certificate shall be conspicuously displayed in the place of business of such person, firm or corporation."

Section 291 G. C. provides as follows:

"Such person, firm or corporation shall make, execute and deliver a bond to the state of Ohio in the sum of five thousand dollars, conditioned for the faithful holding and transmission of any money, or the equivalent thereof, delivered to it for transmission to a foreign country, or conditioned for the selling of genuine and valid steamship or railroad tickets for transportation to or from foreign countries, or both if to be engaged in both of such businesses."

Section 292 G. C. refers to the execution and filing of the bond and further provides:

"Upon the relation of any party aggrieved, a suit to recover on such bond may be brought in a court of competent jurisdiction."

My predecessor, Hon. Timothy S. Hogan, in an opinion rendered to you under date of July 12, 1913, Annual Report of the Attorney-General for the year 1913 at page 142, reached the conclusion that a surety on a bond given for the purposes under consideration, since the statutes do not prescribe the length of time for which the certificate shall be issued, could at any time, on reasonable notice, be released from the bond. The bond is to cover the proper discharge of the authority contained in the certificate. The certificate not being limited as to time would be continuous and it would seem to me that the only way a certificate under such statutes could be cancelled would be by the return thereof to the auditor of state, since under the provisions of section 2901 G. C. the certificate is required to be conspicuously displayed in the place of business. Upon the return of the certificate the authority of the person named therein to transact the business would terminate and the bond given for faithful performance would not cover any transaction after the return of such certificate.

In answer to your first question, as to whether the auditor of state has the authority to accept a new bond in lieu of one already on file without the surety requesting release from the old bond, I am of the opinion that the auditor of state would not be authorized to accept a new bond on the certificate already issued, but that if the person holding the certificate desires to surrender the same and take out a new certificate, said auditor would be authorized to accept the old certificate and cancel same and issue a new certificate, and accept a new bond to cover the new certificate.

The above answer effectually disposes of your second question as to whether the auditor of state has authority to issue a new certificate effective from the date the new bond becomes effective.

You ask in your third question as to the liability of the sureties in the event a claim is established against a principal where different bonds have been given, each covering a part of the total period during which the principal has been acting as ticket agent and foreign banker, the specific question being whether the liability which may exist against the principal upon the bond and consequently chargeable to the surety is to be recovered under the bond in force at the time of the commission of the wrongful act or to be recovered under the bond in force at the time of the discovery of the act or against either or both.

Since under the provisions of section 292 G. C. the bond is for the benefit of persons aggrieved and suit on such bond is to be brought on the relation of such party aggrieved, I do not feel that any opinion should be expressed on this matter by me, since it would be a question between private parties. However, I am of the opinion that section 11226 G. C. would apply, said section reading as follows:

> "An action on the official bond, or undertaking of an officer, assignee, trustee, executor, administrator, or guardian, or on a bond or undertaking given in pursuance of statute, shall be brought within ten years after the cause thereof accrued."

The above section likewise answers your fourth question as to the time the liability on the part of the surety ceases, so that no action can be maintained against such surety for liability under its bond.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2010.

TAXES AND TAXATION—SHARES OF CAPITAL STOCK OF CLEVELAND & PITTSBURGH RAILROAD COMPANY ARE NOT TAXABLE IN OHIO.

Shares of the capital stock of the Cleveland & Pittsburgh Railroad Company are not taxable in this state.

COLUMBUS, OHIO, November 9, 1916.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—In your letter of October 19th you request my opinion as follows:

> "In assessing the property of the Standard Oil Co. of Ohio, the commission is confronted with the statement that the shares of capital of the Cleveland & Pittsburgh Railroad Co. are not taxable when held by residents of this state. The enclosed affidavit of Mr. J. E. Kloss, secretary and treasurer of the Cleveland & Pittsburgh Railroad Co., has been filed with the commission and sets out the manner of the incorporation of the company.
>
> "The commission requests your opinion as to whether or not the stock of this company when held by residents of this state is taxable. The commission calls your attention to the fact, which is not shown in the affidavit, that the Cleveland & Pittsburgh Railroad Co. has not in the past paid any franchise tax upon its capital stock and that the question as to the liability of the company to pay franchise taxes is now pending in the courts."

From your statement of facts it appears that the Standard Oil Company of Ohio owns a number of shares of the capital stock of the Cleveland & Pittsburgh Railroad Company. From the statement of facts set forth in the enclosed affidavit of Mr. Kloss, secretary and treasurer of said railroad company, it appears that the Cleveland and Pittsburgh Railroad Company was organized as an Ohio corporation under authority of an act of the general assembly of Ohio passed March 14, 1836, 34 O. L. 576; that in connection with extensions into the state of Pennsylvania, the Cleveland & Pittsburgh Railroad Company was also incorporated as a Pennsylvania corporation, under an act of the legislature of that state, passed April 18, 1853, laws of Pennsylvania, 1853, page 473; that prior to December 1, 1871, said corporation owned and operated its lines, but on said date a lease executed on October 25, 1871, became effective, under which the Pennsylvania Railroad Company took possession of, and has since operated, all of the property of said company, which lease is for the term of nine hundred and ninety-nine years; that the main line of railroad of said corporation consists of an aggregate of 205.14 miles, including branches; that of this mileage there is in the state of Pennsylvania 14.70 miles, leaving in the state of Ohio 190.44 miles, or 92.83 per cent. of the total main track mileage owned by the corporation; that the total mileage of all tracks, including double tracks and side tracks owned by the corporation, is 722 miles; and of this there is in the state of Pennsylvania 54.80 miles, leaving in Ohio 667.20 miles, or 93.79 per cent. of the total mileage of all tracks; that of all the other property owned by the company, an amount greatly in excess of two-thirds is within the state of Ohio; that under the terms of the lease above referred to, the lessee pays taxes in Ohio upon all of the property of the Cleveland & Pittsburgh Railroad Company lying therein; and upon the portion of the property in the state of Pennsylvania said lessee pays taxes in that state. It is further stated by Mr. Kloss that said lessee also pays all other taxes required to be paid by the laws of the state of Ohio in connection with its operation of the railroad property of said the Cleveland & Pittsburgh Railroad Company.

As stated by Mr. Kloss, the Cleveland & Pittsburgh Railroad Company was organized as an Ohio corporation pursuant to the authority conferred by an act of the general assembly passed March 14, 1836, 34 O. L. 576, and entitled "An act to incorporate the Cleveland & Pittsburgh Railroad Company."

Section 11 of said act provides in part that

> "The said corporation shall be, and they are hereby vested with the right to construct a double or single railroad or way from Cleveland, in the county of Cuyahoga, on the most direct and least expensive route, to some point in the direction of Pittsburgh, on the state line between Ohio and Pennsylvania, or on the Ohio river."

Section 2 of an act of the general assembly, passed March 11, 1845, 43 O. L.401, entitled "An act to revive and amend the act entitled 'An act to incorporate the Cleveland & Pittsburgh Railroad Company,' passed March 14, 1836," provides:

> "The railroad, mentioned in the above recited act, shall commence at a convenient place in the city of Cleveland, in the county of Cuyahoga, and thence on the most direct practicable and least expensive route to the Ohio river, at the most suitable point; and if the said railroad shall not be commenced in five years from the passage of this act, and if said railroad shall not be completed within twelve years from the commencement thereof, then this act shall be null and void; provided that said company may unite said railroad, by them constructed, at some point southeasterly of the city of Cleveland, with any other railroad, authorized by law, which may be constructed on the easterly side of the Cuyahoga river, leading to Cleveland, and to make such arrangements as to the division of labor and earnings as the directors of the companies owning such united railroads may deem equitable."

Section 3 of said act provides:

> "That it shall be lawful for said corporation to commence the construction of said railroad or way, and enjoy all the powers and privileges conferred by this act, and the act hereby revived, as soon as the sum of fifty thousand dollars shall be subscribed to said stock (referred to in section 1 of the act), and the payment thereof considered safe and secure."

Section 4 of the act passed February 21, 1850, 48 O. L. 248, entitled "An act to authorize The Cleveland & Pittsburgh Railroad Company to increase their capital stock and for other purposes" provides:

> "Said company is further authorized to extend its road, under power obtained from the state of Pennsylvania, to the city of Pittsburgh in said state, or any point in the direction of Pittsburgh at which this road may be connected with any other road leading from said city, and to increase its capital to the amount necessary for the construction and equipment of such extension; provided, that the aggregate amount of the capital stock of said company shall not exceed four millions of dollars."

Section of the act of the general assembly of Pennsylvania, referred to by Mr. Kloss, passed April 18, 1853, laws of Pennsylvania 1853, page 473, entitled "An act to incorporate the Cleveland & Pittsburgh Railroad Company" provides as follows:

> "Section 1. Be it enacted by the senate and house of representatives of the commonwealth of Pennsylvania in general assembly met, and it is hereby

enacted by the authority of the same, That the full and entire assent of this commonwealth be and the same is hereby given to all and each of the provisions contained in an act of the general assembly of Ohio, passed March fourteenth, one thousand eight hundred and thirty-six, entitled 'An act to incorporate the Cleveland & Pittsburgh Railroad Company,' and also an act of said general assembly of Ohio, passed March eleventh, one thousand eight hundred and forty-five, entitled 'An act to revive and amend the act entitled "An act to incorporate the Cleveland and Pittsburgh Railroad Company," ' and also an act authorizing said company to extend their road into the state of Pennsylvania, and the said acts of the general assembly of the state of Ohio are hereby adopted, ratified and confirmed and enacted into laws of this commonwealth, and all and each of the provisions, conditions and restrictions thereof, as fully and effectually as if the same were enacted section by section, so far as the same can apply in this commonwealth, reserving always to this commonwealth the same and like rights and powers in all respects, in and over that part of the contemplated railroad which may be in the state of Pennsylvania, as has been reserved and provided in the said recited acts of the state of Ohio in and over that part of the said railroad which may be in the state of Ohio, and the said acts shall be in full force and effect, according to the true intent and meaning thereof, wheresoever the same is applicable, as well within as without this commonwealth, to incorporate the Cleveland & Pittsburgh Railroad Company for all, every object and purpose therein set forth and provided, and all the acts and proceedings of the corporators, stockholders and directors of the said Cleveland & Pittsburgh Railroad Company, which have been legally done in pursuance of the above recited acts of the state of Ohio, shall have the same validity, force and effect, in this state and elsewhere, as if they had been subsequent to the passage of this act, and in pursuance thereof."

Section 5 of said act provides:

"That said company is hereby authorized to increase the capital stock of their company to an amount equal to the cost of the construction and equipment of their road within the state of Pennsylvania."

Section 7 of the act provides:

"That said company is hereby authorized to extend their railroad into this state from the point where it may cross the west line of this state, in the county of Beaver, and to continue it up the valley of the Ohio river and connect with any railroads running in the direction of or terminating in Pittsburgh."

and section 8 of the act provides:

"That two of the directors of said Cleveland & Pittsburgh Railroad shall be citizens of Pennsylvania."

In view of the above legislation I do not think that it can be said that the Cleveland & Pittsburgh Railroad Company, organized as an Ohio corporation under the act of 1836 and the acts of the general assembly of Ohio amendatory thereto, by availing itself of the authority conferred by the legislature of Pennsylvania to extend its line into that state, ceased to be an Ohio corporation within the meaning of the pro-

vision of section 192 G. C. hereinafter set forth. In the case of Lander v. Burke, 65 O. S. 532, it was held that:

> "A corporation organized under the laws of this state does not cease to be such, nor become a foreign corporation, by accepting from another state or country a grant of the privilege of owning and using real and other property therein necessary or convenient in carrying on its corporate business." (See second branch of syllabus.)

While said company was incorporated prior to the adoption of the constitution of 1851, it was held in the case of C. H. & D. Railroad Company v. Cole, 29 O. S. 126, (first branch of syllabus) that:

> "Railroad companies incorporated prior to the adoption of the constitution of 1851, and which avail themselves of the twenty-fourth section of the general corporation act of 1852 (S. & C. Stat. 281), either by taking leases of the roads of other companies, or by leasing their own roads to other companies, are to be regarded as thereby accepting a 'provision' of said act, within the meaning of its seventy-first section, and relinquishing all rights under their charters inconsistent with the provisions of said act."

In entering into the lease hereinbefore referred to the Cleveland & Pittsburgh Railroad Company and the Pennsylvania Railroad Company acted under authority of the provision of said section 24 of the act of 1852 now found in section 8807 G. C., the first part of which is as follows:

> "A company may lease or purchase any part or all of a railroad constructed, or in course of construction by another company, if the lines of their roads are continuous or connected, and not competing, upon terms agreed upon between the companies."

The general authority conferred on a railroad company to extend its lines into another state is now found in section 8756 G. C. which provides as follows:

> "A company organized for the purpose of constructing a railroad to the boundary line of this state, may extend its road into and through an adjoining state under the regulations which may be prescribed by such state. The rights, powers and privileges of the company over the extension, in the construction and use of its road, and in controlling the property and applying the money and assets thereon, shall be the same as if the road were built wholly within this state."

Section 5372 G. C. as originally enacted in 56 O. L. 175, provided in part that,

> "No person shall be required to list for taxation any shares of the capital stock of a company, the capital stock of which is taxed in the name of such company."

While this section has been amended by subsequent legislation and as now in force is found in 106 O. L. 247, the provision of said section above quoted has never been changed, the language of said provision as now in force being identically the same as that found in the original enactment.

In interpreting this provision the courts have defined the corporate stock of a corporation as consisting of the money and property which has been subscribed and paid in, in order to carry on the purpose of such corporation.

Jones v. Davis, 35 O. S. 474;
Lee v. Sturges, 46 O. S. 153;
Hubbard v. Brush, 61 O. S. 252;
Lander v. Burke, 65 O. S. 532;
Sturges v. Carter, 114 U. S. 511.

In the case of Jones v. Davis, supra, the second branch of the syllabus provides:

> "The personal property which a corporation, organized and doing business under the laws of this state, was required to list for taxation by section 11 of the act of May 11, 1878, 75 O. L. 436 (section 5404 G. C.), embraced the capital stock of the corporation, and such being the case, an owner of shares of the capital stock of such company was not required to list his shares for taxation."

It was further held by the court in the case of Lander v. Burke, supra, that investments by residents in this state in the shares of stock of a corporation, whether domestic or foreign, are not exempt from taxation under the above provision of section 5372 G. C. except when the property of the corporation is taxed in its name in this state and that said provision of said statute does not therefore authorize the exemption of stock in an Ohio corporation, the property of which is practically all situated in the Dominion of Canada and is taxed there and not in Ohio.

While it was held by the court in the case of Lee v. Sturges, and Insurance Co. v. Ratterman, 46 O. S. 153, that the above exemption provided for in section 5372 G. C. does not apply to shares of stock in a corporation which is formed by the consolidation of an Ohio corporation with corporations of other states, even though such consolidated corporation pays taxes in Ohio upon its property which is situated in said state. The Cleveland & Pittsburgh Railroad Company is not a corporation resulting from such a consolidation and the holding in said cases would not apply to the shares of the capital stock of said company.

It appears that by the terms of the lease above referred to the lessee company pays taxes in Ohio upon all the property of the Cleveland & Pittsburgh Railroad Company lying therein. It might well be argued, however, in view of the holding of the court in the case of Lander v. Burke, supra, that inasmuch as a part of the property of the Cleveland & Pittsburgh Railroad Company is located in the state of Pennsylvania and is returnable for taxation in that state, the shares of stock in said company are not exempted from taxation by the above provision of section 5372 G. C. were it not for the provision of the first part of section 192 G. C. that:

> "No person shall be required to list for taxation a share of the capital stock of an Ohio corporation,"

which provision was enacted subsequent to the time said decision was rendered. (97 O. L. 496.)

This provision of section 192 G. C. is general in its terms and exempts the owner of shares of stock in an Ohio corporation from the duty of returning the same for taxation regardless of whether all the property of said corporation is located in this state and returnable for taxation here in the name of the corporation.

Inasmuch as the Cleveland & Pittsburgh Railroad Company, organized under authority of the act of 1836 and the subsequent acts of the general assembly of Ohio amendatory thereto, has continued to exercise its right to exist as a corporation under the laws of Ohio, I am of the opinion that said company is an Ohio corporation within the purview of the above provision of section 192 G. C. It was so treated by counsel and by the courts in the case of State v. the Cleveland & Pittsburgh Railroad Com-

pany, 2 O. App. Rep. 228, which involved the question of the liability of said railroad company to pay the fee of one-tenth of one per cent. upon the outstanding capital stock of said company for the years 1902 to 1907, inclusive, under section 1 of the act of the general assembly, commonly known as the Willis law, as enacted in 95 O. L. 124, and as in force during said years.

In view of the foregoing, I am of the opinion in answer to your question, that shares of the capital stock of the Cleveland & Pittsburgh Railroad Company are not taxable in this state.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2011.

WORKMEN'S COMPENSATION ACT—NO AUTHORITY OF LAW FOR INDUSTRIAL COMMISSION TO REQUEST STATE HIGHWAY DEPARTMENT TO WITHHOLD PAYMENT OF MONEY EARNED BY AN EMPLOYER, TO PAY AN AWARD ALLOWED BY SAID COMMISSION—HOW MONEY MIGHT BE OBTAINED.

1. *There is no authority of law for industrial commission to request the state highway department to withhold the payment of money earned by an employer, to pay an award for compensation allowed by said commission under and by virtue of the provisions of section 27 of the Ohio workmen's compensation act, or section* 1465-74 *G. C.*, 103 *O. L.* 82.

2. *Money in the possession of the state highway department due an employer might be reached by proceedings in court after a judgment in favor of an employe, if the money were still in the hands of the department, provided that the highway department has no claim against the fund.*

COLUMBUS, OHIO, November 9, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your letter of October 27, 1916, requesting my opinion is before me and is as follows:

> "The commission now has pending before it the claim of one Albertus B. Swank, filed under the provisions of section 27 of the compensation act, on account of an inquiry sustained by said Swank while in the employ of Robbing & McDaniels, contractors, of Springfield, Ohio.
>
> The proof on file in the claim has a tendency to indicate that the injury sustained by the claimant will cause a permanent and total disability.
>
> "The commission, under date of October 20, held a hearing in the claim and at that time found that claimant's injury occurred in the course of employment and ordered the employer to pay to him compensation at the rate of $12.00 per week, beginning July 8, 1916, until March 31, 1917, at which time the case was continued for a further hearing.
>
> "It appears from the records that counsel for the employer appeared before the commission and stated that the employer herein is bankrupt. However, the state highway department is now holding certain money earned by the employer under a contract for the construction of a public highway in Clark county. This money is being held at the request of the commission

in order that the funds might be provided for the payment of such award as may be allowed to claimant in the above numbered claim. (Claim No. 631.)

"We request your opinion on this matter as to the method of proceedure to be followed by the commission in obtaining for the claimant herein from the fund now in the hands of the state highway department such amount of compensation as may be due to him under the provisions of the compensation act."

The award of compensation in this claim has been made under and by virtue of the provisions of section 27 of the Ohio workmen's compensation law, or section 1465-74 of the General Code (103 O. L. 82.) In your letter you state that:

"The proof on file in the claim has a tendency to indicate that the injury sustained by the claimant will cause a permanent and total disability.

"The commission, under date of October 20th, held a hearing on the claim and at that time found that claimant's injury occurred in the course of employment and ordered the employer to pay him compensation at the rate of $12.00 per week, beginning July 8, 1916, until March 31, 1917, at which time the case was continued for a further hearing."

From this quotation it appears that there is great likelihood that the claimant will sustain a permanent and total disability and that additional compensation will be allowed the claimant on March 31, 1917 if the same condition exists as to the disability on that date.

This department, on December 3, 1915, rendered an opinion to your commission, it being opinion No. 1066, and found in Vol. III, page 2322 of the Opinions of the Attorney-General for the year 1915, upon the question of the right of your commission to commence an action for the recovery of compensation in claims arising under section 27, where the entire amount of the award had not been determined. We held in that opinion that the action should not be commenced until the entire award had been determined. This holding was based on the principle that a single cause of action cannot be divided so as to sustain two or more actions. I quote from the conclusion of the opinion above referred to as follows:

"A civil action should not be commenced for the collection of a partial amount of the award already found due, but that the action should be for the *full amount* due the employe by reason of his said injuries."

Therefore, no action should be commenced in this claim until after March 31, 1917, or until such time as the total amount of compensation due the employe is determined and fixed by your commission, for the reason that if an action is instituted for the recovery of a partial award we might well be met with the objection on a subsequent action to recover further compensation that a recovery had been made in a former suit and that the question of recovery on an allowance by your commission had been adjudicated in a former action.

Your letter further states that:

"It appears from the records that counsel for the employer appeared before the commission and stated that the employer herein is bankrupt. However, the state highway department is now holding certain money earned by the employer under a contract for the construction of a public highway in Clark county. This money is being held at the request of the commission, in order that the funds might be provided for the payment of such award as may be allowed to claimant in the above numbered claim."

There is no authority of law for your commission to request the state highway department to withhold the payment of money earned by the employer in this claim. Such a request, if complied with, is in effect a garnishment.

In the absence of legislation authorizing same the request of your commission to the state highway department to withhold earned money due the employer would be without warrant of law. The money now in the possession of the state highway department due the employer in question might be reached by proceedings in court after a judgment in favor of the employe, if the money were still in the hands of the department at that time; provided always that the highway department has no claim against the fund.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2012.

SECRETARY OF STATE—ADVISED NOT TO FILE PROPOSED AMENDMENT TO ARTICLES OF INCORPORATION OF LIMA COLLATERAL LOAN COMPANY—CORPORATION ORGANIZED UNDER SPECIAL ACT—PROPOSED AMENDMENT CHANGES ORIGINAL PURPOSE.

Secretary of state advised to refuse to file proposed amendment to the articles of incorporation of The Lima Collateral Loan Company because said corporation is organized under a special act and because the proposed amendment substantially changes the purpose of its original organization.

COLUMBUS, OHIO, November 10, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of November 3, 1916, requesting my opinion as follows:

> "We are submitting to your department certificate of amendment to the articles of incorporation of 'THE LIMA COLLATERAL LOAN COMPANY.'
>
> "The aforesaid incorporation filed articles of incorporation under section 9857 of the General Code, which reads as follows:
>
> " 'Corporations may be organized for the purpose of making loans on pledges of goods and chattels and upon mortgage thereof; but they shall not receive money on deposit, engage in banking, nor make loans upon security other than herein is provided. The names of such corporations shall begin with the word "The" and end with the words "Collateral Loan Company." '
>
> "The aforesaid certificate changes the name of the corporation and also enlarges the corporate powers.
>
> "The purpose clause of 'THE LIMA COLLATERAL LOAN COMPANY' reads as follows:
>
> " 'Said corporation is formed for the purpose of making loans upon pledges of goods and chattels and upon mortgages on goods and doing all things incident thereto.'
>
> "We kindly request an opinion upon the question as to whether the submitted certificate of amendment should be filed in this department."

The Lima Collateral Loan Company, by the certificate of amendment attached

to your letter, seeks to amend its articles of incorporation in two particulars, which I quote from the certificate:

> "First. The corporate name be changed from The Lima Collateral Loan Company to The Buckeye Finance Company;
>
> "Second. That the corporate powers of this company be amended to read as follows:
>
> " 'Said corporation is formed for the purpose of buying, loaning money upon, selling, transferring, assigning, discounting, borrowing money upon and pledging as collateral, and otherwise dealing either as principal, agent or broker in bills of lading, warehouse receipts, evidences of deposit and storage of personal property, bonds, stocks, promissory notes, commercial paper, accounts, invoices, bills of exchange, choses in action, interest in estates, contracts and mortgages on real or personal property, pledges of personal property and other evidences of indebtedness of persons, firms and corporations, and own, hold and convey such real estate as my be necessary in the operation of its business and doing all things incidental thereto.' "

Section 9857 of the General Code, quoted in your letter, and the six succeeding sections of the General Code constitute an act of the general assembly of Ohio, found in 97 Ohio Laws, page 134, and authorize the organization, limit the powers and prescribe the duties of a particular class of corporations designated as "Collateral Loan Companies" which latter term must by the provisions of said section 9857 constitute a part of the name of every such corporation.

It appears that The Lima Collateral Loan Company was organized under the provisions of this special act and for the purpose therein authorized.

The only authority of Ohio corporations to amend their articles of incorporation is found in section 8719 of the General Code, which is as follows:

> "A corporation organized under the general corporation laws of the state, may amend its articles of incorporation as follows:
>
> "1. So as to change its corporate name—but not to one already appropriated, or to one likely to mislead the public.
>
> "2. So as to change the place where it is to be located, or its principal business transacted.
>
> "3. So as to modify, enlarge or diminish the objects or purposes for which it was formed.
>
> "4. So as to add to them anything omitted from, or which lawfully might have been provided for originally in such articles. But the capital stock of a corporation shall not be increased or diminished, by such amendment, nor the purpose of its original organization substantially changed."

It will be observed that the provisions of this section apply only to corporations "organized under the general corporation laws of the state" and that even as to such a corporation the power to substantially change the purpose of its original organization is specifically denied.

The Lima Collateral Loan Company is not a corporation organized under the general corporation laws of Ohio, but is organized under the special act referred to. Further, the proposed amendment clearly effects a substantial change in the purpose of its original organization.

I therefore advise you that you should not file the certificate of amendment referred to in your letter.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

2013.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, FRANKLIN TOWNSHIP RURAL SCHOOL DISTRICT.

COLUMBUS, OHIO, November 10, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Franklin township rural school district in the sum of $4,000.00 for the purpose of erecting and equipping an elementary grade school building, being eight bonds of $500.00 each."

I have examined the transcript of the proceedings of the board of education of Franklin township rural school district; also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of the said district.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2014.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, CEDARVILLE TOWNSHIP RURAL SCHOOL DISTRICT, GREENE COUNTY, OHIO.

COLUMBUS, OHIO, November 10, 1916.

Industrial Commission of Ohio, Columbus. Ohio.

GENTLEMEN:—

"RE:—Bonds of Cedarville township rural school district, Greene county, Ohio, in the sum of $6,000.00, being twelve bonds of five hundred dollars each."

I have examined the transcript of the proceedings of the board of education and other officers of Cedarville township rural school district relative to the above bond issue, and I find the same regular and in accordance with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with law and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of Cedarville township rural school district.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2015.

SCHOOL LANDS—NO AUTHORITY FOR GRANTNG OF AN EASEMENT ON SUCH LANDS TO PIPE LINE COMPANY—PURPOSE LAYING PIPE LINE—THE BUCKEYE PIPE LINE COMPANY.

There is no authority in law permitting of the granting of an easement on school lands to a pipe line company for the purpose of laying a pipe line.

COLUMBUS, OHIO, November 10, 1916.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of a letter from Mr. C. F. McCrum, right of way agent of The Buckeye Pipe Line Company, whose address is Lima, Ohio, relative to a certain matter which I consider of such importance as that an opinion should be rendered and consequently I am rendering an opinion to you thereon.

The matter concerning which Mr. McCrum writes is as follows:

> "The Buckeye Pipe Line Company is about to lay a crude oil pipe line across lands supposedly owned by the Woodard Brothers and Leroy Woodard, in the southwest quarter Sec. 16, and the north east quarter Sec. 16, Starr township, Hocking county, Ohio, to care for the oil production in and around that section of the Hocking county oil field.
>
> "In going over some correspondence which I find in the office of Mr. Bates, our secretary,—correspondence between your office and his—in regard to certain oil rights on properties owned by these Woodards, I find there is a question as to the ownership of surface rights and it is because of this I write you.
>
> "Will a right of way for this crude oil line, signed by the Woodards, be sufficient for our purpose or will the state of Ohio, by yourself as attorney-general, have to grant this right to us, and if so, will you advise me as to the procedure.
>
> "I understand the Woodards have a 99 years' lease of surface rights. How much longer this right has to run I am unable to state. At the expiration of that time, providing the oil line is still in use, to whom would the title revert? It is hardly possible that oil will be produced from this land so long a period, but should this happen and our line remains in use, we would like to be protected after that time."

From the above letter I assume that what is desired by the company is an easement in the lands mentioned for the purpose of laying and maintaining a pipe line.

While I do not have the papers before me, yet I know that as a matter of fact the Woodards have an agricultural lease on these lands, the said lands being school lands. A lease of school lands such as acquired by the Woodards is solely for agricultural purposes and for no other. An easement in lands creates an interest in the lands and must be obtained from the owner thereof. Consequently, an attempt by the Woodards to grant an easement in the lands in question would not be sufficient authority for the laying of the pipe line. The title to these school lands is vested in the state of Ohio in trust for the beneficiaries created by the trust.

By an act passed by the legislature in 1914, 104 O. L. 224, the auditor of state was authorized to lease for oil, gas or other minerals any unsold portions of section sixteen or section twenty-nine of original surveyed townships, upon such terms and for such time as will be for the best interest of the beneficiaries. This act was sub-

sequently amended at the special session held in 1914, see 105 Ohio Laws, page 6. By that section the auditor of state is authorized to lease for oil, gas, coal, or other minerals, any unsold portions of section sixteen and section twenty-nine, and he is further authorized to grant "to such lessee the right to use so much of the surface of such land as may be reasonably necessary to carry on the work of prospecting for, extracting, piping, storing, and removing all oil or gas * * *; provided, however, that such lease shall require the lessee to pay all damage to the holder of the lease holding under a lease from the trustees of the original township." This section, however, only authorized the auditor of state to grant the right of piping oil to the lessee who is producing the oil and does not extend the right to the auditor of state to grant an easement in any of the lands in question to a company for the sole purpose of laying a pipe to transport oil.

Answering the question raised by the letter hereinbefore set out, therefore, I would state that there is at present no authority in any one to grant an easement to a pipe line company for the purpose of laying down and maintaining a pipe line across the lands in question, and there will not be any such authority until the legislature has granted the same.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2016.

JUSTICE OF PEACE—COSTS—IF JUDGMENT OF CONVICTION IN FISH AND GAME CASE IS REVERSED IN COURT OF COMMON PLEAS, JUSTICE IS ENTITLED TO HIS COSTS—SEE SECTION 1404 G. C.

If a judgment of conviction in a fish and game case by a justice of the peace is reversed in the court of common pleas the justice is entitled to his costs under section 1404 *G. C.*

COLUMBUS, OHIO, November 10, 1916.

HON. P. A. SAYLOR, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—I am in receipt of your letter of November 1, 1916, wherein you submit for opinion the following:

> "On the 12th day of April, 1916, C. C. Acton, deputy state game warden, filed a complaint in the court of L. T. Stephens, justice of the peace in and for Washington township, Preble county, Ohio, charging Forest Crismer with having in his possession a devise for catching fish other than a bait and line with hook and lure. Trial was had in the court of the justice of the peace and conviction secured. Later the case was taken to the court of common pleas of Preble county, Ohio, in proceedings in error and the decision of the justice was reversed.
>
> "The justice now puts in his criminal cost bill under section 1404 of the General Code of Ohio, and asks the county auditor of Preble county, pay him the costs in these proceedings. The county auditor, under my instructions, has refused to pay, there being some doubt in my mind as to the proper construction of 1404. I now ask you whether this justice is entitled to his costs under the statement of the case already given, from the county or the state."

Section 1404 G. C. provides as follows:

"A person authorized by law to prosecute a case under the provisions of this chapter shall not be required to advance or secure costs therein. If the defendant be acquitted or discharged from custody, or if he be convicted and committed in default of payment of fine and costs, such costs shall be certified, under oath by the justice to the county auditor who shall correct all errors therein and issue his warrant on the county treasurer, payable to the person or persons entitled thereto."

Said section was originally enacted in 99 O. L., page 368, being the second paragraph of section 17, providing as follows:

"In all cases prosecuted under the provisions of this act, no costs shall be required to be advanced or be secured by any person or persons authorized under the law to prosecute such cases; and if the defendant be acquitted or discharged from custody, by nolle or otherwise, or if he be convicted and committed in default of paying fine and costs, all costs of such case shall be certified by said justice of the peace under oath to the county auditor, who, after correcting any errors in the same, shall issue a warrant on the county treasury, in favor of the person or persons to whom such costs and fees shall be paid."

After the justice of the peace had pronounced judgment of conviction in the instant case the matter was taken on error to the court of common pleas and I assume that a bond was given to stay the execution of the sentence. The court of common pleas having reversed the decision of the justice of the peace undoubtedly a mandate to that effect was sent to the justice of the peace, provided of course, no further proceedings were taken in the court of common pleas. It therefore became the duty of the justice of the peace to discharge from custody the person charged with the offense, and upon the justice discharging the defendant from custody he is authorized to certify the costs to the county auditor for payment.

Specifically answering your question therefore, I am of the opinion that the justice in question is, under the provisions of section 1404 G. C. in the instant case, entitled to his costs from the county.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2017.

COUNTY CHILDREN'S HOME—CONTRACT FOR ELECTRIC CURRENT MADE BY OHIO LIGHT AND POWER COMPANY WITH COUNTY COMMISSIONERS IS LEGAL—KNOX COUNTY.

The charge for electric current made by the Ohio Light & Power Company to the commissioners of Knox county for furnishing such current to the children's home of said county according to the terms of the contract herein set forth, is not prohibited by the provisions of section 614-2 et seq. G. C. as unjust and unreasonable and that said contract is legal.

COLUMBUS, OHIO, November 11, 1916.

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

GENTLEMEN:—Your letter of September 23rd is as follows:

"In your annual report for the year 1915, Vol. 2, page 1032, we find an opinion rendered by you to Hon. Chas. L. Bermont, Mt. Vernon, Ohio, in which you held that the county commissioners are without authority to enter into a contract with an electric company to construct at county's expense electric line from company's plant to children's home.

"We enclose herewith copy of a contract that the commissioners of Knox county did enter into with an electric company to furnish electricity to the children's home, and we would ask whether said contract is a legal one. We are also sending you a letter of our examiner in regard to said contract as he finds it."

The copy of the contract enclosed in your letter reads as follows:

"CONTRACT FOR ELECTRICITY AT CHILDREN'S HOME.

"The undersigned requests The Ohio Light & Power Company to supply electric current upon the premises children's home, Coshocton road, owned by Knox county and occupied as children's home.

"Applicant agrees to pay said company monthly for the service rendered at schedule No. 4 as appears in published rate schedule of said company, which rate schedule and rules and regulations appearing therein are made part of this application.

"No change shall be made in the equipment or in the type, size or number

of lamps or other appliances connected. The current shall not be used except for the equipment scheduled by the company's inspectors, no other electric service shall be used in connection with the equipment supplied hereunder without previous written consent of The Ohio Light and Power Company. The service rendered hereunder shall continue for a term of 120 months and continuously thereafter until terminated by either party upon thirty days' written notice to the other party. The undersigned guarantee the monthly consumption of current hereunder shall be equal to at least $20.20, and acknowledges the receipt of a copy of the rate schedule, rules and regulations referred to and the same have been read and are understood. It is mutually agreed that at the end of ten years from date of this contract, the county has the privilege of renewing same at the same rates allowed other consumers in Mt. Vernon.

"It is further agreed that the minimum herein specified covers a consumption of 188 kilowatt hours, approximately. The company agrees to keep in good repair the line supplying the children's home. Rate 6 cents per K. W. H., less 10 per cent. for prompt payment.

"Signed:

"A. J. DARRAH,
"*Superintendent.*

"JNO. EARLEYWINE,
"L. BRITTON,
"T. M. DILL,
"*County Commissioners.*"

At the time the opinion above referred to was rendered to the prosecuting attorney of Knox county, I was informed, as stated in said opinion, that the commissioners of said county were about to abandon the plan of making the contract with The Ohio Light and Power Company, which I held was unauthorized, and had about decided to provide their own lighting system for the new county children's home, as they had found that this would be much less expensive than the plan proposed by the said The Ohio Light and Power Company.

It appeared that said county commissioners, acting under authority and in compliance with the provisions of section 3077 G. C. had submitted to a vote of the electors of said county the question of establishing a county children's home and the issue of bonds or notes of the county to provide funds therefor, and the vote being favorable said commissioners had proceeded to purchase a site and erect buildings thereon for said home under authority of section 3078 G. C.

It was held in said opinion that said commissioners might issue additional bonds for the purpose of securing the necessary funds to provide for the proper lighting of said building, in compliance with the provisions of section 3079 G. C., if, upon submitting the question of said additional issue to a vote of the electors of the county, in the manner provided by section 3077 G. C. as amended 103 O. L. 889, the vote of said electors should be favorable to said additional issue.

It now appears that said commissioners did not choose to avail themselves of this authority for said purpose and you inquire whether the contract as above set forth, made by said county commissioners with said light and power company is legal.

The letter of Mr. Edward J. Ott, your examiner, is in part as follows:

"Am herewith enclosing a copy of the contract between the Ohio Light and Fuel (Power) Company and the county commissioners of Knox county, O., under which said company is supplying the Knox County Children's Home with electric current for lighting. Under this contract said institution pays said company approximately $30.00 per month.

"This seemed an exorbitant amount to pay for electric current for said institution and upon further investigation the following situation was disclosed: It seems that the Ohio Light and Fuel company proposed to furnish current at regular rates for lighting the children's home, if they were permitted to construct a line from the city of Mt. Vernon to said home at the expense of the county, over which to transmit their current to said home.

"In an opinion rendered in this matter to the prosecuting attorney of Knox county, Attorney-General Edward C. Turner holds that county commissioners have no authority in law to enter into such a contract. See Opinions of the Attorney-General of Ohio, Vol. 2, 1915, page 1032.

"Thereupon the Ohio Light and Fuel Company constructed a line to the children's home at its own expense and the county commissioners made the contract here under consideration by the terms of which the county will pay for a term of 120 months an excess rate over and above the regular rate charged other consumers.

"On the face of it this transaction appears only to be a subterfuge because at the end of 120 months the county will have really paid for the construction of said electric line by the excess rate required to be paid under the contract."

Mr. Ott calls attention to Section 2435-1 G. C. which provides:

"The commissioners of any county may, at any time, either before or after the completion of any county building, invite bids and award contracts for supplying such building with light, heat and power, or any of the same, for any period of time not exceeding ten years; but none of the provisions of section fifty-six hundred and sixty of the General Code shall apply to any such contracts."

In view of the above provisions of section 2435-1 G. C. it is evident that the commissioners of Knox county in entering into a contract above set forth sought to avail themselves of the authority conferred by said section.

The right of said county commissioners under said section to invite bids and to award a proper contract for supplying the buildings at the children's home with light, heat and power, or any of the same, can not be questioned.

The Ohio Light and Power Company, being engaged in the business of supplying electricity for light, heat and power purposes to consumers within this state is an electric light company as defined by section 614-2 G. C. and as such is a "public utility" as defined by section 614-2a G. C. Said utility is therefore subject to the provisions of section 614-12 G. C. that

"Every public utility shall furnish necessary and adequate service and facilities which shall be reasonable and just, and every unjust or unreasonable charge for such service is prohibited and declared to be unlawful."

and to the further provisions of sections 614-14 and 614-15 of the General Code

prohibiting rebates and special rates, and the subjecting of any person, firm, corporation or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

The question arises whether the contract above referred to provides a rate for electric current that is prohibited by the foregoing provisions of the statutes.

In answer to my request for additional information I am in receipt of a letter from Hon. Charles L. Bermont, prosecuting attorney of Knox county, under date of October 11, which is as follows:

> "I am in receipt of your letter of October 5, requesting a statement of the facts in connection with the making of the contract with the Ohio Light and Power Company, by the commissioners of this county, for furnishing the Knox County Children's Home with electric current.
>
> "When this home was about ready for occupancy it was necessary that the same be furnished with electric current for lighting and also for the operation of a motor used in connection with the heating and ventilating system.
>
> "The home is about three miles from the city of Mt. Vernon and the Ohio Light and Power Company, which operates in this city, would not build a line to this home and furnish electric current to the county for the same rate as it was receiving in the city.
>
> "The matter was taken up with the attorney-general's office in regard to the commissioners building the line and it was held that the commissioners had no authority to do this.
>
> "The next thing considered was the building of a plant at the home. The matter was gone into and it was ascertained that this proposition would cost between $3,000.00 and $3,500.00, which did not include the cost of operation, which would cost for an engineer, alone, the sum of $60.00 per month, judging from what we are paying at the county infirmary, which is $60.00 per month and board.
>
> "The Ohio Light and Power Company then made a proposition upon which a contract was entered into and I think you have the contract now in your office. Under this contract the bills for current have been running as follows: January, 1916, $20.20; February, $28.50; March, $26.39; April, $34.44; May, $27.21, June and July, which were paid in one bill, $42.06, and August, which was the last bill in, was $21.53.
>
> "You can readily see from a glance the reason that the contract was made with the power company."

In view of the facts as set forth in Mr. Bermont's letter I do not think it can be said that the charge for electric current made by the Ohio Light and Power Company according to the terms of the aforesaid contract is unjust or unreasonable, and I am of the opinion in answer to your question that said contract is legal.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2018.

TAXES AND TAXATION—CONTRACT BETWEEN LOGAN NATURAL GAS AND FUEL COMPANY AND THE CITIZENS GAS AND ELECTRIC COMPANY OF ELYRIA, OHIO, CONSTRUED—QUESTION AS TO WHETHER CONTRACT IS ONE OF SALE OR AGENCY MUST BE DETERMINED BY EACH AGREEMENT.

Whether or not a contract between a local or distributing gas company and a producing or supplying company has the legal effect of a contract of sale or that of a contract of agency or factorage can be determined in a given case only by inspection of the entire agreement and the ascertainment of its predominating characteristics.

Where the predominating characteristics of such a contract indicate that the relation of factor and principal is created thereby such a legal effect is not prevented by a stipulation on the part of the local or distributing company which amounts to a guaranty of the collection of the supplying companies' proportion of the price of all gas sold to consumers.

The contract between The Logan Natural Gas and Fuel Company and The Citizens Gas and Electric Company of Elyria, Ohio, examined and held to amount to an agreement of agency and not a sale.

COLUMBUS, OHIO, November 11, 1916.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I return herewith copy of a contract between The Logan Natural Gas and Fuel Company, a gas producing company, and The Citizens Gas and Electric Company of Elyria, a distributing company, which I have carefully examined in accordance with the request of your letter of September 20.

The general principles of law in the decision of the case of State v. The Coshocton Gas Company have been dwelt upon in other opinions addressed to your commission. I shall not repeat such discussion here.

My examination of the above mentioned contract convinces me that it witnesses an arrangement for the undertaking of a joint enterprise in which the efforts of both companies are to be put forth to a common end, viz.: supplying natural gas to consumers in the city of Elyria.

I call attention to the following material provisions of the contract which reflect upon the main question involved and evidence the character of the relation which it creates, as I have described it:

"*Second Paragraph*

"Commencing with the date hereof, the Logan Company agrees to supply and deliver to the Distributing Company a quantity of natural gas for distribution and sale in the said contract territory sufficient to meet and supply the demands therein for domestic consumption. The said gas shall be delivered at the point of delivery hereinafter fixed, at a pressure sufficient to maintain a pressure of not to exceed four ounces to the square inch on the principal low pressure lines of the distributing system of the Distributing Company in the said contract territory:

"But

* * * * * * * *

"The Distributing Company declares that it understands and expressly agrees that the Logan Company shall not be liable, directly or indirectly, for any loss, damage or injury sustained by the Distributing Company and

resulting directly or indirectly from any shortage in the supply of gas or interruption in the delivery thereof or failure of the pressure or volume thereof arising from any cause whatsoever, except the negligence or wilful default of the Logan Company.

"Third Paragraph

"The Distributing Company agrees that it will at all times during the life of this contract have and keep its system of distributing pipes and mains in the said contract territory, including all necessary attachments, connections, service pipes and appliances in, through and under the streets, avenues, alleys, public grounds and places in the said contract territory, of such a size, length and capacity that with a pressure not exceeding four ounces to the square inch on the principal low pressure lines of its said distributing system, it will be able to fully supply natural gas for domestic, industrial and manufacturing purposes to all inhabitants of the said contract territory, who may desire to purchase the same for domestic, industrial and manufacturing consumption.

* * * * * * * *

"Fifth Paragraph

"The Distributing Company agrees that beginning with the date hereof, it will commence to receive under this contract the said gas from the Logan Company and distribute and sell the same through its said distributing system to consumers thereof within the said contract territory, upon the terms and conditions, and in the quantity herein provided for, and will continue so to do during the term of this contract as hereinafter fixed.

* * * * * * * *

"Seventh Paragraph

"The point of delivery of all gas hereunder shall be the low or outlet side of such reducing station or stations.

"Eighth Paragraph.

"The Distributing Company agrees that at all times during the life of this contract it will fully keep and perform the following covenants and undertakings:

"(A) Exercise and use the highest degree of care in keeping and maintaining the mains, lines, pipes, connections and appliances of its said distributing system, including service lines to the consumer, in the highest and best order, repair and condition and free from leakage.

* * * * * * * *

"(E) Properly connect and attach its distributing system to the said reducing station or stations of the Logan Company.

"(F) Locate and furnish an office or offices at some convenient point or points in the said contract territory (the number and location of such offices to be approved by the Logan Company), and employ therein clerks and employees necessary to carry on the business of selling natural gas within said territory.

* * * * * * * *

"(H) At all times during the continuance of this contract, to do any and all things necessary to build up, extend, enlarge, manage and conduct the said business of furnishing natural gas within the contract territory.

* * * * * * * *

"Ninth Paragraph.

"The Distributing Company agrees that the Logan Company may whenever it desires, and from time to time, send its properly accredited

agents or representatives into the contract territory, and canvas the same from house to house and from business plant to plant, soliciting customers or consumers of gas for the Distributing Company at the then current rates, but the Distributing Company shall not be charged with any of the cost or expense of such agents or representatives or of such solicitation, the whole thereof to be borne by the Logan Company; but the Distributing Company agrees that whenever a list of such new consumers or old consumers for additional consumption so secured by such solicitors is furnished it, it will make and enter into proper contracts with them and furnish and supply gas to all such consumers so secured, provided they are entitled to demand the same under the terms of the present or any new franchise granted to the Distributing Company, and provided such customers or consumers are to the satisfaction of the Distributing Company financially responsible, or make a cash deposit, or give other satisfactory evidence to cover future gas bills, in accordance with the rules and regulations of the Distributing Company and the laws of the state of Ohio.

"Tenth Paragraph.

"The Distributing Company further agrees that at all times during the life of this contract it will fully keep and perform the following covenants and undertakings:

* * * * * * * *

"(C) Assume and discharge all and every expense, cost, labor and risk incurred in the distribution and sale of natural gas within the contract territory between the point where delivery is made hereunder to the Distributing Company at the low or outlet side of the said reducing station or stations and the several points of delivery by the Distributing Company to consumers;

"(D) Pay and discharge all taxes (this to include any tax or license, state, municipal or otherwise, upon the sale of the said gas within the said contract territory, whether based upon the sale of gas generally or upon the gross or net sales thereof or receipts therefrom or otherwise), and assessments levied at any time whatsoever on any property of the Distributing Company within the contract territory, except only any taxes levied or assessed directly against the Logan Company and based upon its percentage of the sales of gas within the contract territory.

"It being the intent and meaning of this contract and particularly of sub-paragraphs (C) and (D) above that all and every tax, charge, cost and expense of whatsoever nature and kind incurred in the building, extension, repair and operation of the said distributing system and in the transportation, marketing and sale of the said gas after it leaves the low or outlet side of the said reducing station or stations, except only any taxes levied or assessed directly against the Logan Company, and based upon its percentage of the sales of gas within the contract territory, shall be borne and paid for exclusively by the Distributing Company, and that all mains, pipes and appliances used in the transportation and marketing of the said gas after it leaves the said point or points of delivery shall be laid, maintained, used and owned exclusively by the Distributing Company, and that it, and it alone, and not the Logan Company, shall be liable for any damage arising from the negligent or careless construction, repair, maintenance or operation of such mains and pipes between the said point of delivery and the consumer.

"Eleventh Paragraph.

"The Distributing Company further covenants and agrees that at all times during the life of this contract it will

"(A) Furnish all meters used by the consumers;

"(B) Require each consumer, domestic, industrial or manufacturing, to sign a contract for gas before connections are made with its pipes or mains or gas turned into the house or service pipe of such consumer, which contract for domestic, industrial or manufacturing purposes shall be of a form furnished by the Logan Company or first submitted to and approved by it;

* * * * * * * *

"(F) Keep a record of the number of each meter, and the readings thereof, which is connected or disconnected from its said distributing system, and forward each month to the Logan Company a record, giving the number of meters set, connected and disconnected, and showing the total number of consumers at the end of each month;

"(G) Keep at its office all contracts with consumers, and also a full and complete record of the same and all meters used; and also such books of account as will fully and clearly show all accounts and contracts with consumers and all other transactions and matters relating to the sale and delivery of the gas hereunder;

"(H) Give to the Logan Company and its officers, agents, attorneys or employees, full and free access, at all reasonable business hours the books of account, contracts and records, and also any and all papers relating to or connected with the business of distributing and marketing the gas under this contract, so that such account books, contracts, records and papers shall be at all reasonable times open to the examination and inspection of the officers, agents, attorneys or employees of the Logan Company;

* * * * * * * *

"Twelfth Paragraph.

"Inasmuch as the return to the Logan Company for the gas delivered hereunder is a percentage of the price which the Distributing Company charges the consumers thereof, it is necessary for the Logan Company to protect itself from the sale by the Distributing Company of its gas at ruinous rates, and the Distributing Company therefore now covenants and agrees with the Logan Company,

"(A) That it will not furnish gas free of charge to anyone without the written permission of the Logan Company, and then only for such a period of time and in such quantities as it may in writing stipulate.

"(B) That the price charged by it for the natural gas furnished to it by the Logan Company distributed and sold by it to domestic consumers within the said city limits during the life of this contract shall not be less (after allowing the discount for prompt payment in the next sub-paragraph (C) provided for) than thirty (30) cents net per thousand cubic feet, measured on a four-ounce pressure basis;

"(C) That it will allow to each domestic consumer a discount of approximately ten per cent. of each month's gas bill for prompt payment thereof before the tenth day of the month following that in which the gas was consumed, provided the net price to domestic consumers, after allowing such discount, shall not be less than the minimum price fixed in the last preceding sub-paragraph (B).

* * * * * * * *

"(G) Inasmuch as it is for the public good that the Logan Company

prefer domestic consumers along its system and conserve its supply of gas as long as possible for domestic consumption, the Distributing Company now agrees that it will sell for other than domestic consumption without the express written consent of the Logan Company first had and obtained.

"But

"It agrees that upon the written direction of the Logan Company, and not otherwise, it shall and will sell gas for industrial and manufacturing purposes within the said city, but then only for such prices and upon such percentages thereof to the Logan Company, and upon such terms as that company may in writing direct, and such direction may, at the pleasure of the Logan Company, be at any time withdrawn, such withdrawal to be absolute, or the Logan Company may name new prices and new percentages and fix new terms upon which the Distributing Company will thereafter sell gas for industrial and manufacturing purposes, and which new prices, percentages and terms may at the pleasure of the Logan Company be likewise at any time and from time to time modified or withdrawn absolutely or new prices, percentages and terms from time to time again named;

* * * * * * * *

"Thirteenth Paragraph.

"The Distributing Company further agrees that during the life of this contract it shall and will fully keep and perform the following covenants and undertakings:

* * * * * * * *

"(B) Make and deliver to the Logan Company at its general office, wherever the same may be located, on or before the tenth day of each and every month during the continuance of this contract, a full and complete statement upon a form approved or furnished by the Logan Company, showing in detail the total quantity of gas sold and delivered to consumers during the preceding month, analyzed in a form and manner directed by the Logan Company and the gross amount charged therefor, including minimum charges.

"(C) Pay to the Logan Company at its principal office, wherever the same may be located, on or before the fifteenth day of each and every month during the running of this contract:

"(1) A sum of money equal to (70%) seventy per cent. of the gross sales of gas for domestic consumption during the preceding month, including therein minimum charges; and also,

"(2) A further sum of money equal to such a per cent. of the gross sales of gas for industrial purposes and for manufacturing purposes (gas for either of said purposes to be sold only upon the written direction of the Logan Company as hereinbefore provided for) as the Logan Company may in its notices directing such sales stipulate and fix.

"It is distinctly understood that the Distributing Company guarantees the payment of all gas bills and that the above percentage shall be based upon the gross amount of the gas bills after allowing the discount for prompt payment before the tenth day of the month as provided for in sub-paragraph (C) of the TWELFTH paragraph hereof, and the Logan Company shall not be charged with any part of bad accounts.

* * * * * * * *

"Seventeenth Paragraph.

"The Distributing Company expressly covenants and agrees that if it

shall default in the payment of any month's settlement or payment of gas for a period of fifteen days after the same falls due by the terms of this contract, then this contract shall, at the option of the Logan Company, be cancelled and annulled, and all rights of the Distributing Company hereunder forfeited; except, however, that default in payment of any month's bill which shall arise over a *bona fide* dispute as to the same or any part thereof, shall not operate to terminate this contract for fifteen days after such dispute is settled, provided the Distributing Company pays promptly when due the amount of such bill which is not disputed."

The above quoted material provisions of the contract clearly show that the transactions referable to it do not constitute sales. This is not a case wherein one party buys fungible goods from another party, with the right to dispose of the same according to his own will. On the contrary, the Distributing Company, which is to deal directly with the consumer, is to dispose of the gas only in such manner as is or may be consented to by the supplying company. Not all gas which passes through the consumers' meters even is to be settled for by monthly payments; for provision is made in the contract for furnishing gas free of charge by the mutual consent of both parties; and such gas so furnished is not to be paid for.

It is true that the Distributing Company must settle for such gas as is sold to consumers, whether it has collected from the consumers or not; but the exact attitude of the parties toward this stipulation is made very clear by their description of it as follows:

"It is distinctly understood that the Distributing Company *guarantees* the payment of all gas bills."

While, then, the Distributing company guarantees the payment of all gas bills, it does not agree to pay for all gas which passes into its distributing system, nor even for all gas which passes out of the same through the consumers' meters, because it may, with the consent of the supplying company, furnish gas free to some consumers.

Again, the contract expressly provides that the Distributing Company shall pay all taxes upon the sale of gas "except only any taxes levied or assessed directly against the Logan Company and based upon its percentage of the sales of gas within the contract territory."

It is true, as it was in the case of State v. Coshocton Gas Co., commented upon in previous opinions to the commission, that the local company most probably is conducting its business under a franchise granted by the council of the City of Elyria, and that by such municipal action it is recognized as the sole agency engaged in the business of furnishing and selling gas to consumers. Nevertheless, by this contract it appears that the local company is not a free agent in the sale of such gas within the city of Elyria, but that it is subject in important particulars to the direction and control of the supplying company, so long as it continues to procure its gas from that source.

On the whole, then, the relation between the two is best described as that of factor and principal, and the Distributing Company, regarded as a factor, may be likened to one doing business under a *del credere* commission.

The following observations of Professor Mechem upon the general subject are applicable here: (2nd Ed. Mechem on Agency, sections 2499, 2534:)

"It is not at all inconsistent with the factor's situation as an agent merely, that he has, by special contract, undertaken to be personally respon-

sible for the payment of the price of the goods he sells. That ordinarily is the common case of the *del credere* commission. When, however, the contract goes beyond that, the case is not so clear. There comes constantly before the courts for interpretation * * * a great variety of contracts * * * which present some of the aspects of an agency and some of the aspects of a sale, and which * * * the courts, with more or less of consistency determine in one case to show sale and in another to indicate agency, as the characteristics of agency or sale *may seem to predominate.* * * *

"In these cases * * * names and titles applied by the parties are not conclusive, but the case must be determined by the essential characteristics of the relation attempted to be created.

"It is ordinarily the characteristic of an agency rather than of a sale that the principal retains the title to the goods consigned, and to the thing for which they may be exchanged * * * and that the proceeds of them when sold are to be held as such and are to be accounted for as his property; * * * that the risk of their loss shall be his unless specially assumed by the other party; that the consignor shall have the right to determine the price and the terms and conditions of sale; that he shall not have the right to demand the proceeds until the goods are sold, * * * that the non-payment of the price for which the goods are sold shall be the loss of the consignor unless the other party has specially agreed to indemnify. * * *

"A factor is said to act under a *del credere* commission when in consideration of an additional commission he guarantees the payment to the principal of debts that become due through his agency * * *.

"The *del credere* commission of course does not mean that the factor agrees that he *will* sell the goods; or that he will either sell them or pay for them, or that he will pay for those which he does not sell,— though special contracts of that sort are sometimes made;—but merely that, if he does sell them, the owner shall get his pay for them.

"A factor acting *del credere,* is not on that account relieved from any of the duties which attach to other factors, nor is he clothed with any greater authority.

"Neither does the factor by acting under a *del credere* commission cease to be an agent, nor, does the principal lose his title to the goods or their proceeds or the right to pursue the purchaser for the price."

These general observations state clearly the principles upon which the several opinions of this department to the commission, relative to the interpretation of similar contracts, have proceeded.

Faced as we are by the decision of the courts in the Coshocton Gas Company case, which decision was placed upon the broad ground indicated by Professor Mechem, viz., that the predominating characteristics of the arrangement will determine its character as a sale or an agency, we must resolve all questions which arise by the application of a like principle.

Particular provisions of such contracts, therefore, are not determinative. Each contract must be examined to ascertain the predominating characteristics; and in the event that provisions are found therein which if isolated would be mutually inconsistent, the whole contract must be examined with a view to ascertaining what sort of provisions predominate.

Thus, in the case of the contract between the Springfield Gas Company and the Ohio Fuel Supply Company, dealt with in my opinion to the commission under date of May 15, 1915, Opinions of the Attorney-General, volume 1, page 766, in

spite of a recital to the effect that upon the delivery of the gas to the distributing company it should be the sole property of the company, and in spite of a further provision for the making of settlements on the basis of gas supplied and delivered. I came to the conclusion that the contract was one of factorage or agency, as distinguished from sale, and that the question raised thereby was determined by the Coshocton Gas Case. The whole contract was examined in this case, to ascertain what were its predominating characteristics.

Again, in the matter of the Alliance Gas & Power Company, I advised the commission on August 26, 1915, volume 2, Opinions of the Attorney-General, page 1621, that the contract between that company and a supplying company partook rather of the characteristics of a sale than those of the creation of an agency, reaching my conclusion in the face of provisions of the character similar to some which had been found in the Springfield Gas Company contract, because other provisions in the Alliance Gas Company contract tended to throw the balance on the side of a sale. In that particular case an express stipulation in the contract, to the effect that the parties agreed that the readings of the consumers' meters should conclusively determine the quantity of gas delivered by one party to the other and to be paid for by the latter, threw light upon the effect of another provision for periodical payments based upon gross sales instead of collections, and showed that the parties did not regard the latter as having the effect merely of a guaranty of the collection of the bills, but rather that it has the effect of payment for a commodity sold and delivered.

In the case of the Ada Natural Gas Company, upon which no formal opinion was rendered, I reached my conclusion that the question involved was governed by the Coshocton Gas case for substantially the same reasons which I have endeavored to express in dealing with the case now under consideration, being of the opinion then, as I am now, that provisions as to the basis of settlement between the Supplying Company and the Distributing Company, which, in connection with the whole contract, can not be said to have any greater effect than a mere guaranty of the collection of the bills, are not inconsistent with the idea of agency, but are merely analogous to the agreements which characterize the relation of principal and factor under a *del credere* commission.

For all the foregoing reasons, then, I advise that the excise tax of the Citizens Gas and Electric Company should be based only upon the proportion of the receipts, which under its contract with the Logan Natural Gas and Fuel Company may be retained by it.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2019.

ROADS AND HIGHWAYS—CHIEF HIGHWAY ENGINEER NOT AUTHORIZED TO CERTIFY TO COUNTY COMMISSIONERS AND TOWNSHIP TRUSTEES HIS APPORTIONMENT OF COST OF AN IMPROVEMENT UNTIL SAME IS COMPLETED.

The chief highway engineer is not authorized to certify to county commissioners and township trustees his apportionment of the total cost and expense of an improvement until the improvement is completed.

COLUMBUS, OHIO, November 11, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication of October 26, 1916, which communication reads as follows:

"Permit me to quote below a letter received from Mr. W. S. Howland, auditor of Ashtabula county, today:

"'In view of the fact that we had to overdraw the bond and interest funds of the following state roads, viz: the Hampden-Andover, Main Market, Jefferson-Andover, or repudiate the bonds on account of no frontage being certified by the state. We overdrew the various bond and interest funds, and did not repudiate the bonds. According to the holdings of the attorney-general and the bureau of inspection, this is a grievous offense, hence, the pilgrimage by Mr. Case and myself to Columbus to see if we could correct this condition so we would not have to overdraw these various funds again, or repudiate the bonds during the year of 1917.

"'We felt pleased, while in Columbus, with your attitude and also the manner in which the state auditor, Mr. Donahey, looked upon this condition in our county, and when Mr. Halbedel, the chief state inspector, requested an opinion of the attorney-general our ardor was dampened.

"'Now if the attorney-general holds against certifying by the highway department frontages of the above named roads, we do not see any reason why we should digress from the holdings of the attorney-general and the bureau of inspection, which would mean the repudiation of the bonds of the above named roads, but in view of the fact that we know you are willing to do anything in your power to aid us, therefore we are asking you to certify the frontages in the following roads, so we can place them upon our special assessment duplicate and collect the assessments at our next December installments, viz: No. 689 Hampden-Andover Inter-County Highway; No. 475 Section "I," petition No. 686; No. 816, Main-Market road, Inter-County highway; Section "K," petition 24-6 No. 870; Jefferson-Andover, Inter-County highway No. 151, Section "J," petition No. 248, Dorcet section.

"'Trusting that you will be able to certify the assessments into this office at an early date, and thanking you in advance, we remain.'

"We are able to comply with Mr. Howland's request to furnish the apportionment of the cost and expense of improving Section 'J' of Inter-County highway No. 475, Hampden-Andover road, for the reason that this road has just been completed, and we have, therefore, exact figures as to its cost.

"However, the other two sections of Inter-County highway mentioned by Mr. Howland have not yet been completed and it would be necessary to add an estimated amount to cover the probable cost of engineering and inspection to the contract price in order to arrive at an approximation of the total cost of the work.

"You will note from a copy of letter under date of October 20, from Mr. Ray N. Case, county highway superintendent of Ashtabula county, that he has made approximate estimates of the cost of engineering and inspection on the two improvements and indicates that the county is willing to pay any excess of these estimates.

"It appears that the county authorities are eager to collect the assessments from the abutting property owners this year and I respectfully request that you advise me whether or not it would be proper for this department to comply with the request of Mr. Howland."

The copy of the communication addressed to you by Mr. Ray N. Case, county highway superintendent of Ashtabula county, reads as follows:

"In compliance with your request that I file a statement of the engineering and inspection on various state improvements in this county, I beg to submit the following:

"On the Jefferson-Andover, I. C. H. No. 151, Section J, the cost of engineering and inspection to September 1, was $1,420.38. The September payroll was $190.40, and the October payroll estimated to be approximately $200.00, and to complete the work in November should not exceed $100.00. This would make a total of $1,910.78 as the cost of engineering and inspection to date. The preliminary plans on this improvement cost $571.43, which would leave a balance of $1.339.35 as the cost of engineering and inspection upon approximately one-half the length of the total contract. It is rather hard to estimate the cost of engineering and inspection to complete the work next year; the item of inspection is, in itself, indefinite, owing to the uncertainty in the progress of the work, weather conditions being taken into consideration, but in my judgment, we should allow approximately $1,400.00 to complete the work next year; that would make a grand total of $3,310.78, as the cost of engineering and inspection for the entire length of road. Any amount above that as agreed by Mr. Howland, while in Columbus, could be paid by the county, without being charged against this improvement.

"On Main-Market road No. 1, I. C. H. No. 2, section K, there has been expended to September 1, as engineering and inspection, $864.80. The September payroll amounted to $311.20; the October payroll will be approximately $391.30, and inspection for the month of November, I would estimate to be about $200.00, making a total of $1,767.30 as the total cost of engineering and inspection on that improvement. Should there be any payroll, engineering or inspection that would exceed this amount, the county will pay any excess of that amount. These amounts added to the estimated cost of the improvements would be as near the total cost as could be approximated."

The authority of your department in the matter of apportioning the cost of an improvement and certifying the same to the local authorities rests entirely upon the provisions of section 204 of the Cass highway law, section 1211 G. C., which section reads as follows:

> "Upon completion of the improvement, the chief highway engineer shall immediately ascertain the cost and expense thereof, and apportion the same to the state, county, township or townships and abutting property. He shall certify the total cost and expense of the improvement and his apportionment thereof to the county commissioners, and the trustees of the township or townships interested therein."

Under the terms of the above quoted section, the chief highway engineer has no authority in the premises until the completion of the improvement. I, therefore, advise you, in answer to your question, that your department is not authorized to apportion anything other than the actual cost and expense of the improvement, which, of course, cannot be ascertained until the improvement is completed, and that the chief highway engineer is therefore not authorized to make any certificate to the local authorities in Ashtabula county until the highways in question are completed.

Where bonds are issued under section 216 of the Cass highway law, section 1223 G. C., the dates of maturity of the bonds should be so fixed that none of the bonds will fall due in advance of a date when it may safely be assumed the road will have been completed, the cost and expense thereof ascertained, apportioned and certified, assessments made and the first assessment collected. A failure to observe the above precaution has evidently produced the situation existing in Ashtabula county, but even where such a situation exists a compliance with section 5630-1 G. C., 106 O. L., 495, provided, of course, the bonds have been issued since said section went into effect on September 3, 1915, would provide funds necessary for the redemption of bonds issued in anticipation of the collection of special assessments, where unforeseen contingencies result in delaying the collection of the assessments until after the date of maturity of the bonds, or the first installment thereof. This section provides, among other things, that bonds issued by county commissioners, in anticipation of the collection of special assessments, shall be full, general obligations of the county and that the county commissioners shall, prior to the issuance of the bonds above mentioned, provide for the levying of a tax upon all the taxable property of the county to cover any deficiency in the payment or collection of such special assessments.

The above observations indicate some of the methods of avoiding embarrassment in a matter of this kind, but in any event the authority of your department is fully defined by section 1215 G. C., supra, and the chief highway engineer is not authorized to act in advance of the completion of the improvement.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2020

AUTOMOBILES—PERSON WHO ALLOWS MOTOR VEHICLE *TO STAND* IN A PUBLIC ROAD IN NIGHT TIME WITHOUT ANY LIGHTS NOT GUILTY OF VIOLATION OF SECTION 12614 G. C.—MUNICIPAL CORPORATIONS ARE AUTHORIZED TO REQUIRE SUCH VEHICLES TO DISPLAY LIGHTS IN NIGHT SEASON, ALTHOUGH NOT IN MOTION.

A person who allows an automobile to stand in a public road or highway in the night time without any light, is not guilty of a violation of Section 12614 *G. C.*

Under the provisions of section 3632 *G. C. municipal corporations are authorized to require that automobiles display lights in the night season, although the vehicles are not in motion.*

COLUMBUS, OHIO, November 13, 1916.

HON. JOSEPH W. HORNER, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—I acknowledge the receipt of your inquiry under date of November 7, 1916, which inquiry reads as follows:

> "Section 12614 of the Criminal Code reads as follows:
>
> "'Whoever operates or drives a motor vehicle upon the public roads and highways without providing it with sufficient brakes to control it at all times and a suitable and adequate bell or other device for signaling, or fails during the period from thirty minutes after sunset to thirty minutes before sunrise to display a red light on the rear thereof and three white lights, two on the front and one on the rear thereof, the rays of which rear light shall shine upon and illuminate each and every part of the distinctive number borne upon such motor vehicle, the light of which front lamps to be visible at least two hundred feet in the direction in which such motor vehicle is proceeding, shall be fined not more than twenty-five dollars.'
>
> "A party here left their automobile standing in front of his place of business in the night time without any lights whatsoever.
>
> "I would ask your opinion whether or not this section would apply to a machine that is not in motion and without lights in the night season?"

While the changes which have been made in the section are not material in so far as your inquiry is concerned, it should be observed that section 12614 G. C. as quoted by you, was amended in 103 O. L., 766, and now reads as follows:

> "Whoever operates or drives a motor vehicle upon the public roads and highways without providing it with sufficient brakes to control it at all times and a suitable and adequate bell or other device for signaling, or fails during the period from thirty minutes after sunset to thirty minutes before sunrise to display a red light on the rear thereof and three white lights, two on the front and one on the rear thereof, the rays of which rear white light shall shine upon and illuminate each and every part of the distinctive number borne upon such motor vehicle, the light of which front lamps to be visible at least two hundred feet in the direction in which such motor vehicle is proceeding, shall be fined not more than twenty-five dollars. Provided, that motor vehicles of the type commonly called motor cycles shall display one white light in front to be visible at least

two hundred feet in the direction in which such motor vehicle is proceeding, and one rear combination red and white light, showing red in the direction from which such motor vehicle is proceeding and such rear light to be so placed that it will reflect its white light upon and fully and clearly illuminate the distinctive license identification mark of such motor vehicle."

A motor vehicle which is not in motion could not be said to be operated or driven. It might be argued that the provision making it an offense to operate or drive a motor vehicle without sufficient brakes or without a signaling device is not related to the provision making it an offense to fail to display lights and that the latter provision applies to all motor vehicles on the public roads or highways without regard to whether they are being operated or driven. This construction of the statute is, however, rendered untenable by the provision that the light of the front lamps shall be visible at least two hundred feet in the direction in which the motor vehicle *is proceeding.* This latter provision is, to my mind, conclusive of the intention of the legislature to make the provisions of section 12614 G. C. applicable only to motor vehicles which are in motion.

I, therefore, advise you that a person who allows an automobile to stand in a public road or highway in the night time, without any lights whatever, is not guilty of a violation of the section in question.

Section 3632 G. C. expressly authorizes municipal corporations to regulate the use of automobiles and under this section municipal corporations are authorized to require that automobiles display lights in the night season, although the vehicles are not in motion. Possibly an examination will disclose that an ordinance of this character is in force in the municipality in which the act referred to by you was done, assuming that the occurrence took place within the limits of a municipal corporation.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2021.

ROADS AND HIGHWAYS—HOW TO PROCEED WHERE PERSON CLAIMS TO HAVE BEEN INJURED BY REASON OF NEGLIGENCE OF EMPLOYEES OF STATE ENGAGED IN CONSTRUCTING ROAD BY FORCE ACCOUNT—CLAIM PRESENTED TO LEGISLATURE.

Where persons claim to have been injured by reason of the negligence of employees of the state engaged in constructing a road by force account, such persons may not bring a suit against the state, and there is no appropriation from which voluntary payment of damages may be made to them by the state highway department. The only duty of the state highway commissioner is to collect the facts and preserve a record of the same for use in case the persons who claim to have been injured should hereafter present a claim for damages to the General Assembly.

COLUMBUS, OHIO, November 13, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication of November 8, 1916, which communication reads as follows:

"I am handing you herewith a letter from E. A. Merkel, county highway superintendent of Mansfield, describing an automobile accident which happened on the Mansfield-Wooster road, I. C. H. No. 164, Section 'N,' Richland county.

"You will note that this contract has been taken over from the original contractors, the Ohio Valley Construction Co., and is now being constructed by 'force account' by the highway department under the supervision of Mr. Merkel.

"I desire that you advise me what action, if any, on the part of the state highway department should be taken."

The letter addressed to you by Mr. E. A. Merkel, county highway superintendent of Richland county, reads as follows:

"Relative to an automobile accident on Sec. 'N' Mansfield-Wooster road, I. C. H. No. 164: This accident happened at the following location, to the following men and as near as I can state from personal investigation in the following manner:

"The names and addresses of the young men are Frank Wigton, owner of the machine, Howard Kulp, Charles Carr and Fred Moore, all of Big Prairie, Ohio.

"This accident happened at Sta. 77 on the Wooster road where a detour sign was placed in order to protect the portion of the road west of that and under construction. Sta. 77 is on a 7% grade and the automobile was descending the grade. The summit of this grade is so located that the detour sign and barricade could be observed at night by reasonably good lights at a distance of 200 feet. The barricade extended a part way across the road leaving it possible for a vehicle to pass at the south and conveniently, if they were running at a low rate of speed. About at this same point a road leads off of the Wooster road directly south and at right angles to the improvement.

"The instructions from me to the parties in charge of this work have been very strict and plain to at all times keep the barricades and detour signs properly lighted at night. We have had very serious trouble this entire season with disorderly parties stealing and destroying the lights especially on this road at this point.

"I have almost positive evidence that there was no light on this barricade when this accident happened about 8:30 p. m. In fact, it can be proved that there was no light on this barricade that night for the man in charge of lighting these lights, states that when he reached this barricade that evening, the lamp was gone. I also have evidence that this lamp was carried about 150 feet east of the accident, this being the direction the parties were approaching from, which indicates that they did not destroy the light. Also one of the workmen who passes this barricade on his way home at night states that he passed this barricade about six o'clock (after dark) and that there was no light on the barricade.

"The owner and driver of this Maxwell touring car, Frank Wigton, states that he was approaching the barricade at about ten miles per hour. This statement is evidently untrue, as he also states that he was aware of the detour sign and barricade and that he had so short a time to make up his mind the safest thing to do that he deliberately turned his machine into the bank to avoid crashing into the barricade, which machine, as the evidence discloses, was turned completely over and was found the next morning by myself, laying on its side with the front end

of the car turned directly east, the direction from which it was approaching. All occupants of the car were bruised and hurt some, and one man, Howard Kulp, was taken to the hospital. I think this man had five ribs broken and is yet under the doctor's care in Mansfield.

"The automobile was badly demolished, and indications are that it will require at least $200.00 to repair the machine. The automobile is still where it was wrecked and the owner of the machine is awaiting the action of the state highway department in determining what shall be done. This young man has not to my knowledge employed an attorney nor has he made a claim for damage, but he does state that if the machine is properly repaired that he thinks all the injured men will be satisfied. Of this I have no assurance.

"The prosecuting attorney and the county commissioners will not make any offer of settlement until the state highway department has given some instructions. The question to determine is as to the liability of the county or state for the accident and who is liable.

"The contract for constructing this road was originally in the hands of the Ohio Valley Contracting Co., of Cincinnati, which company is now in the hands of the receiver and I also understand that this company's bondsmen have also gone into the hands of a receiver. I, as resident engineer, under the instructions of the state highway department, am constructing this road on the force account basis.

"Any other information, if desired, will be provided at your request, if possible."

While it is provided by section 16 of article I of the constitution of Ohio that suits may be brought against the state in such courts and in such manner as may be provided by law, yet this constitutional provision is not self-executing and the legislature has never conferred jurisdiction on any court or courts to entertain suits against the state and has never provided a manner in which such suits may be brought. The persons who claim to have been injured or to have suffered damage to their property, by reason of the automobile accident referred to by Mr. Merkel, are, therefore, unable to bring any suits against the state for the purpose of enforcing the payment of damages. A reference to the several appropriation measures passed by the eighty-first general assembly discloses that no appropriation was made for the uses and purposes of the state highway department from which appropriation it would be lawful for your department to make voluntary payment to the persons who were injured or whose automobile was damaged, even should an investigation disclose that the accident in question was due to the negligence of the agents of the state and that the injured persons were without fault.

I, therefore, advise you that there is no action which the state highway department may lawfully take in the premises other than to collect all the facts and preserve a record of the same on the files of the state highway department for the future use of any legislative committee to which the matter might be referred, in case the persons who claim to be injured should pursue the only course open to them in the matter of obtaining redress from the state and hereafter present a claim or claims to the general assembly.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2022.

TIMES OF HOLDING COURT—PUBLICATION OF ORDER REQUIRED BY SECTION 1519 G. C. SHOULD BE MADE IN ACCORDANCE WITH SECTION 6252 G. C.—NEWSPAPER.

Publication of order required by section 1519 G. C. should be made in accordance with section 6252 G. C.

COLUMBUS, OHIO, November 13, 1916.

HON. HENRY W. CHERRINGTON, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—I am in receipt of your letter under date of October 18, 1916, which is as follows:

> "The clerk of courts asks me for an opinion on the following:
> "'By section 6252 the order fixing the times for holding court required publication in two newspapers of opposite politics. Since then section 1519 (103 O. L. 442) has been re-enacted and apparently is the latest law on the subject and permits publication of the order of the court of appeals in one or more newspapers. I now desire to know whether I am required to make publication as provided in section 6252.'"

Section 6252 G. C., to which you refer, provides in so far as the question at hand is concerned as follows:

> "Section 6252: * * *An order fixing the times of holding court * * * shall be published in two newspapers of opposite politics at the county seat, if there be such newspapers published thereat. In counties having cities of eight thousand inhabitants or more, not the county seat of such counties, additional publication of such notices shall be made in two newspapers of opposite politics in such city. * * * "

This statute was originally enacted in an act found in 73 O. L. page 75, which act was passed on March 25, 1876. In section 2 of said act (section 4357 R. S.) it was provided:

> " * * * Orders fixing times of holding courts * * * shall be published in two newspapers, one of each political party, if there be two papers of different political principles printed within said county in each of the several counties of this state * * * ."

In said act it is further provided for German advertisement. The provision for the additional publication in cities not county seats was provided for in an amendment to said section 4357 R. S., 86 O. L. 258, passed April 12, 1889. The said sections were not materially changed in the enactment of the general code in 1910 and stand as section 6252 of the general code.

Section 1519 G. C., (103 O. L. 412) provides:

> "Upon receipt of such order signed by the judges of his district, the clerk of the court of appeals shall immediately enter it on the journal of the court of appeals of his county, which entry shall be sufficient evidence as to the legal terms for holding the courts as therein ordered. The clerk shall cause a copy of the order to be published in one or more newspapers of general circulation in such county once a week on the same day of the week, for three consecutive weeks."

The original act from which section 1519 G. C. (103 O. L. 412) originated is found in an act to provide for the organization of circuit courts, 81 O. L. 168, passed April 14, 1884, at which time the original of section 6252 G. C. was in force, and was given the section No. 454b of the revised statutes.

Section 454b R. S. provided that immediately upon the first day of October the circuit judges should issue to the clerk in each county a written order fixing the time of the commencement of each term of the circuit court, which the clerk, upon receipt thereof, was to immediately enter upon the journals of the court, and it was further provided "such clerk shall cause a certified copy of such order or orders to be published in one or more newspapers of general circulation in such county once a week, on the same day of the week, for three consecutive weeks."

On February 7, 1885, there was an act passed to revise and consolidate the statutes relating to the organization and jurisdiction of the circuit and other courts, 82 O. L. 16. In section 449 it was provided that the clerk of the circuit court should cause a copy of the order of the court fixing the term of court "to be published in one or more newspapers of general circulation in his county, once a week, on the same day of the week, for three consecutive weeks." In section 458 of said act the clerk of the common pleas court of each county upon the receipt or an order fixing the term of court was required to cause a copy to be published "in one or more newspapers of general circulation in his county, once a week, on the same day of the week, for three consecutive weeks." Section 449 hereinbefore referred to was amended in 83 O. L. page 30.

A comparison of the language of section 1519 G. C. with the original thereof will disclose that there has been practically no change made in the phraseology.

It appears, therefore, that at the time of the enactment of the original of section 1519 G. C. the original of section 6252 G. C. was in full force and effect, and the question then arises as to whether or not the provisions of section 1519 G. C. having been later enacted should be considered as changing the provisions of section 6252 G. C.

The provisions of section 1519 G. C. are to the effect that a copy of the order is to be published in one or more newspapers of general circulation for three consecutive weeks.

Section 6252 G. C. provides that if there are two newspapers of opposite politics at the county seat publication shall be made there. And if there are one or more newspapers of opposite politics in a city of eight thousand inhabitants or more not a county seat in the county, such publication should be made there. There is nothing in the statute as to the number of insertions to be made. It may be possible that in certain county seats there are not two newspapers of opposite politics published, and if such is the case then the publication would be made in only one newspaper. It does not seem to me, therefore, that there is such a conflict between the two statutes that it can be said that section 1519 G. C. is exclusive of the provisions of section 6252 G. C. but rather that the two may be read together without in any way doing violence to the language of either. If there are two newspapers of opposite politics at the county seat an order fixing the time of holding court should be printed in such newspapers. If in such county there is a city of eight thousand inhabitants or more, not a county seat, additional publication shall be made in two newspapers of opposite politics if there be such in such city, and under the provisions of section 6253 G. C. publication shall be made in a newspaper printed in the German language. The time of publication is fixed by the provisions of section 1519 G. C., Section 6252 G. C. not providing for the time of publication.

Answering your question specifically, therefore, I am of the opinion that the

order fixing the times of holding court is required to be made in accordance with the provisions of section 6252 G. C. in all cases wherein said provisions are applicable.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2023.

AGRICULTURE—CORN BOYS' TRIP—CERTAIN ITEMS OF BILL OF T. P. RIDDLE APPROVED AND DISAPPROVED FOR 1916.

COLUMBUS, OHIO, November 14, 1916.

The Board of Agriculture, Columbus, Ohio.

GENTLEMEN:—Under date of October 17, 1916, you wrote me a letter to the following effect:

> "In the opinion No. 1948, dated September 29, 1916, you advised that Mr. T. P. Riddle, who conducted the corn boys' trip to Washington in the year 1915, was an independent contractor in so far as the trip proper was concerned. I herewith hand you a letter which I received from Mr. Riddle, dated October 13th, which is self-explanatory, together with an itemized statement as furnished by him, which he asks the board of agriculture to pay.
>
> "I respectfully request your advice whether items Nos. 1, 2, 8, 9, 10 and 11 are just claims against the state, and should be paid by the board of agriculture."

The letter of Mr. Riddle, referred to above, is as follows:

> "I am enclosing herewith a copy of a statement to the amount of $1,067.24, addressed to the State Board of Agriculture over eight months ago.
>
> "Each item of this statement was substantiated by receipt or citation of authority. Further, every item of this statement was approved for payment by the State Board of Agriculture or by its duly authorized agents.
>
> "I presume that the payment of this account was being held up as a club to force my acquiescence to the demand of the State Board of Agriculture for the surrender of the records involved in the handling of last year's Buckeye corn special tour.
>
> "In view of the attorney-general's ruling No. 1948, which sustains me in my contention that I was an independent contractor in the handling of the 1915 Buckeye corn special tour, I fail to appreciate the cause for further delay, and I respectfully request hereby that the account be paid within the next ten days. The failure of the State Board of Agriculture to pay this account within the time limit stated will necessitate my suing for its collection."

Since that time we have had a conference in regard to the various items to which you refer.

Item I is as follows:

Office expense, on account, 10-1-15 to 12-31-15_____$208 28

In regard to this item I have examined the account which was submitted by Mr. Riddle wherein he set forth fully the items of expenditure and the receipted bills therefor. All of said expenditures seem to have been for legitimate office expenses. As Mr. Riddle was permitted to conduct his office at Lima, Ohio, as director of junior contests I can see no reason why this bill should not be audited and paid.

Item II is as follows:

Traveling expenses, on account, 10-19-15 to 12-31-15_____$67.86

I have examined the detailed account submitted by Mr. Riddle in this regard and find that it is for expenses incurred by him in traveling on behalf of the state and can see no reason why said bill should not be paid.

Items VIII and IX are as follows:

B. C. S. T. Ticket 1242, T. P. Riddle_____$59.25

B. C. S. T. Ticket 1099, Florence Jackson_____ 59.25

These items were distinctly covered in opinion No. 1948 to the effect that Mr. Riddle being an independent contractor required to furnish a certain service and at a certain price, and his stenographer taken along to act as secretary, would not be entitled to their expenses from the state.

Item X is as follows:

B. C. S. T. Ticket 1204, N. L. Bunnell_____$59.25

This item was also covered by opinion No. 1948 to the effect that the members of the board of agriculture would not be authorized to take the trip at the state's expense.

Item XI is as follows:

B. C. S. T. Ticket 1289, J. R. Clarke_____$59.25

I have personally consulted Mr. J. R. Clarke and am informed by him that he was at that time an employe of the state; that the committee of junior contests which was a committee of the board of agriculture in charge of the matter, and also the secretary of said board directed him to go on said trip in order to see that only those who were properly entitled to take the trip were carried on the trip and further to help see that the contract of Mr. Riddle was properly carried out. I am therefore inclined to the opinion that Mr. Clarke's expenses are properly chargeable.

This answers all of the items inquired about.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

2024.

BUILDING AND LOAN ASSOCIATIONS—DEPOSITORS MAY WITHDRAW FUNDS BY NON-NEGOTIABLE ORDERS—SAME ASSIGNABLE—SECTION 9652 G. C. CONSTRUED.

Under section 9652 G. C., depositors in a building and loan association may withdraw funds by non-negotiable orders, which orders are assignable, and may be honored and paid by such building and loan association when presented by an association.

An order by a depositor upon funds in a building and loan association which is not payable "to order or to bearer" is non-negotiable within the meaning of section 9652 G. C.

COLUMBUS, OHIO, November 14, 1916.

HON. L. G. SILBAUGH, *Inspector of Building and Loan Associations, Columbus, O.*

DEAR SIR:—I have your letter of October 20, 1916, in which you request my opinion as follows:

"In the enumeration of powers granted to building and loan associations of this state are the following:

"'General Code Section 9651. To permit members to withdraw all or part of their stock deposits, at such times, and upon such terms as the constitution and by-laws provide. * * *

"'Section 9652. To permit withdrawal of deposits upon such terms and conditions as the association provides except by check or draft. But no such association shall be permitted to carry for any member or depositor any demand, commercial or checking account. Nothing in this chapter shall prevent members or depositors from withdrawing funds by non-negotiable orders.'

"The _____ Savings Company, a building and loan association of this state, has allowed the withdrawal or deposits, copies of the requests of which are as follows:

"(A)

"_____, Ohio, Oct. 9, 1916. No._____

"The _____ Savings Company, pay to _____ (payee) _____ $50.09 fifty and 9-100 dollars.

"(Signed) (Depositor.)

"On the back thereof is the endorsement of the 'payee' which is followed by endorsement: 'Pay The _____ Savings Co., or order.

"The _____ Bank Co.

"(Signed) _____

"Cashier.

"On the face is stamped 'paid October 14, 1916,' by 'The_____ Savings Company.'

"(B)

"_____ Ohio, Oct. 13, 1916. No._____

"The _____ Savings Company pay to The _____ Bank $50.00 fifty _____ dollars.

"(Signed) (Depositor.)

"On the back thereof is the following endorsement: 'Pay to the order of _____ Saving Co., The _____ Bank, _____, Ohio.

'(Signed) _____

'Cashier.'

"On the face is stamped 'paid Oct. 14, 1916,' by 'The _____ Savings Company.'

"(C)

"_____, Ohio, March 25, 1916. No. 44.

"The _____ Savings Company. Pay to _____ ourselves _____$3,000.00. Three thousand _____dollars.

"The_____Bank

"By_____(Signed)_____

"'Assistant Cashier.'

"On the face is stamped 'paid March 27, 1916.' By 'The_____ Savings Company.'

"I also enclose full copies of the originals of these instruments for your inspection.

"The by-laws of this building and loan association contain the following provisions relative to withdrawal of these deposits:

"'Special depositors, and all other depositors, whose deposits are not pledged to the company, may as a general rule, upon written application to the secretary or general manager, withdraw all, or any part, of their credits or deposits, at any time without previous notice; but to protect the interest of depositors and borrowers, and avoid sacrifice of securities, sixty days written notice of withdrawal may at any time be required, and the right to interest on special or other deposits shall cease with any application to withdraw. All persons withdrawing shall be entitled to receive the amount of all credits, or any part thereof, at the time of the application to withdraw. The required notices to withdraw shall be filed in the order in which they are received, and paid from the regular receipts of the company in the order in which they are filed as fast as 75% of the regular receipts of the company will pay them; but, the board of directors may, at its discretion, use all the regular receipts to pay withdrawals. All withdrawals shall be taken from the oldest deposits, and no withdrawal from any one account or certificate shall exceed one thousand dollars in each thirty days of other pending applications for withdrawal; but, the board of directors may, at its discretion, pay withdrawals not exceeding twenty-five dollars at any one time, nor exceeding one hundred dollars within thirty days, regardless of the order of application.'

"The depositor is required to sign the following statement in the pass-book issued to him for such deposits:

"'It is understood that the account evidenced by this pass-book is not a demand, commercial or checking account, and that I have no right to demand the withdrawal or payment of any part thereof except upon the written application and notice above set forth, and then only by non-negotiable orders.

"'_____'

"I desire your opinion as to whether funds in a building and loan association in this state can be withdrawn in the manner and form as indicated by the foregoing instruments"

Under section 9652 of the General Code, quoted in your letter, a building and loan association is not permitted to carry a demand or checking account for any member or depositor, or to permit the withdrawal of deposits by check or draft. It may permit withdrawal of deposits in any other manner, however, upon such terms and conditions as it may choose to prescribe in its constitution and by-laws, and may permit withdrawals by non-negotiable orders.

The question presented is whether the so-called "request" upon which with-

drawal or deposits by depositors is permitted by the building and loan association under consideration are checks or drafts, the use of which is forbidden by the General Code or non-negotiable orders the use of which are permitted.

Section 8106 of the General Code, defining the essentials of a negotiable instrument, is as follows:

> "An instrument to be negotiable must conform to the following requirements:
>
> "1. It must be in writing and signed by the maker or drawer;
>
> "2. It must contain an unconditional promise or order to pay a sum certain in money;
>
> "3. Must be payable on demand, or at a fixed or determinable future time:
>
> "4. Must be payable to order or to bearer; and
>
> "5. When the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty."

It will be observed that such an instrument, as one of the qualifications of negotiability, must be made payable to order or bearer.

Section 8290 of the General Code defines a check as follows:

> "A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this division applicable to a bill of exchange payable on demand apply to a check."

The term "draft" is commonly employed as a synonym for either a bill of exchange or check. (Cudahy Packing Company v. Smith, 75 Fed., 473.) Section 8231 of the General Code defines a "bill of exchange" as follows:

> "A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer."

It follows that the words of negotiability "to order" or "to bearer," which by virtue of the definition contained in section 8231 of the General Code, supra, are necessary in a proper bill of exchange are also essential in a check, and that checks and drafts are, within the meaning of section 9652, negotiable instruments.

In none of the "requests" set forth in your letter as exhibits (A), (B) and (C) are words of negotiability found which must be used before such an instrument can come within the definition of a check or draft.

The by-laws of the association under consideration, as quoted in your letter, and the statement which the depositor is required to sign are further indicative of the right of the parties, and that such orders are not intended or treated as negotiable. The fact that such orders are assigned and the assignment recognized and the assignee treated as the owner thereof does not add to them the quality of negotiability. The assignee takes such orders subject to all the equities which may exist between the drawer and the drawee, and therefore I am of the opinion that the funds deposited in a building and loan association may be withdrawn by a depositor in the manner and form indicated in exhibits (A), (B) and (C) set forth in your letter.

I am forced to the conclusion just expressed solely by reason of the provisions of section 9652 G. C., authorizing withdrawal of deposits from building and loan associations by non-negotiable orders. I believe, however, that the practice of

permitting such orders to be assigned and of passing from hand to hand and being used to all intents and purposes as checks is an extension of power beyond the legislative intent and contrary to the spirit of the building and loan act as evidenced by other provisions of the General Code, and should be corrected by further legislation.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2025.

BOARD OF EDUCATION—BONDS ISSUED FOR PURPOSE OF PURCHASING SITE WHEREON TO ERECT HIGH SCHOOL BUILDING—MAY NOT BE USED FOR ERECTION OF GRADE SCHOOL BUILDING.

The proceeds of bonds issued by the board of education of a school district for the purpose of purchasing a site whereon to erect a high school building and for the construction of such building, may not be used by said board for the erection of grade school buildings.

COLUMBUS, OHIO, November 15, 1916.

HON. FRANK B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Your letter of November 13th is as follows:

> "The Middletown board of education has now on hands to the credit of the building fund $37,000, derived from sale of bonds without a vote of the people under section 7629 G. C., and under a resolution of said board worded in part as follows:
>
> "'That the bonds of said city school district of Middletown, Ohio, be issued and sold according to law in the sum of $37,000 for the purpose of purchasing real estate whereon a high school building may be erected and for the purpose of improving said land when so acquired.'
>
> "The board of education will be delayed seriously by coondemnation proceedings in securing land for a high school building, and in this connection it may be stated that on August 8, 1916, by vote of the people, the board now has the right to issue $200,000 in bonds for high school uses.
>
> "Can the board of education under the circumstances use the $37,000 above mentioned to erect grade school houses?"

From your statement of facts it appears that subsequent to the time the board of education of the Middletown city school district, acting under authority of section 7629 G. C., issued and sold bonds in the sum of $37,000 for the purpose of purchasing real estate whereon a high school building might be erected, and for the purpose of improving said land when so acquired, said board of education submitted to the qualified electors of said school district the question of issuing $200,000 of bonds for said purpose and the vote of said electors was favorable to said issue, so that it is not now the desire of said board of education to use said sum of $37,000 realized from the sale of the bonds first above referred to, for the purpose for which said bonds were issued. You inquire whether, upon the facts stated, said board of education may use said sum of $37,000 for another and different purpose, i. e., for the erection of grade school buildings.

Section 5654 G. C. (103 O. L. 521) provides:

> "The proceeds of a special tax, loan or bond issue shall not be used for any other purpose than that for which the same was levied, issued or made, except as herein provided. When there is in the treasury of any city, village, county, township or school district a surplus of the proceeds of a special tax or of the proceeds of a loan or bond issue which cannot be used, or which is not needed for the purpose for which the tax was levied, or the loan made, or the bonds issued, all of such surplus shall be transferred immediately by the officer, board or council having charge of such surplus, to the sinking fund of such city, village, county, township or school district, and thereafter shall be subject to the uses of such sinking fund."

In view of the above provisions of section 5654 G. C. it seems clear that inasmuch as the board of education of the school district referred to in your inquiry does not desire to use the proceeds of the bonds in question for the purpose for which said bonds were issued, it is the duty of said board to transfer said sum to the sinking fund of said district in compliance with the requirement of the latter part of said section.

I am of the opinion, therefore, in answer to your question that said board of education may not use said sum of $37,000 for the purpose of erecting grade school buildings.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2026.

ROADS AND HIGHWAYS—LAND LYING OUTSIDE AN INCORPORATED VILLAGE ABUTTING A ROAD IMPROVEMENT CARRIED FORWARD BY STATE WHICH LAND IS OWNED BY VILLAGE—IS ASSESSABLE FOR IMPROVEMENT.

Land lying outside an incorporated village and abutting on an inter-county highway improvement carried forward by the state highway department, which land is owned and used by said village in connection with its system of water works, may be assessed for a portion of the cost and expense of said inter-county highway improvement, subject to the limitation expressed in section 1214 G. C., which assessment must be made according to the benefits accruing to the land in question.

COLUMBUS, OHIO, November 15, 1916.

HON. FRED W. MCCOY, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR:—I acknowledge the receipt of your request for an opinion under date of November 10, 1916, which request reads as follows:

> "The trustees of Fox township, Carroll county, Ohio, will meet on the 2d day of December, 1916, to apportion the cost and expense of the improvement of section D, Carrollton-Salineville road, Inter-County highway No. 377, and desire to know if, in your opinion ,two or three acres of land abutting on said improvements used by the village of Salineville, Ohio, in connection with their system of water works for said village can be assessed their portion of the cost and expenses of said improvement."

I assume that the land to which you refer is owned by the village of Salineville.

I learn from the records in the office of the state highway commissioner that no part of the road improvement referred to by you extends into the village of Salineville and that the tract of land abutting on the improvement and used by the village of Salineville lies outside the corporate limits of that village. As a matter of fact, the entire road improvement is situated in Carroll county, while the village of Salineville is located entirely within the adjoining county of Columbiana.

A very similar question, and one the answer to which is decisive of the question submitted by you, was considered by me in opinion No. 1192, rendered to Hon. T. B. Jarvis, prosecuting attorney of Richland county on January 21, 1916. The third question considered in that opinion related to the right of the county to assess a part of the cost of a road improvement constructed under the provisions of section 6956-1 et seq. of the General Code, now repealed, against a tract of land owned by the city of Mansfield and lying immediately south of the improved road in question, which land was used for a sewage and garbage disposal plant and was situated outside the limits of the city. Section 6956-10 G. C., now repealed, being the section under which the assessment considered in that opinion was to be made, provided for an assessment upon the owners of real estate lying and being within one mile from either side, end or terminus of the improvement, according to benefits. It was pointed out that this provision was general in its nature and contained no exemption as to property owned by a municipality, and after citing and discussing a number of authorities in the opinion in question it was held that the land owned by the city, and lying outside the city limits and used for the purpose of a sewage and garbage disposal plant, might be assessed for a part of the cost and expense of the improvement in question, which assessment, like all others, must be made according to the benefits derived from the improvement.

The section under which assessments are to be made in the matter of the improvement referred to by you, being section 1214 G. C., is also general in its terms and contains no exception as to property owned by a municipality, it being provided in the section in question that ten per cent of the cost and expense of improvement, excepting therefrom the cost and expense of bridges and culverts, shall be a charge upon the property abutting on the improvement, providing the total amount assessed against any owner of abutting property shall not exceed 33% of the valuation of such abutting property, for the purposes of taxation, and that the township trustees shall apportion the amount to be paid by the owners of the abutting property, according to the benefits accruing to the owners of the land so located.

In accordance with the view expressed in opinion No. 1192 of this department, I advise you, in answer to your inquiry, that the land referred to by you, abutting on the improvement and owned and used by the village of Salineville, in connection with its system of water works, may be assessed for a portion of the cost and expense of the inter-county highway improvement referred to by you, subject to the limitation expressed in section 1214 G. C., which assessment must, of course, be made according to the benefits accruing to the land in question.

I am enclosing for your information a copy of opinion No. 1192, referred to above.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2027.

STATE LIQUOR LICENSING BOARD—CHARGES FILED AGAINST COUNTY LICENSE COMMISSIONER—STATE BOARD HAS POWER TO HEAR CHARGES—NOT AFFECTED BY REASON OF INDICTMENT AGAINST SUCH COUNTY LICENSE COMMISSIONER.

The power of the state liquor licensing board to hear and determine charges against a county license commissioner, pursuant to the provisions of section 1261-25 *G. C.*, 103 *O. L.*, 219, *is not affected by the fact that such county license commissioner is under indictment for a criminal offense founded upon the same transaction upon which the charges before the state liquor licensing board are based.*

COLUMBUS, OHIO, November 15, 1916.

THE STATE LIQUOR LICENSING BOARD, *Columbus, Ohio.*

GENTLEMEN:—Yours under date of November 2, 1916, is as follows:

> "In view of the pending indictment against F. G. Searle, member of the Darke county liquor licensing board, we would like to ask your opinion as to whether this board would have authority to try Mr. Searle on the subject involved in that indictment while said indictment is pending.
>
> "The liquor license code provides that a member of a county board may be removed after a hearing of which the member has been given a thirty day notice, but we are at a loss to know whether we could compel Mr. Searle to go into a hearing of the matter while the indictment is pending."

Section 10 of the liquor license law, section 1261-25, 103 O. L., 219, provides as follows:

> "Any county license commissioner may be removed by the state board in case of misconduct in office, bribery, incompetency, any gross neglect of duty or gross immorality, upon a hearing, thirty days' notice having been given to the commissioner whose removal is considered, as well as to the attorney-general, who may attend the hearing and represent the state; and the decision of the state board shall be final."

This section confers upon the state liquor licensing board full authority to remove a county license commissioner for any of the causes therein enumerated, subject only to the conditions and limitations there prescribed. The provisions of this section relate only to the removal of the individual in question from the office of liquor license commissioner and in no sense operate to impose upon the individual any criminal penalty for any conduct which may be the subject of charges upon which the removal of the license commissioner is sought and the proceedings for the removal of such officer here authorized are wholly independent of any criminal prosecution which may be based upon any conduct of such county liquor license commissioner. That the transactions of a county liquor license commissioner are the basis of a criminal prosecution in no way impairs the authority of the state liquor licensing board to entertain charges against such commissioner, based upon the same transaction, when there is involved therein or the same constitutes misconduct in office, bribery, incompetency, any gross neglect of duty or gross immorality.

I am, therefore, of opinion, in answer to your inquiry that the fact that the county liquor license commissioner is under indictment in no way affects the authority of the state liquor licensing board to hear and determine charges against such county license commissioner, pursuant to the provisions of section 1261-25 G. C., supra.

The question of the policy or expedience of hearing such charges prior to a final disposition of the criminal prosecution is a matter for determination by the state liquor licensing board.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2028.

COUNTY AGRICULTURAL SOCIETIES—BOARD OF AGRICULTURE SHOULD INTERPRET ITS OWN RULES RELATIVE TO SUCH COUNTY SOCIETIES.

The rules adopted by the board of agriculture governing the conduct of the affairs of county and district agricultural societies are subject to the interpretation and application of the board of agriculture in issuing the certificate that the laws of the state and the rules of the board have been complied with as required by section 9880 G. C.

COLUMBUS, OHIO, November 15, 1916.

HON. P. A. SAYLOR, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—I acknowledge your request for an opinion, which is as follows:

"My attention has been called to the rules 'for the organization and management of county agricultural societies, adopted by the state board of agriculture, January 24, 1916,' rule 5 of which is as follows:

"'Rule 5. Directors, other than the treasurer, shall receive an amount not exceeding $3.00 and mileage of five cents per mile one way in attending each meeting and conducting the affairs of the society. No allowance shall be made to exceed twelve meetings each year, nor shall any funds, accumulations, profits or property of the society, or any portion or part thereof, be in any manner, except as above used, expended, delivered to or for, the individual benefit of any member or officer of the board of directors, or any other person or persons, as a share, gift or dividend in the proceeds or property of the society. The treasurer and secretary may receive compensation for their services. The election of officers by the board of directors shall be by ballot in all cases.'

"The officers of said society asked for my interpretation of Rule 5, and gave me the following facts:

"Several of the officers of the society, in order to promote the welfare of their department and make that department a success, especially that department with reference to speed horses, have been compelled to visit other fairs and solicit entries from these fairs to attend at our fair here Mr. Haston of our board, and his predecessor in that department, have always gone to Troy, Ohio, and got as many of the speed horses to come from Troy to our fair as he could, by the use as to location and size of purse and the next point to be shipped to. It is the belief of our board

that unless this effort was made by the speed department and probably some of the other departments, that our fair would be below the standard, because of lack of entries. Then, too, several members of the society have gone down to our fair grounds and have done manual labor on the grounds along with other hired laborers, in getting the buildings in shape to house the exhibits, etc. These members have expense accounts. None of them are so very heavy, but they are for moneys actually spent, or labor actually performed in order to make the fair a success. Is there no way that they can be reimbursed?

"I am mailing a copy of this letter to the state board of agriculture and ask that you take the matter up with them and advise with reference to the section, applied to the facts as given above.

"There is no doubt in my mind that there is a moral obligation to pay these bills, but whether it can be done legally or not is another question."

Section 9880 G. C. provides as follows:

"When thirty or more persons, residents of a county, or of a district embracing one or more counties, organize themselves into an agricultural society, which adopts a constitution and by-laws, selects the usual and proper officers, and otherwise conducts its affairs in conformity to law, and the rules of the state board of agriculture, and when such county or district society has held an annual exhibition in accordance with the three following sections, and made proper report to the state board, then, upon presentation to the county auditor, of a certificate from the president of the state board attested by the secretary thereof, that the laws of the state and the rules of the board have been complied with, the county auditor of each county wherein such agricultural societies are organized, annually shall draw an order on the treasurer of the county in favor of the president of the county or district agricultural society for a sum equal to two cents to each inhabitant thereof, on the basis of the last previous national census. The total amount of such order shall not in any county exceed eight hundred dollars, and the treasurer of the county shall pay it."

Under the provisions of the above quoted section the expenditure of funds of the agricultural society for the purposes mentioned in your inquiry is governed by the rules of the board of agriculture applicable to the conduct of the affairs of such society.

The rules of the board of agriculture governing agricultural societies are subject to change or modification by the board of agriculture and subject as well to the interpretation and application thereof by the board of agriculture in the issuance of the certificate that the laws of the state and the rules of the board have been complied with, as required by section 9880 G. C., supra.

Such interpretation and application of the rules of the board of agriculture as it would adopt or make in the issuance of certificates would, it is believed, in the absence of fraud, gross negligence or abuse of discretion, be controlling in the courts and binding upon this department. Any attempt to interpret Rule 5, above quoted in this opinion, would, therefore, be futile, and the matter referred to in your inquiry is subject to determination by the board of agriculture.

The attention of the board of agriculture has been directed to the matter of your inquiry, by which board it will be given proper consideration.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

2029.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, VILLAGE OF SHAKER HEIGHTS.

COLUMBUS, OHIO, November 15, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the village of Shaker Heights in the sum of $33,300.00 for the improvement of North Moreland boulevard by grading, draining, curbing and paving the same, being one bond of three hundred dollars and thirty-three bonds of one thousand dollars each."

I have examined the transcript of the proceedings of council and other officers of the village of Shaker Heights, also the bond and coupon form attached, and find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of said village.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2030.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, VILLAGE OF SHAKER HEIGHTS.

COLUMBUS, OHIO, November 15, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the village of Shaker Heights in the sum of $10,700.00 for the improvement of North Moreland boulevard by constructing storm and sanitary sewers therein, being one bond of two hundred dollars and twenty-one bonds of five hundred dollars each."

I have examined the transcript of the proceedings of council and other officers of the village of Shaker Heights, also the bond and coupon form attached, and find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of said village.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2031.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, VILLAGE OF SHAKER HEIGHTS.

COLUMBUS, OHIO, November 15, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the village of Shaker Heights in the sum of $5,400.00 for the improvement of North Moreland boulevard by constructing a water main therein, being one bond of four hundred dollars and ten bonds of five hundred dollars each."

I have examined the transcript of the proceedings of council and other officers of the village of Shaker Heights, also the bond and coupon form attached, and find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of said village.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2032.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, VILLAGE OF SHAKER HEIGHTS.

COLUMBUS, OHIO, November 15, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the village of Shaker Heights in the sum of $18,800.00 for the improvement of Kemper road by grading, draining, curbing and paving the same, being one bond of three hundred dollars and thirty-seven bonds of five hundred dollars each."

I have examined the transcript of the proceedings of council and other officers of the village of Shaker Heights, also the bond and coupon form attached, and find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of said village.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2033.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, VILLAGE OF SHAKER HEIGHTS.

COLUMBUS, OHIO, November 15, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the village of Shaker Heights in the sum of $10,200.00 for the improvement of Kemper road by constructing storm and sanitary sewers therein, being one bond of two hundred dollars and ten bonds of one thousand dollars each."

I have examined the transcript of the proceedings of council and other officers of the village of Shaker Heights, also the bond and coupon form attached, and find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of said village.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2034.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, VILLAGE OF SHAKER HEIGHTS.

COLUMBUS, OHIO, November 15, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the village of Shaker Heights, for the improvement of Kemper road, in the sum of $4,500.00 by constructing a water main therein, being nine bonds of five hundred dollars each."

I have examined the transcript of the proceedings of council and other officers of the village of Shaker Heights, also the bond and coupon form attached, and find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of said village.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2035.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, VILLAGE OF SHAKER HEIGHTS.

COLUMBUS, OHIO, November 15, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the village of Shaker Heights in the sum of $34,796.00 for the improvement of Fairmount road by grading, draining, curbing and paving the same, being one bond of two hundred and ninety-six dollars and sixty-nine bonds of five hundred dollars each."

I have examined the transcript of the proceedings of council and other officers of the village of Shaker Heights, also the bond and coupon form attached, and find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of said village.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2036.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, VILLAGE OF SHAKER HEIGHTS.

COLUMBUS, OHIO, November 15, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the village of Shaker Heights in the sum of $8,600.00 for the improvement of Fairmount road by constructing storm and sanitary sewers therein, being one bond of one hundred dollars and seventeen bonds of five hundred dollars each."

I have examined the transcript of the proceedings of council and other officers of the village of Shaker Heights, also the bond and coupon form attached, and find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of said village.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2037.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, VILLAGE OF SHAKER HEIGHTS.

COLUMBUS, OHIO, November 15, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE:—Bonds of the village of Shaker Heights in the sum of $2,500.00 for the improvement of Fairmount road by constructing a water main therein, being five bonds of five hundred dollars each."

I have examined the transcript of the proceedings of council and other officers of the village of Shaker Heights, also the bond and coupon form attached, and find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of said village.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2038.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, VILLAGE OF SHAKER HEIGHTS.

COLUMBUS, OHIO, November 15, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE:—Bonds of the village of Shaker Heights in the sum of $51,645.00 for the improvement of North Park boulevard by grading, draining, curbing and paving tthe same, being one bond of one hundred and forty-five dollars and one hundred and three bonds of five hundred dollars each."

I have examined the transcript of the proceedings of council and other officers of the village of Shaker Heights, also the bond and coupon form attached, and find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of said village.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2039.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, VILLAGE OF SHAKER HEIGHTS.

COLUMBUS, OHIO, November 15, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the village of Shaker Heights in the amount of $16,597.00 for the improvement of North Park boulevard by the construction of storm and sanitary sewers therein being one bond of ninety-seven dollars and thirty-three bonds of five hundred dollars each."

I have examined the transcript of the proceedings of council and other officers of the village of Shaker Heights, also the bond and coupon form attached, and find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of said village.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2040.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, VILLAGE OF SHAKER HEIGHTS.

COLUMBUS, OHIO, November 15, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the village of Shaker Heights in the sum of $6,935.00 for the improvement of North Park boulevard by the construction of a water main therein being one bond of four hundred and thirty-five dollars and thirteen bonds of five hundred dollars each."

I have examined the transcript of the proceedings of council and other officers of the village of Shaker Heights, also the bond and coupon form attached, and find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of said village.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2041.

APPROVAL, SALE OF OHIO CANAL LANDS IN CITY OF MASSILLON TO HESS-SNYDER CO.

COLUMBUS, OHIO, November 15, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works. Columbus, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication of November 10, 1916, transmitting to me duplicate copies of a resolution providing for the sale of 9,903 square feet of the Ohio canal lands in the city of Massillon, Stark county, Ohio, to the Hess-Snyder Co. of said city.

I find that the sale of this land is authorized by an act of the general assembly, found in 106 O. L., 234, and that the resolution submitted to me is properly drawn.

I am therefore returning the same with my signature attached to the duplicate copies thereof.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2042.

COUNTY COMMISSIONERS—NOT AUTHORIZED TO APPOINT COUNTY SURVEYOR TO MAKE PLANS FOR SEWER IMPROVEMENT.

County commissioners are not authorized, under the provisions of section 6602-1 *G. C., et seq., to appoint the county surveyor to make the necessary plans, specifications and estimates for a sewer improvement. This is true without regard to whether the county surveyor receives compensation for this work in addition to his regular salary.*

COLUMBUS, OHIO, November 16, 1916.

HON. F. J. BISHOP, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—Your request for an opinion, under date of October 27, 1916, reads as follows:

> "I would like your opinion on the following proposition:
> "Section 6602-2 giving the county commissioners power to build sewer system outside of municipalities provides that the commissioners shall have prepared the necessary plans, specifications and estimates of said proposed sewer improvement.
> "I would like your opinion as to whether or not the commissioners can appoint the county surveyor to prepare the plans, specifications and estimates and if so can the county surveyor receive compensation for this work in addition to his regular salary?"

Section 6602-I G. C. contains the following provisions:

> "The board of county commissioners may employ a competent sanitary engineer for such time and on such terms as they may deem best to assist them in performing any of their duties under this act and may provide

for the payment of his necessary assistants and expenses.

"In any county of the state having a population exceeding 100,000 the board of county commissioners may create a sanitary engineering department to be under their supervision, and in charge of a competent sanitary engineer, for the purpose of assisting them in the performance of their duties under this act or their other duties regarding sanitation provided by law.

"The board of county commissioners shall provide suitable rooms for the use of such department and shall provide for the payment of all the expenses of such department which are authorized by said board."

Section 6602-2 G. C., referred to by you, provides in part as follows:

"Whenever the board of county commissioners of the county shall declare by a majority vote the necessity of the construction, maintenance, repair, or operation of a sewer improvement, or a sewage treatment works mentioned in section one, and shall declare that said construction, maintenance, repair or operation is for the purpose of drainage, public convenience, or public health, and welfare, or when a petition, signed by the freeholders of the majority of the acreage in a sewer district, petition the county commissioners for the construction within said district of such a sewer improvement, or when a petition signed by the owners of the majority of the foot frontage of a proposed local or lateral sewer improvement, petition the board of county commissioners for the construction within said district of such a local or lateral sewer improvement, then the county commissioners shall have prepared the necessary plans, specifications and estimates of said proposed sewer improvements; * * * "

It will be noted that neither of these sections makes any reference to the county surveyor. No duties are cast upon that official by the sections in questions which authorize the county commissioners to employ a competent sanitary engineer. Whatever might have been the proper answer to your question prior to the going into effect of the Cass highway law, amended senate bill No. 125, 106 O. L., 574, the provision of section 138 of that act, section 7181 G. C., that "the county surveyor shall give his entire time and attention to the duties of his office" is decisive of the matter at the present time. It is no part of the duty of the county surveyor to act as a sanitary engineer for the county commissioners where the commissioners are proceeding under section 6602-1 et seq. of the General Code, and since the county surveyor must, under the provisions of section 7181 G. C., devote his entire time and attention to the duties of his office, it follows that the county surveyor is not authorized to accept employment under the provisions of section 6602-1 G. C., et seq., and the county commissioners are not authorized to appoint or employ him to prepare the necessary plans, specifications and estimates. This is true without regard to whether the county surveyor receives compensation for this work in addition to his regular salary. He is required to devote his entire time to the duties of his office and would not be authorized to devote a part of his time to work in connection with which no duty is cast upon him by the statutes.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2043

COUNTY COMMISSIONERS—MAY ISSUE BONDS FOR REPAIR OF BRIDGES WITHOUT VOTE OF ELECTORS, PROVIDED EXPENDITURE IS WITHIN LIMITATION PRESCRIBED BY SECTON 5638 G. C.—SEE ALSO SECTON 5649-1 G. C. FOR ITS LIMITATIONS.

By provision of section 2434 *G. C. county commissioners may issue bonds for the purpose of providing funds for the repair of the bridges of the county and this may be done without a vote of the electors of said county so long as the expenditure for the repair of any one of said bridges is within the limitation prescribed by section* 5638 *G. C. Due regard, however, should be given to the limitation that will be affected by the levying of taxes for interest and sinking fund incident to said bond issue, upon tax levies for current expenses of the county, the levy for interest and sinking fund being preferred to levies for current expenses by provision of section* 5649-1 *G. C.,* 104 *O. L.,* 12.

COLUMBUS, OHIO, November 16, 1916.

HON. CHARLES E. BALLARD, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—Your letter of November 14 is as follows:

"I respectfully request your opinion upon the following questions:

"The commissioners of Clark county, Ohio, desire to issue $60,000.00 worth of bonds—the estimated cost of repairing about 200 different county bridges by block floor, concrete floor and repair of the walls and butments. The amount of money to be expended on any one bridge does not exceed $700.00, but the total cost of repairing all of said bridges will equal about $60,000.00.

"(1) Have the commissioners authority to issue bonds in the sum of $60,000.00 for the purpose of paying the cost of repairing said bridges, under section 2434 G. C., without first submitting the question to the voters of the county?"

"(2) Are the provisions of section 2434 G. C.—

" 'or other necessary buildings or bridges, or for the purpose of enlarging, repairing, improving or rebuilding thereof,'

"limited by the provisions of section 5638 G. C., as to the amount that can be expended without submitting it to a vote of the people?"

Section 2434 G. C. provides in part that:

"* * * for the purpose of erecting or acquiring a building in memory of Ohio soldiers, or for a court house, county offices, jail, county infirmary, detention home, or additional land for an infirmary or county children's home or other necessary buildings or bridges, or for the purpose of enlarging, *repairing,* improving, or rebuilding thereof, * * * the commissioners may borrow such sum or sums of money as they deem necessary, at a rate of interest not to exceed six per cent. per annum, and issue the bonds of the county to secure the payment of the principal and interest thereof."

The part of section 2434 G. C., above quoted, is a general grant of authority to borrow money for the purpose therein mentioned and to issue bonds to secure the payment thereof. As was stated in opinion No. 1949 of this depart-

ment, rendered to the board of state charities on September 29, 1916, said provision of said statute comprehends the borrowing of money and the issuance of bonds both with and without the vote of the electors of the county.

The authority to borrow money and issue bonds pursuant to the above provision of the statute and upon the approval of a majority of the electors of the county, is subject only to the limitation of fifteen mills upon the combined maximum rate for all taxes prescribed by section 5649-5b G. C. (103 O. L. 57) and to the further limitation of the amount approved by the vote of the electors.

The authority to borrow money and issue bonds without a vote of the electors under said provision of said statute is subject to all the limitations of the so-called Smith law governing levies for county purposes and those limitations should be taken into consideration by county commissioners in determining the amount of money to be raised for any of the purposes mentioned therein.

By the terms of said provision of section 2434 G. C. one of the things for which county commissioners may borrow money and issue bonds is to repair the bridges of the county. I am of the opinion, therefore, in answer to your first question, that your county commissioners have authority under section 2434 G. C., supra, to issue bonds in the amount and for the purpose mentioned in said inquiry. Due regard, however, should be given to the limitation that will be affected by the levying of taxes for interest and sinking fund incident to said bond issue, upon tax levies for current expenses of your county. When said bonds are issued the tax levy for interest and sinking fund must be made in preference to levies for current expenses as required by section 5649-1 G. C. (104 O. L. 12.)

You further inquire whether the authority of said county commissioners to issue bonds for the aforesaid purpose, without a vote of the electors, is limited by the provisions of section 5638 G. C., which are as follows:

> "The county commissioners shall not levy a tax, appropriate money or issue bonds for the purpose of building county buildings, purchasing sites therefor, or for land for infirmary purposes, the expenses of which will exceed $15,000.00, except in case of casualty, and as hereinafter provided; or for building a county bridge, the expense of which will exceed $18,000.00, except in case of casualty, and as hereinafter provided; or enlarge, repair, improve, or rebuild a public county building, the entire cost of which expenditure will exceed $10,000.00; without first submitting to the voters of the county the question as to the policy of making such expenditure."

Under the above provisions of section 5638 G. C. county commissioners may not levy a tax, appropriate money or *issue bonds* for building a county bridge the expense of which will exceed $18,000.00, except in case of casualty, or for repairing or improving such bridge the entire cost incident to which will exceed $10,000.00, without first submitting to the electors of the county the question as to the policy of making such expenditure.

It will be observed, however, that these respective limitations apply to the construction or to the improvement or repair of a single bridge and it appears from your statement of facts that the amount of money desired to be expended on any one bridge in your county will not exceed $700.00.

It is evident, therefore, that in issuing bonds for the purpose of repairing the bridges referred to in your inquiry your county commissioners are not concerned with the limitations prescribed by said section 5638 G. C., supra.

The resolution of said commissioners providing for said bond issue should, however, enumerate the bridges desired to be repaired or improved, by proper

reference to name or location, and should set forth the estimated cost of such repair or improvement with respect to each particular bridge. In this way no question can be raised as to the provisions of said section 5638 G. C. applying to said issue.

Answering your second question I am of the opinion that for the purpose for which the bonds above mentioned are to be issued, the authority of your county commissioners to proceed under the provision of section 2434 G. C., hereinbefore quoted, is not limited by the provisions of section 5638 G. C., supra.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2044.

APPROVAL, RESOLUTIONS FOR IMPROVEMENT OF ROADS IN CLINTON, ERIE AND ROSS COUNTIES.

COLUMBUS, OHIO, November 16, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication of November 15, 1916, transmitting to me for examination final resolutions relating to the following roads:

"Clinton County—Sec. 'B' Wilmington-Xenia road, Pet. No. 1571, I. C. H. No. 248.

"Erie County—Sec. 'J' Columbus-Sandusky road, Pet. No. 2308 I. C. H. No. 4.

"Erie County—Sec. 'O' Sandusky-Norwalk road, Pet. No. 1460, I. C. H. No. 294.

"Highland and Ross Counties—Bridge Cincinnati-Chillicothe road, I. C. H. No. 8."

I find these resolutions to be in regular form and am therefore returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2045.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, VILLAGE OF CUYAHOGA FALLS, OHIO.

COLUMBUS, OHIO, November 16, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the village of Cuyahoga Falls in the sum of $60,000.00 for the construction of sewers in said village, being sixty bonds of $1,000.00 each."

I have examined the transcript of the proceedings of the council and other officers of the village of Cuyahoga Falls relative to said bond issue; also the bond and coupon form attached, and find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of said village.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2046.

APPROVAL, LEASES OF CERTAIN CANAL LANDS.

COLUMBUS, OHIO, November 16, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication of November 10, 1916, transmitting to me for examination the following leases of canal lands:

"August Kramer, for M. & E. canal lands in Allen county	$ 200.00
"G. F. Dotson, Rushtown, O., portion of the abandoned Ohio canal in Scioto county	100.00
"J. M. Faverty, Portsmouth, O., for portion of abandoned Ohio canal in Scioto county	150.00
"H. W. Goode, Russels Point, O., portion of M. & E. canal lands in Logan county	400.00
"Charles Mongan, Portsmouth, Ohio, portion of abandoned Ohio canal in Scioto county	150.00
"Al Bridwell and Roy C. Lynn, Portsmouth, O., portion of abandoned Ohio canal lands	200.00
"Carl Wetherill, Spencerville, O., 1 acre of Miami & Erie canal lands in Allen county	100.00
"The Mead Pulp & Paper Co., Dayton, O., portion of M. & E. canal lands	2,633.33"

I find these leases to be in regular form and am, therefore, returning the same with my approval endorsed upon the triplicate copies thereof.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2047.

DEPENDENT OR NEGLECTED CHILDREN—LAW RELATING TO SUCH CHILDREN DISTINGUISHED FROM PROVISIONS APPLICABLE TO DELINQUENT CHILDREN—BOARD OF ADMINISTRATION ORDERS —JUVENILE COURT MAY ISSUE FURTHER ORDERS IN REGARD TO COMMITMENT OF SUCH CHILDREN—SEE SECTION 1643 G. C.

In view of the provisions of law relating to the care of dependent and neglected children as distinguished from delinquent children, the action of the Ohio Board of Administration in establishing branches of the Bureau of Juvenile Research at the Boys' Industrial School and the Girls' Industrial School insofar as it relates to dependent or neglected children is in opposition to the letter and spirit of the law and the commitment of neglected or dependent children to the institutions named, under the order of the board, is without force and effect.

Dependent or neglected children so committed under and by virtue of the orders referred to being wards of the juvenile court by virtue of section 1643 *G. C. are subject to the further orders of the court which committed them.*

COLUMBUS, OHIO, November 16, 1916.

The Board of State Charities, Columbus, Ohio.

GENTLEMEN:—Your request for an opinion is as follows:

"According to the provisions of section 1841-1 of the General Code, the juvenile court of Hardin county committed three children to the board of administration and, in accordance with instructions previously issued by the state board that all boys who are not feeble-minded should be delivered at the Boys' Industrial School, these three children were taken to that institution.

"The commitment papers stated that they were committed for the reason that 'they have not proper parental care and guardianship, and that such children are *dependent* upon the public for their support.'

"These boys were brought to the Boys' Industrial School during the temporary absence of the superintendent, who, on his return, communicated with the committing judge asking him to send for the boys as it was contrary to the law governing said institution for him to receive dependent children.

"This the judge refused to do claiming that they had been legally committed.

"A member of the board of administration requested the board of state charities to receive these children for placement in foster homes, as provided for in section 1352-5 of the General Code.

"The board of state charities thereupon accepted these children and placed them to board in private families pending the selection of suitable foster family homes.

"These children are difficult cases to establish in free foster homes. There has been considerable expense for payment of private board, and is likely to be for some time, especially in regard to one.

"Under these circumstances there seems to be no way to charge back to Hardin county the necessary expense for maintenance of these children. Such expenses are paid from a rotary fund; without reimbursement from Hardin county the fund will be partially depleted if the present status exists much longer.

"It has been suggested that the boys be returned to the industrial school, but this does not seem proper or legal, as they were committed to be dependent not delinquent.

"We desire to ascertain:

"First. Does section 1643, when construed in connection with sections 1680 and 1683, permit the committing judge to recall said children at any time?"

"Second. May the juvenile judge cancel his order of commitment to the board of administration and make a second entry committing them to the board of state charities?

"Third. If neither of the plans proposed in queries one and two is feasible or possible, has the board of state charities the legal right to charge incidental expenses of these children to Hardin county, as is done in the case of children committed directly to the board of state charities?

"Fourth. Was the commitment of these boys in the manner described above warranted by law when the judge of the juvenile court apparently knew that the only provision that the state had for the care of such cases would be at the Boys' Industrial School, which is exclusively restricted to the care of delinquent boys of certain ages? In other words does section 1841-1 taken in connection with the laws regulating state institutions for the care of juvenile wards permit the inclusion of dependent children?"

This office is just in receipt of a letter from the prosecuting attorney of Hardin county to the effect that the juvenile judge in dealing with the children referred to found that they were dependent and neglected children, and being in receipt of a notice from the Ohio Board of Administration to the effect that it had established a bureau of juvenile research for boys at the Boys' Industrial School, and for girls at the Girls Industrial School, committed the children to the Ohio Board of Administration under date of July 28, 1914, by an order as follows:

"That said Helen Augustus, James Augustus, Cleo Augustus and Virgil Augustus be committed to said the Ohio Board of Administration to be there received, cared for, educated and kept, subject to the control of and until discharged by the proper authorities of said institution."

The order of the Ohio Board of Administration issued under date of July 1, 1914, the date when the juvenile research act became effective, is as follows:

"TO JUDGES OF JUVENILE COURTS:—

"Section 1841-1 of the General Code, as enacted Laws of Ohio, volume 103, p. 175, provides:

"'All minors who, in the judgment of the juvenile court, require state institutional care and guardianship, shall be wards of the state, and shall be committed to the care and custody of the "Ohio Board of Administration," which board thereupon becomes vested with the sole and exclusive guardianship of such minors.'

"In accordance with the provisions of the act above quoted, boys who, in the judgment of the juvenile court, require state institutional care and guardianship, are to be committed to the care and custody of the Ohio Board of Administration at its bureau of juvenile research at the Boys' Industrial School at Lancaster, Ohio; and girls who, in the judgment of the juvenile court, require institutional care and guardianship, are to be com-

mitted to the care and custody of the Ohio Board of Administration at its bureau of juvenile research at the Girls' Industrial School at Delaware, Ohio.

"THE OHIO BOARD OF ADMINISTRATION."

The juvenile research act was passed March 25, 1913, and approved April 22, 1913, to become effective on the first day of July, 1914.

Section 1653-1 of the General Code (103 O. L. 873) is as follows:

> "The provisions of section 1652 shall not apply to the Girls' Industrial School or the Boys' Industrial School, so far as the same allows the commitment of a child under ten years or over eighteen years of age to such institution. In no case shall a child found to be a dependent or neglected child be committed to such institution, nor shall any child under ten years or over eighteen years of age be committed to such schools except as provided in section 2111 of the General Code."

Section 1653-1 in its amended form was passed April 28, 1913, and approved May 9, 1913, or about one month later than the passage of the juvenile research act.

In section 1653-1 there is to be found the specific provision that *"in no case shall a child found to be a dependent or neglected child be committed to such institution."* Hence it is clear that it was the intention of the general assembly that the policy of caring for dependent and neglected children insofar as they were not to be committed to the Boys' Industrial School or to the Girls' Industrial School was concerned, was to continue. The establishment of the bureau of juvenile research at the Boys' Industrial School and at the Girls' Industrial School by the Ohio Board of Administration was a violation of that policy and clearly in opposition to the provisions of section 1653-1 of the General Code, supra.

Section 2084 of the General Code, as amended (103 O. L. 879) is as follows:

> "Male youth, not over eighteen nor under ten years of age, may be committed to the Boys' Industrial School in the manner provided by law on conviction of an offense against the laws of the state."

Before the amendment the section read as follows:

> "Male youth, not over sixteen nor under ten years of age, may be committed to the Boys' Industrial School by any judge of the common pleas court, probate court or police court on conviction for an offense against the laws of the state."

It may be argued that this amendment to section 2084 of the General Code, which is a part of the law governing the Boys' Industrial School, opened the doors for the admission of dependent children to the Boys' Industrial School notwithstanding the provisions of section 1653-1 of the General Code, supra. However, in view of the various provisions of the juvenile court law it may be fairly assumed that the amendment to section 2084 was made with a view to having it conform to the related sections of the juvenile court law.

Standing alone under the bureau of juvenile research act (103 O. L. 175) the order of the Ohio Board of Administration of July 1, 1914, supra, would seem to be authorized, but when taken in connection with the positive provisions of section 1653-1 of the General Code, supra, legislation subsequent to the passage of the juvenile research act, grave question exists as to the right of the Ohio

Board of Administration to designate the Boys' Industrial School and the Girls' Industrial School as places where, under authority of any existing law, dependent or neglected children may be sent.

The second question propounded by you is as follows:

> "May the juvenile judge cancel his order of commitment to the board of administration and make a second entry committing them to the board of state charities?"

In view of what has been said with reference to the question as to the right of the Ohio Board of Administration to admit dependent and neglected children to the Boys Industrial School and the Girls' Industrial School your second question is pertinent. Viewing the matter as I do, I am of the opinion that the act of the Ohio Board of Administration in establishing the bureau of juvenile research at the Boys' Industrial School and at the Girls' Industrial School insofar as it related to dependent and neglected children was not only without authority of law, but is in direct opposition to the established practice and specific provision of law relative to the care of such children, and therefore without force and effect. It would necessarily follow that the commitment of dependent and neglected children to the Ohio Board of Administration under the order referred to, which called for their delivery at the Boys' Industrial School and at the Girls' Industrial School was without force and effect, and that as the dependent children referred to are, under the provisions of section 1643 of the General Code, wards of the juvenile court an order may be made by said juvenile court for their commitment to the board of state charities or elsewhere as provided in section 1653 of the General Code as amended, 103 O. L. 872. This will obviate the necessity for consideration o fthe other questions incident to your inquiry. Respectfully,

EDWARD C. TURNER,
Attorney-General.

2048.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY JEFFERSON TOWNSHIP RURAL SCHOOL DISTRICT, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, November 16, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

> "RE:—Bonds of Jefferson township rural school district, Franklin county, Ohio, in the sum of $35,000.00 for the purpose of purchasing sites for and the erection and equipment of two elementary grade school buildings in said district, and for repairs and additional rooms for the high school building at Gahanna, being seventy bonds of $500.00 each."

I have examined the transcript of the proceedings of the board of education and other officers of Jefferson township rural school district relative to the above bond issue; also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and signed by the proper officers will, upon delivery, constitute valid and binding obligations of said school district. Respectfully,

EDWARD C. TURNER,
Attorney-General

2049.

AUTOMOBILE FOR COUNTY INFIRMARY—COUNTY COMMISSIONERS MAY PURCHASE OIL, GASOLINE AND TIRES FOR AUTOMOBILE FURNISHED BY SUPERINTENDENT OF COUNTY INFIRMARY—SUCH SERVICE MAY BE REQUIRED IN FIXING SUPERINTENDENT'S COMPENSATION.

Where the county commissioners find it necessary to provide for the county infirmary the use of an automobile they may do so by purchasing oil, gasoline and tires for an automobile furnished by the superintendent of the county infirmary.

The same service might be required by the county commissioners to be provided by the superintendent of the county infirmary and taken into consideration in fixing his compensation.

COLUMBUS, OHIO, November 17, 1916.

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

GENTLEMEN:—In your letter of October 19th you enclose a copy of a resolution adopted by the board of county commissioners of Erie county, and request my opinion as to its validity. Said resolution reads as follows:

"Sandusky, Ohio, Oct. 18, 1916.

"Mr. Kelley offered the following resolution and moved its adoption. Same was duly seconded by Mr. Holzaepfel and carried. Upon roll call the following vote was had: Mr. Crecelius aye, Mr. Holzaepfel aye, Mr. Kelley aye.

"WHEREAS, the superintendent of the county infirmary recently purchased an automobile for his own personal use, and finds it to great advantage to use same in connection with his duties as infirmary superintendent, and,

"WHEREAS, before the purchase of the automobile the county boarded Mr. Herbel's driving horse, in consideration of its use while engaged in the service of the county, by the superintendent, and,

"WHEREAS, it appears to the board that maintenance of an automobile will cost less than the maintenance of a horse, and will be the means whereby the superintendent can handle his outside duties with dispatch, thus giving him more time to devote to matters claiming his attention in the institution, and,

"WHEREAS, the said superintendent appeared before the board, asking that a plan be arranged to reimburse him for the times, when the automobile is operated in transacting his official business for the county, it is therefore,

"RESOLVED, that in consideration of the above the county commissioners will authorize the purchase of gasoline, oil and tires for the automobile whenever necessary."

Section 2523 G. C. provides:

"The county commissioners shall appoint a superintendent, who shall reside in some apartment of the infirmary or other building contiguous thereto, and shall receive such compensation for his services as they determine. The superintendent shall perform such duties as the commissioners

> impose upon him, and be governed in all respects by their rules and regulations. He shall not be removed by them except for good and sufficient cause. The commissioners shall not appoint one of their own number superintendent, nor shall any commissioner be eligible to any other office in the infirmary or receive any compensation as physician, or otherwise, directly or indirectly wherein the appointing power is vested in such board."

Section 2524 G. C. provides for the giving of a bond by the superintendent appointed by the county commissioners under the above provision of section 2523 G. C., and sections 2525 to 2528, inclusive, of the General Code, prescribe the duties of said superintendent.

It will be observed that section 2523 G. C. provides that the superintendent of the infirmary shall receive such compensation for his services as the county commissioners may determine. No express provision is made for allowing said superintendent for traveling expenses, in addition to such compensation, in connection with the performance of his duties. While section 2528 G. C. provides that at the request of the superintendent, the county commissioners shall set apart from the poor fund a reserve fund not to exceed at any time two hundred dollars, which upon their order shall be paid to the superintendent and expended by him as needed for current supplies and *expenses*; that the superintendent shall keep an accurate account of such fund, and all expenditures therefrom shall be audited by the board, and that when and as often as such amount is entirely disbursed, on the order of the commissioners, the county auditor shall pay the superintendent the amount so appropriated, I do not think it can be said that the term "expenses" as used in said section includes traveling expenses incurred by said superintendent as above set forth.

The right of certain officials to be reimbursed for actual and necessary expenses incident to the use of automobiles owned by said officials and used by them in the performance of their official duties has been considered by me in several of my former opinions.

In opinion No. 154 of this department rendered to Hon. Charles L. Bermont, prosecuting attorney of Knox county, on March 20, 1915 (Opinions of the Attorney General, Vol. II, page 295) I held that county commissioners may make an allowance to the sheriff for actual and necessary expenses incurred by him in paying for repairs on his automobile and in keeping it in good condition, when said machine is used by him in the discharge of his official duties. This was held to be authorized under provision of section 2997 G. C., the latter part of which provides that

> "In addition to the compensation and salary herein provided, the county commmissioners shall make allowances quarterly to each sheriff for * * * all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office,"

it having been held in the case of State ex rel. Sartain as Sheriff of Franklin County, Ohio, v. Sayre, as Auditor, etc., that the word "vehicles" as used in the above statute includes automobiles. To the same effect see opinion No. 625 of the department rendered to Hon. Meeker Terwilliger, prosecuting attorney of Pickaway county, on July 20, 1915 (Opinions of the Attorney-General, Vol. II, page 1276).

In opinion No. 618 of the department, rendered to your bureau on July 17, 1915, I held that, under section 4744-1 G. C., 104 O. L. 142, which provides that in addition to the salary therein prescribed "the county board may also allow the county superintendent a sum not to exceed three hundred dollars per annum

for traveling expenses and clerical help," said county board of education may, within the limitation prescribed in said section, allow a county superintendent an amount sufficient to cover the actual and necessary expense of maintaining and operating an automobile owned by him and used in the discharge of his duties, having due regard for the expense of such use in public and private business.

In opinion No. 750 of the department, rendered to Hon. A. L. Duff, prosecuting attorney of Ottawa county, on August 20, 1915, I held that under section 4734 G. C. (104 O. L. 137) which provides that "each member of the county board of education shall be paid his actual and necessary expenses incurred during his attendance upon any meeting of the board," a member of the county board of education is entitled to reimbursement for the actual and necessary expense incurred by him in operating an automobile owned by him while used as a means of conveyance in attending a meeting of said board.

In opinion No. 758 of the department, rendered to Hon. Clark Good, prosecuting attorney of Van Wert county, on August 24, 1915 (Opinions of the Attorney-General, Vol II, page 1592) it was held that a county surveyor, when necessary in the discharge of his official duty, may hire an automobile, and that the expense incident to such hire may be paid by the county commissioners under authority of section 2786 G. C., which provides in part that:

> "The county surveyor and each assistant and deputy shall be allowed his reasonable and necessary expenses incurred in the performance of his official duties."

It was observed in said opinion that this authority would not be changed by the going into effect of the Cass highway law for the reason that that law contains a provision covering the payment of expenses of the county surveyor when acting as county highway superintendent, said provision being found in section 138 of said law (7181 G. C., 106 O. L. 612) as follows:

> "* * * The county highway superintendent and his assistants, when on official business, shall be paid out of the county treasury their actual and necessary traveling expenses, including livery, board and lodging."

It will be observed that in each of the foregoing opinions the conclusion therein reached was based on the express provisions of the statutes authorizing the reimbursement of the official in question for the expenses incurred as therein set forth.

As has already been stated no express provision is made by statute for allowing the superintendent of the county infirmary for traveling expenses in addition to the compensation fixed by the county commissioners under authority of section 2523 G. C. supra.

I call your attention, however, to an opinion of my predecessor, Hon. Timothy S. Hogan, found in the Annual Report of the Attorney-General for the year 1913, volume II, page 1074, in which it was held that the county commissioners, in fixing the compensation of the superintendent of the infirmary under the above provision of said section 2523 G. C., may provide for the allowance of expenses when incurred by that official in making investigations incident to the performance of his official duties.

I concur in this holding and I am of the opinion that said commissioners may, in fixing the compensation of the superintendent of the infirmary of said county under authority of section 2523 G. C., supra, take into consideration the expenses incurred by said superintendent in making necessary investigations incident to the performance of his duties and make proper allowance for the same.

Consideration should be given, however, to section 2522 G. C., which provides in part as follows:

> "The board of county commissioners shall make all contracts and purchases necessary for the county infirmary and prescribe such rules and regulations as it deems proper for its management and good government * * *."

I think it would not be contended that county commissioners may not purchase and maintain for the county infirmary an automobile under the authority conferred by section 2522 G. C., supra, when they find the same to be necessary.

Under the provisions of section 2523 G. C., supra, it is required that the superintendent of the county infirmary shall perform such duties as the county commissioners impose upon him. All of this class of duties of the superintendent of the county infirmary is subject to the determination of the county commissioners, both as to character and extent, and while the commissioners might impose upon the superintendent, pursuant to this section, duties which would necessitate his incurring expenses without making any provision for his reimbursement therefor, other than his regular compensation, it is clearly within the power of the commissioners in prescribing the duties of the superintendent of the county infirmary to require that for the purposes of conveyance and transportation in certain cases he shall use such vehicles and means of conveyance as are provided by the county commissioners for the county infirmary. That is to say, the commissioners may eliminate traveling expenses of the superintendent in the performance of his duties, in many cases at least, by providing a conveyance for the use of the infirmary and requiring the superintendent to use the same in the performance of his duties, and this the commissioners it seems have sought to do by the arrangements evidenced by the resolution submitted. So that there is not here involved any question of payment or reimbursement of expenses incurred or to be incurred by the superintendent of the county infirmary. The resolution evidences a finding of the county commissioners of the necessity of purchasing for the infirmary, not an automobile as it must be conceded they might do, but gasoline, oil and tires for an automobile only, and the purchase of such articles for the county infirmary when necessary and of utility is authorized by the provisions of section 2522 G. C., supra.

While, as above stated, the county commissioners may take that matter into consideration in fixing the compensation of the superintendent of the county infirmary and require of him that he furnish his own conveyance and means of transportation necessary to the performance of all the duties imposed upon him just as they might require the superintendent to furnish his own farming implements in the cultivation of the farm as required by them, such method of providing means of conveyance and transportation for the infirmary is not exclusive. If the county commissioners find it necessary to provide for the county infirmary an automobile or the use of the same, the authority therefor is clearly conferred by section 2522 G. C., supra. This authority to provide an automobile for the county infirmary does not, however, make it necessary in order to make such provision that an automobile should be purchased outright.

If the county commissioners find it necessary to purchase gasoline, oil and tires for an automobile in order to enable the superintendent of the county infirmary to perform the duties imposed upon him by the county commissioners, the purchase of these articles may certainly not be rendered illegal by the mere fact that the county owns no automobile if these articles are of utility to the infirmary, and may be made to effect any reasonable and necessary purpose for which they are designed.

I see no legal objection to the commissioners entering into a contract with the superintendent for the use of his automobile for the infirmary. It is recited in the resolution that the commissioners have been feeding a horse which they did not own in consideration of its use for the infirmary, and I can see no objection to this as a method of providing proper and necessary conveyance for the infirmary. I know of no statute, rule or policy of law which operates as an inhibition against the county commissioners hiring a horse or automobile or other conveyance from the superintendent of the county infirmary at a fair and reasonable price therefor. There is no relationship between them that would prevent them from dealing with each other at arm's length.

A contract for the use of an automobile for the county infirmary is not a contract for the purchase of property, or supplies for the use of the county within the meaning of sections 12910 and 12911 G. C. which make it a criminal offense for any person holding an office of trust or profit or as agent, servant or employe of such officer or board of such officers to be interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, etc.

I am therefore of opinion that where the county commissioners find it necessary to provide an automobile for the county infirmary they may do so by purchasing oil, gasoline and tires for an automobile owned and furnished by the superintendent for the infirmary, and that the resolution above quoted is therefore authorized by law, although the same service might be required by the county commissioners to be provided by the superintendent of the county infirmary and taken into consideration in fixing his compensation.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2050.

BANKS AND BANKING—STOCKHOLDERS OF STATE BANKS NOT AUTHORIZED TO CUMULATE THEIR VOTES IN ELECTION OF DIRECTORS.

Stockholders of state banks are not authorized to cumulate their votes in the election of directors.

(Following opinion of Attorney-General Hogan, vol. 1, 445, Annual Report of Attorney-General, 1914.)

COLUMBUS, OHIO, November 18, 1916.

HON. HARRY T. HALL, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of November 15, 1916, requesting my opinion as follows:

> "Will you please render this department at your earliest convenience an opinion on the question of stockholders of state banks cumulating votes in the election of directors?
>
> "Section 8636 of the General Code, applicable in such matters for general corporations, authorizes cumulative voting. Your predecessor held that stockholders in state banks could not cumulate their votes."

I have carefully read the opinion of my predecessor, Honorable Timothy S. Hogan, found in volume I, at page 445, of the Annual Report of the Attorney-General for the year 1914, which is referred to in your letter, and I am in full accord with the reasoning and conclusion therein expressed.

I, therefore, advise you that stockholders of state banks may not cumulate their votes in the election of directors. Respectfully,

EDWARD C. TURNER,
Attorney-General.

2051.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, LANIER TOWNSHIP, RURAL SCHOOL DISTRICT, PREBLE COUNTY, OHIO.

COLUMBUS, OHIO, November 18, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Lanier township rural school district, Preble county, Ohio, in the sum of $5,000.00 to improve the public school property of said district, being ten bonds of five hundred dollars each."

I have examined the transcript of the proceedings of the board of education and other officers of Lanier township rural school district; also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of said district. Respectfully,

EDWARD C. TURNER,
Attorney-General.

2052.

MOBILIZATION OF OHIO NATIONAL GUARD—BAND OF ENGINEER BATTALION ENTITLED TO PAYMENT OUT OF STATE FUNDS FROM TIME SECRETARY OF WAR DIRECTED THAT SAID BAND WAS NOT INCLUDED IN CALL OF PRESIDENT UNTIL MUSTERED OUT.

The band of the engineer battalion is entitled to payment out of state funds.

COLUMBUS, OHIO, November 20, 1916.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—I am in receipt of your letter of November 11, 1916, to the following effect:

"I am enclosing herewith, first a copy of the order of the secretary of war touching the mobilization of state troops; second a copy of the order

issued by the adjutant general of Ohio in pursuance of the order of the secretary of war; third, copies of telegrams which passed between the office of the adjutant general of Ohio and the office of the secretary of war touching the status of regimental bands and the band of the engineer battalion. In pursuance of the order originally issued by the secretary of war the order of the adjutant general of Ohio was sent out and particular attention is called to the last paragraph, section 1 of this order. It was understood at the time by the adjutant general's department that regimental bands and the band of the engineer battalion were included in the order of the secretary of war. Learning subsequently from the war department that the band of the battalion of engineers was not included in the order because of the fact that there was lack of two companies to make up a regiment of engineers negotiations were opened with the state of Michigan to secure an arrangement whereby their two companies of engineers be combined with our battalion and thus make a regiment. Pending these negotiations, which were carried on for some time, the band of the battalion of engineers was held in camp. It was finally decided by the war department that the combination of the Ohio and Michigan organizations was not feasible and subsequently the band of the battalion of engineers was ordered home. The government of the United States has paid the members of the band for the time which elapsed between the sending of the two conflicting telegrams by the war department. The question which I now propose for your consideration is whether under the existing state of facts the adjutant general's department has authority to pay the members of the band of the engineer's battalion for the time they were on duty at the mobilization of the camp."

I have examined the enclosures submitted with your letter and find that on the 18th day of June, 1916, the president of the United States, through the authority vested in him by the constitution and laws called into service two brigades of three regiments each of infantry, one squadron of cavalry, one battalion of field artillery, one battalion of engineers, one battalion of signal corps, three field hospitals, two ambulance companies of the Ohio National Guard, the said call being addressed to you and signed by the secretary of war.

On June 19th by command of yourself the adjutant general of Ohio in pursuance of the commands of the president of the United States called the following: First infantry brigade, consisting of the second, third and sixth regiments; second infantry brigade, consisting of the fourth, fifth and eighth regiments; first squadron of cavalry, first battalion of field artillery, first battalion of engineers, field battalion signal corps, first, second and third hospitals, first and second ambulance companies.

On the same day, to wit, June 19, the adjutant general of Ohio telegraphed to the chief division of militia affairs for advice as to whether or not the call of the president included regimental bands and the band of the engineer battalion. On June 20 the chief of the militia bureau advised that regimental bands were recognized as organized militia by the war department and the band of the engineer battalion was included in the call.

On June 24 the chief of the militia bureau again telegraphed that the secretary of war had directed that the band of the engineer battalion was not included in the call.

On July 20 the adjutant general of Ohio telegraphed to the chief of the militia bureau that the band of Ohio engineers was mobilized in pursuance of the telegram of June 20 and was awaiting muster, and referred in said telegram to section 11 of the act of June 3 as authorizing a band for the engineer corps,

advising that the band was and always had been a part of the Ohio engineer corps and under said section was entitled to be mustered. On July 21 a reply telegram referred solely to the telegram of June 24.

Upon receipt of your request for advice I took the matter up with Colonel E. S. Bryant and learned the following facts:

That at the time the telegram of June 24 was received from the chief of the militia bureau to the effect that the band of the enginer battalion was not included in the call, said band was then mobilized in Cleveland, Ohio, but had not yet proceeded to Camp Willis, and that through some inadvertence said telegram of June 24 was not transmitted to the commanding officer at Cleveland; consequently the band was brought to the mobilization camp at Camp Willis and held there until finally discharged.

While the reason for the order of June 19 by the adjutant general of Ohio calling for the organizations hereinbefore mentioned was because of the order of June 18 issued, by the secretary of war, nevertheless the adjutant general of Ohio did not change his order, which then included the band of the engineer battalion, after the receipt of the telegram of June 24. Said band remained under orders of the adjutant general of Ohio and having proceeded to Camp Willis pursuant to said order it would amount, as I view it, to an order by the adjutant general of Ohio requiring the band to proceed to Camp Willis.

Such being the fact, I am of the opinion that the members of the band of the engineer battalion should be paid out of the appropriation made to the Ohio national guard in the same manner and for the same amount as if a separate and distinct order had been issued by the adjutant general of Ohio requiring said band to report at Camp Willis.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2053.

COUNTY COMMISSIONERS—SECTION 2416 G. C. DOES NOT AUTHORIZE SALE OF COSTS AND FEES CERTIFIED BY CLERK OF COURTS AS DUE COUNTY UNDER SALARY ACT.

Section 2416 G. C. does not authorize sale of costs and fees certified by Clerk of courts as due the county under salary act.

COLUMBUS, OHIO, November 20, 1916.

HON. ROBERT C. PATTERSON, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—I am in receipt of your letter of November 16, 1916, to the following effect:

> "Under the statutory requirements, the clerk of courts annually sends to me for collection, a list of costs and fees due the county under the salary act, and I have made every effort within my power with my present force in the office to collect these amounts, but the results have been negligible.
>
> "My object in writing to you is to inquire whether or not, in your opinion, General Code section 2416, authorizing the county commissioners "'to compound or release, in whole or in part, any claim or judgment

due the county, etc.,' is broad enough to authorize the sale of these costs and fees."

The section to which you refer, to wit, section 2416 of the General Code, provides as follows:

"The board may compound or release, in whole or in part, a debt, judgment, fine or assessment due the county, and for the use thereof, except where it, or either of its members, is personally interested. In such case the board shall enter upon its journal a statement of the facts in the case, and the reasons for such release or composition."

I am of the opinion that said section is not broad enough to authorize the sale of the costs and fees in question. Respectfully,

EDWARD C. TURNER,
Attorney-General.

2054.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, VILLAGE OF CLYDE, OHIO.

COLUMBUS, OHIO, November 21, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE:—Bonds of the village of Clyde, Ohio, in the amount of $5,000.00 for the purpose of extending and enlarging the municipal water works plant, being ten bonds of five hundred dollars each."

I have examined the transcript of the proceedings of council and other officers of the village of Clyde in connection with the above bond issue; also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted and signed by the proper officers will, upon delivery, constitute valid and binding obligations of said village. Respectfully,

EDWARD C. TURNER,
Attorney-General.

2055.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, BATAVIA VILLAGE SCHOOL DISTRICT—BOND FORM, INCORRECT RECITAL.

COLUMBUS, OHIO, November 22, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE:—Bonds of Batavia village school district issued for the pur-

pose of completing, furnishing and equipping the new school building in the said village, in the amount of $4,000.00, being twenty bonds of $200.00 each."

I have examined the transcript of the proceedings of the board of education and other officers of the Batavia village school district, relative to the above bond issue and I find the same regular and in conformity with the provisions of the General Code.

I am of opinion that said bonds when properly drawn and executed will constitute valid and binding obligations of the said district.

The bond form submitted with the transcript contains an incorrect recital to which I am calling the attention of the prosecuting attorney. I suggest, therefore, that before the bonds are accepted by the treasurer of state, I be given an opportunity of further examining the same.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2056.

ROADS AND HIGHWAYS—MONEY MUST BE IN TREASURY BEFORE IMPROVEMENT IS STARTED—BY PROVISION OF SECTION 1218 G. C. CERTIFICATE OF COUNTY AUDITOR MUST COVER ENTIRE AMOUNT ASSUMED BY COUNTY, INCLUDING SHARES OF COUNTY, TOWNSHIP AND ABUTTING PROPERTY OWNERS—SECTION 5660 G. C. APPLICABLE—BONDS MUST BE SOLD BEFORE COUNTY COMMISSIONERS CAN MAKE AGREEMENT.

The provisions of section 5660 *G. C. apply to the agreement required of county commissioners by section* 211 *of the Cass highway law, section* 1218 *G. C., and the certificate of the county auditor must cover the entire amount assumed by the county, including the shares of the county, township or townships and abutting property owners. Where a bond issue is necessary to meet the shares of the county, township or townships and abutting property owners, it is necessray that such bonds be issued and sold before the county commissioners enter into the agreement required by section* 1218 *G. C., in order that the county auditor may be authorized to make in reference to such agreement the certificate required by section* 5660 *G. C.*

COLUMBUS, OHIO, November 23, 1916.

HON. JOHN V. CAMPBELL, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—I acknowledge the receipt of your inquiry under date of November 18, 1916, which inquiry reads as follows:

"Plans and specifications have been completed by the state highway department for the improvement of two main market roads leading into the city of Cincinnati, in co-operation with Hamilton county, namely, the Hamilton pike and the Springfield pike. Contracts for these improvements will shortly be let. The state will contribute something over one hundred thousand dollars toward the two improvements. After bids have been received it will then be incumbent upon the county commis-

sioners of this county to enter into a written agreement to assume all cost and expense of said improvement over and above the amount to be paid by the state (Cass highway law section 211). The portion to be so paid by the county will be secured by a bond issue under section 216 of the Cass highway law, but the amount to which such bonds shall be issued can not be determined until bids have been received.

"Inasmuch as the opinions heretofore rendered by your department are not clear upon the question involved, we are writing to ask your opinion as to the application of section 5660 of the General Code to such a situation. This, in our opinion, presents two specific questions: One, do the provisions of General Code section 5660 apply to the agreement required of the county commissioners by section 211 of the Cass highway law? Second, If the commissioners adopt a resolution to proceed with the improvement in conjunction with the state, to issue bonds under section 216 of the Cass highway law to pay the county's portion of the expense of such improvement and providing for the levy and collection of taxes sufficient to pay interest and sinking fund charges, must the actual award of the contract be postponed until such bonds are sold and the auditor can certify that the money is in the course of collection under General Code section 5660?

"In this connection we call your attention to the opinion heretofore rendered by you on October 8, 1915, appearing at page 1932 of your 1915 Annual Report and the opinion rendered October 13, 1915, appearing at page 1959, of your report, with a special reference to pages 1962 and 1963. By the first of these it would seem clear that you were of the opinion that a mere certificate that the county's portion will be provided for by a bond issue is insufficient while if the reasoning of the latter be applied, it would seem sufficient if the bonds had been duly authorized although not in fact sold. This latter opinion would also seem to be in harmony with the answer to the fifth question submitted by our letter of June 8, 1916, as such answer is given in your opinion No. 1797, under date of July 18, 1916. We also call your attention to the provisions of section 224, providing that 'no procedure for the construction, improvement, maintenance or repair of roads as provided for in other acts of the general assembly shall apply to main market roads.'

"We are personally of the opinion that the state highway commissioner could let these contracts prior to the sale of bonds to pay the county's portion provided such bonds were in fact duly authorized, but inasmuch as the legality of the contract must eventually be approved by you, we feel that proper foresight requires the present submission of this question to you."

I note that in the first paragraph of your communication you indicate the order of procedure to be the taking of bids, the entering into a contract between the county commissioners and the state, as provided by section 1218 G. C., by the terms of which the county will assume in the first instance that part of the cost and expense of the improvement over and above the amount to be paid by the state and finally the issuing of bonds by the county. You also observe that the amount to which bonds shall be issued cannot be determined until bids have been received. As will be later indicated, my view of the proper order of procedure, as well as the general practice which has been followed in the state under these stautes, do not coincide with the views expressed by you, and it is further my opinion that from the very necessity of things bonds must

be issued before the contract provided for by section 1218 G. C. can be made between the county and the state, and should, as a matter of good practice, be issued before the state highway commissioner advertises for bids.

Upon the first question submitted by you this department held in effect, in opinion No. 1774, rendered to Hon. G. A. Starn, prosecuting attorney of Wayne county, on July 11, 1916, that the provisions of section 5660 G. C. apply to the agreement required of the county commissioners by section 211 of the Cass highway law, section 1218 G. C. While the opinion rendered to Mr. Starn related in terms to the deductions to be made from available funds by the county auditor, upon the making of a certificate under section 5660 G. C., yet the opinion assumes that some certificate must be made by the county auditor at the time the county commissioners make the agreement provided for by section 1218 G. C. In other words, the opinion to Mr. Starn rests upon the assumption that a certificate must be made by the county auditor, under the provisions of section 5660 G. C., at the time the county commissioners make their written agreement to assume in the first instance that part of the cost and expense of the improvement over and above the amount to be paid by the state. The opinion deals with the question of whether the certificate must relate only to the county's share or whether it must relate not only to the county's share, but also to the shares of the interested township or townships and the abutting property owners. The conclusion expressed is that the certificate must relate to the entire amount covered by the agreement of the county commissioners, including the shares of the county, township or townships and property owners. While in the opinion to Mr. Starn there is found no discussion of the cases relating to the application of section 5660 G. C., yet I was not unmindful, at the time the opinion was rendered, of the holding in a number of cases to which I will now refer. In considering these cases I also had in view the fact that they had been well established and uniformly adhered to, both by this department and by the state highway department, the practice of requiring a certificate to be made by the auditor, under the provisions of section 5660 G. C., covering the shares of the county, township or townships and property owners in connection with the agreement required by section 1218 G. C., and earlier sections containing the same provisions, and as a matter of sound public policy I did not think this practice ought to be disturbed unless it could be clearly determined from the statutes and decisions of the courts that a change was required and a different procedure demanded.

In the case of the city of Cincinnati v. Holmes, administrator, et al, 56 O. S., 104, the court laid down the principle that where the general provisions of a statute, and those of a later one on the same subject are incompatible, the provisions of the latter statute must be read as an exception to the provisions of the earlier statute.

Applying this principle to the facts of that case, the court held that the provisions of section 2702 R. S., known as the Burns law, did not apply to the act passed May 4, 1891, 88 O. L., 527, authorizing villages of a certain class to make certain street improvements, and defray the cost and expense thereof by issuing bonds and levying taxes and assessments as therein provided, and that therefore a contract made with a village for the performance of such work, before all the money was in the treasury, was not for said reason void. This decision rests upon the conclusion of the court that the act in 88 O. L., 527, was incompatible with the provisions of the Burns law. I am unable to find in the statutes now under consideration any incompatibility with the provisions of section 5660 G. C. which would warrant the application of the principle supporting the decision in the case of city of Cincinnati v. Holmes, administrator, supra,

especially as in a later case the supreme court of Ohio indicated that it was apprehensive that the decision in question might be given a force and effect not intended by the court and sought to limit the same.

In the case of Comstock, et al, v. village of Nelsonville, 61 O. S., 288, the court held that section 2702 R. S. was not applicable to so much of the cost and expense of a street improvement as is to be paid by an assessment on the property bounding and abutting on such improvement or adjacent thereto. In this case, in discussing the case of Cincinnati v. Holmes, supra, the court used the following language:

> "It was not held in that case (Cincinnati v. Holmes), as argued by counsel for defendant in error, that the Burns law does not apply to any part of the cost and expense of street improvements; but the holding was that the special acts under which the improvements were made in that case, and which had been previously held constitutional by this court, were to be read as an exception to the Burns law and that for that reason alone the statute did not apply in that case. The Burns law being one of a general nature, it is doubtful whether exceptions of a local nature can be constitutionally made thereto."

If contracts for the class of improvements now under consideration were let by the county, there might be a reason for the application of the decision in the case of Comstock v. Nelsonville to so much of the cost of the work as is assessable upon abutting real estate, but contracts for work of this class are let by the state and there is nothing in the decision in question which requires its application to the contract between the state and the county by the terms of which the county assumes in the first instance that part of the cost and expense of the improvement over and above the amount to be paid by the state.

In the case of Mt. Vernon v. State, 71 O. S., 428, the statute under consideration expressly provided that the Burns law should not apply to contracts made thereunder. In so far as the case of Emmert v. Elyria, 74 O. S., 185, is concerned, the argument of the opinion is directed solely to the law relating to municipalities, the court concluding its argument with the observation that, having found certain sections of the statutes inapplicable, their interpretation was not necessary.

In the case of Wood v. Village of Pleasant Ridge, 12 O. C. C., 177, the court expressed the view that section 2702 R. S., did not apply where the whole cost of the improvement was to be assessed upon the abutting lands under the statutes then in force, but the court decided the case upon other grounds. Even if this were not true, the same observation made above as to the case of Comstock v. Nelsonville would be applicable as to this case and also as to the case of Chittenden v. Columbus, 1 O. N. P. (n. s.) 420.

Opinion No. 900 of this department, rendered by me on October 8, 1915, and appearing at page 1932 of the Opinions of the Attorney-General for that year, which opinion is referred to by you, is indicative of the uniform practice of this department, which has been to refuse approval to all agreements made by county commissioners and not bearing the certificate of the county auditor required by section 5660 G. C. In so far as opinion No. 914, rendered to Hon. Robert C. Patterson, prosecuting attorney of Montgomery county, on October 12, 1915, and found at page 1959 of the Opinions of the Attorney-General for that year, which opinion is also referred to by you, is concerned, the statement that bonds must at least have been duly authorized is more in the nature of an argument than a conclusion, but without reference to what may be regarded as the scope and effect of that opinion, discussing an entirely different statutory

proceeding, I am of the opinion that its reasoning could not be applied in this instance. The view expressed in answering the fifth question submitted by you in your letter of June 8, 1916, which letter was answered in opinion No. 1797, rendered to you on July 18, 1916, was based upon the decision of the court in the case of State ex rel v. Amlin, 1 N. P. (n. s.) 517, affirmed by the supreme court without report in 74 O. S., 447. The provision of section 224 of the Cass highway law, section 1230-1 G. C., that "no procedure for the construction, improvement and repair of roads, as provided for in any other acts of the general assembly, shall apply to main market roads" must be read in connection with the provision of section 226 of that act, section 1231 G. C., that "county commissioners, township trustees and village councils shall have the same power and authority to co-operate in the construction, improvement, maintenance and repair of main market roads as is granted to them by this act in the construction, improvement, maintenance and repair of inter-county highways; and in case the commissioners of any county, the trustees of any township and the council of any village, or of any such authorities, determine to co-operate in the construction, improvement, maintenance or repair of any main market road, the procedure shall be the same as in the case of co-operation by such authorities in the construction, improvement, maintenance and repair of inter-county highways, as provided in this act." It is evident from a consideration of both of the above provisions that the first provision referred to is not applicable where county commissioners co-operate in the improvement of a main market road.

In view of the foregoing it is my opinion, in answer to your first question, that the provisions of section 5660 G. C. apply to the agreement required of the county commissioners by section 211 of the Cass highway law, section 1218 G. C., and that the certificate of the county auditor must cover the entire amount assumed by the county, including the shares of the county, township or townships, and abutting property owners.

In answer to your second question, it is my opinion that under the provisions of section 1218 G. C., no contract may be let by the state highway commissioner until the agreement on the part of the county commissioners is on file in the office of the state highway commissioner, with the approval of the attorney-general endorsed thereon, as to its form and legality. Inasmuch as the county auditor must, as to this agreement, make the certificate required by section 5660 G. C. it follows that the county commissioners may not enter into such agreement until the bonds are sold and the county auditor authorized to make his certificate. While section 216 of the Cass highway law, section 1223 G. C., authorizes a bond issue in an amount necessary to pay the respective shares of the county, township or townships and the land specially assessed, it is my view that such bonds may, and indeed ordinarily should, be issued in an amount necessary to pay the county's, township's and property owners' share of the estimated cost and expense. In other words, a bond issue of this class may be based upon the estimated cost rather than upon the actual cost, as determined by the bids. After the preliminary proceedings have been disposed of, the ordinary course of procedure will be for the county to issue bonds for the county's, township's and property owners' share of the estimated cost and expense and after these bonds have been sold, to enter into the agreement with the state provided for by section 1218 G. C. In connection with the making of this agreement the county auditor will make his certificate under section 5660 G. C. The agreement will then be filed in the office of the state highway commissioner, with the approval of the attorney-general endorsed thereon as to its form and legality, and the state highway commissioner will then be in a position to advertise for bids and let the contract for the work. Should the state highway commissioner advertise for bids before the agreement on the part of the commissioners is filed in his

office, with the approval of the attorney-general endorsed thereon, and even should the day of letting arrive before such agreement is made and filed, and should the bids be opened and the lowest and best bidder determined, yet the state highway commissioner would be without authority to award the contract to such lowest and best bidder until such time as the agreement by the county commissioners, bearing the approval of the attorney-general, should be filed in his office.

I am enclosing for your information a copy of the opinion rendered to Mr. Starn, and referred to above, and trust that the same, read in connection with this opinion, will furnish a complete answer to your questions.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2057.

FEES—MARSHALS—CHIEFS OF POLICE—SECTIONS 4387 AND 4534 G. C. CONSTRUED—COLLECTIONS UNDER SECTION 4581 G. C.—THREE CLASSES OF CASES—FEES OF WITNESSES AND JURORS UNDER FISH AND GAME LAWS, SECTION 1387 G. C.—OFFICERS WHO SHOULD SERVE PROCESSES ISSUING FROM VARIOUS POLICE COURTS—FEES IN SUCH CASES.

1 *and* 2. *Under sections* 4387 *and* 4534 *G. C., marshals and chiefs of police are entitled to the same fees as are provided for sheriffs and constables for similar services, in so far as the schedule of fees for such officers are the same. No fee is chargeable for marshals and chiefs of police for the services for which the schedules of fees for sheriffs and constables differ.*

3. *In cases in which police courts act as examining magistrates only, the fees of the police judge are the same as the fees of justices of the peace when acting as examining magistrates.*

In cases in which the police court has final jurisdiction concurrent with the probate court, and of which justices of the peace have no final jurisdiction, the fees chargeable in the police court are the same as those provided for the probate court.

In cases in which the police court, the probate court and justices of the peace each have final jurisdiction, the fees chargeable in the police court are the same as those chargeable in justices courts and probate courts, in so far as such fees are in accord, but to the extent that the fees provided for such courts are different for particular services, no fees are chargeable in the police court for such services.

4. *In prosecutions under the fish and game laws, witnesses and jurors are entitled to the same fees as are provided for criminal cases in the common pleas court.*

5. *In proceedings before the police judges, mayors and judges of criminal courts, the process should be issued to the chief of police or other police officer or marshal of the corporation. For the fees of the chief of police and marshal, see syllabus* 1 *and* 2.

6. *The fees of other police officer serving process would be the same as the fees of a sheriff (sections* 4581 *and* 13436 *G. C.*

COLUMBUS, OHIO, November 23, 1916.

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

GENTLEMEN:—Under date of September 16, 1916, you submitted five inquires to me, which I shall consider in the order submitted:

Your first inquiry is as follows:

"(1) To what fees is a marshal entitled under the provisions of section 4387 G. C.?"

Your second inquiry is as follows:

"(2) To what fees is a chief of police in cities having no police court entitled under the provisions of section 4534 G. C.?"

Your first and second questions are so similar that a determination of the one determines the other.

Section 4387 G. C. referred to in your first inquiry fixing the fees of the marshal provides as follows:

"In the discharge of his proper duties, he shall have like powers, be subject to like responsibilities and shall receive the same fees as sheriffs and constables in similar cases, for services actually performed by himself or his deputies and such additional compensation as the council prescribes. In no case shall he receive any fees or compensation for services rendered by any watchman or any other officer, nor shall he receive for guarding, safekeeping or conducting into the mayor's or police court any person arrested by himself or deputies or by any other officer a greater compensation than twenty cents."

Section 4534 G. C., referred to in your second inquiry fixing the fees of the chief of police, provides as follows:

"In felonies, and other criminal proceedings not herein provided for, such mayor shall have jurisdiction and power, throughout the county, concurrent with justices of the peace. The chief of police shall execute and return all writs and processes to him directed by the mayor, and shall by himself or deputy attend on the sittings of such court, to execute the orders and process thereof and to preserve order therein, and his jurisdiction and that of the deputies in the execution of such writs and process, and in criminal cases, and in cases of violations of ordinances of the corporation, shall be co-extensive with the county, and in civil cases shall be co-extensive with the jurisdiction of the mayor therein. The fees of the mayor in all cases, excepting those arising out of violation of ordinances, shall be the same as those allowed justices of the peace for similar services and the fees of the chief of police or his deputies in all cases, excepting those arising out of violations of ordinances shall be the same as those allowed sheriffs and constables in similar cases."

The fees of the marshal are "the same fees as sheriffs and constables in similar cases." And the fees of the chief of police "the same as those allowed sheriffs and constables in similar cases."

It is to be noted at the outset that in the class of cases enumerated in section 13423 G. C., and of which justices of the peace, police judges and mayors are given final jurisdiction, the fees of the chief of police and marshal, for pursuing and arresting a defendant and in subpoenaing witnesses, are the same as the fees of the sheriff for similar services in the common pleas court.

Section 13436 G. C. provides:

> "Sec. 13436. In pursuing or arresting a defendant and in subpoenaing the witnesses in such prosecutions, the constable, chief of police, marshal or other court officer shall have like jurisdiction and power as the sheriff in criminal cases in the common pleas court, and shall receive like fees therefor."

There still remains for determination the fees chargeable for the chief of police and marshal in other misdemeanor cases of which the police courts and mayors have final jurisdiction, and in felony cases wherein said courts exercise jurisdiction only as examining magistrates. The general fee schedule for sheriffs is provided in section 2845 G. C., and for constables in section 3347 G. C.

An examination of the respective schedule discloses that for the most part the fees provided for constables and sheriffs for particular services are different. This difference in the fees provided does not seem to be referable, in the main, to apparent difference in the character of services of the respective officers, nor to any particular classification of cases, but the schedule seemed to have been determined entirely independently of each other.

In an opinion rendered to your bureau under date of August 30, 1911, by my predecessor, Honorable T. S. Hogan (Annual Report of the Attorney-General for 1911, vol. 1, page 327), it was held as follows:

> "By reason of all the foregoing I am of the opinion that in cases other than those arising out of violations of ordinances, the fees of a constable should be taxed in favor of the chief of police under section 4534, General Code, as amended, unless section 3347, which prescribes the fees of a constable, fails to provide a fee for the specific service performed by the chief of police; in which case the chief is entitled to the fee provided for the sheriff by section 2845 as amended."

However, in the case of State ex rel. Ribble, Prosecuting Attorney v. Kleinhoffer, decided by the supreme court, May 4, 1915, 92 O. S. 163, the supreme court held that if in section 10076 G. C., which provided for the fees allowed a humane officer, the pronoun "they," as used therein—

> "could be held to officers other than humane officers—for example, to a sheriff or constable—it would be impossible to determine to which it does refer. And it is important and necessary that this be known, for the fees of a sheriff and those of a constable, as fixed by sections 2845 and 3347, respectively, are different. It is well settled that the compensation of a public officer must be fixed by statute. The legislature has failed to provide for fees for services rendered by a humane officer and it is not the province of the court to make laws. We conclude, then, that as there is no statutory provision for the allowance of fees in the case under consideration, the payment made by the county was unauthorized."

It seems, therefore, that the supreme court has determined that wherever an officer is given the same fees as the sheriff and constable in similar cases, in so far as the fees of the sheriff and constable are different, it is impossible to determine which schedule of fees is to apply, and there has been no actual fixing of fees by the legislature; consequently none are chargeable.

In so far as the fees provided for sheriffs and constables are the same for

similar services, the provision is definite and the fee so provided is chargeable for chiefs of police and marshals in similar cases.

Answering your first and second questions, therefore, I am of the opinion that in so far as the fees provided for sheriffs and constables for particular services are the same, such fees are also the measure of the compensation for chiefs of police and marshals for the same character of services; but in so far as the fees provided for sheriffs and constables for particular services are different, it is impossible to determine which of the provisions was intended as the measure of compensation for chiefs of police and marshals, and therefore no definite provision has been made and no fees are chargeable for such services.

Your third question is as follows:

> "(3) What fees may be collected under the provisions of section 4581 G. C.?"

Section 4581 G. C. is found in the chapter relative to police courts. Section 4579 G. C. provides for the fees to be received by jurors in said police courts, and section 4580 G. C. provides for witness fees to be allowed in such courts.

Section 4581 G. C. provides as follows:

> "Sec. 4581. Other fees in the police court shall be the same in state cases as are allowed in the probate court, or before justices of the peace, in like cases, and in cases for violation of ordinances such fees as the council, by ordinance, prescribes, not exceeding the fees for like services in state cases."

The jurisdiction of police courts embraces cases that may be classified in two groups:

1. Those in which the court acts as an examining magistrate; and
2. Those in which the court exercises final jurisdiction.

Section 4577 G. C. provides:

> "Sec. 4577. The police court shall have jurisdiction of, and to hear, finally determine, and to impose the prescribed penalty for, any offense under any ordinance of the city, and of any misdemeanor committed within the limits of the city, or within four miles thereof. The jurisdiction of such court to make inquiry in criminal cases shall be the same as that of a justice of the peace. Cases in which the accused is entitled to a jury trial, shall be so tried, unless a jury be waived."

Justices of the peace are also vested with general jurisdiction as examining magistrates, and in certain designated misdemeanors justices of the peace are given final jurisdiction. The jurisdiction of justices of the peace as examining magistrates is conferred by section 13511 G. C. Said section provides:

> "Sec. 13511. When the accused is brought before the magistrate and there is no plea of guilty he shall inquire into the complaint in the presence of such accused. If it appear that an offense has been committed and that there is probable cause to believe the accused guilty, he shall order him to enter into a recognizance, with good and sufficient surety, in such amount as he deems reasonable, for his appearance at the proper time and before the proper court; otherwise he shall discharge him from custody. If the offense charged is a misdemeanor and the accused, in a

writing subscribed by him and filed before or during the examination, waive a jury and submit to be tried by the magistrate, he may render final judgment."

I do not find that the probate court has been vested with any general jurisdiction as an examining magistrate, but is given final jurisdiction of misdemeanors concurrent with the court of common pleas.

Therefore, in cases in which the police court acts only as an examining magistrate, under section 4577, the fees which will be allowable are the same as the fees provided in the fee schedule applicable to proceedings before justices of the peace in such cases.

Section 1746 G. C. provides in part:

"Sec. 1746. Except as otherwise provided, justices of the peace, for the services named, when rendered, may receive the following fees:" (then follows a schedule of fees.)

The foregoing schedule then would determine the fees chargeable for the police court in cases in which that court acts only as an examining magistrate.

Coming then to a consideration of the question of fees accruing in the police court in those state cases in which final jurisdiction is conferred, it is to be noted that while this jurisdiction of the police court extends to a larger class of cases than does the final jurisdiction of justices of the peace, it is identical with that of the probate court, save as to territorial limitations applicable to police courts.

The final jurisdiction with which justices of the peace are vested is conferred by section 13423 G. C. and a few others, such as section 1464 G. C., conferring final jurisdiction in cases arising under the fish and game laws, and section 871-52b G. C. (106 O. L. 327), conferring final jurisdiction in cases arising under the chapter relating to the regulation of the exhibition of motion pictures.

Section 13434 G. C., supra, as amended 103 O. L. 539, confers final jurisdiction on justices of the peace, police judges and mayors in fifteen classes of cases therein enumerated.

While justices of the peace have final jurisdiction concurrent with police judges and mayors in the designated cases above noted, yet the police court and probate court are vested with final jurisdiction as to all misdemeanors generally.

It is, then, but logical to conclude that as to these remaining cases, that is, all those misdemeanors of which the probate court has concurrent final jurisdiction with the police court and of which justices of the peace have not such jurisdiction, the fees taxable in the police court will be the same as those provided for such cases in the probate court.

The criminal jurisdiction of the probate court is conferred by section 13424 G. C., which provides:

"Sec. 13424. The probate court shall have concurrent jurisdiction with the court of common pleas in all misdemeanors and all proceedings to prevent crime."

The criminal jurisdiction of the common pleas court is provided in section 13425 G. C., which provides in part:

"Sec. 13425. The court of common pleas shall have original juris-

diction of all crimes and offenses, except in cases of minor offenses, the exclusive jurisdiction of which is vested in justices of the peace or in other courts inferior to the common pleas. * * * .'

I do not find that exclusive jurisdiction of particular misdemeanors has been conferred upon any court inferior to the common pleas court, but rather original and final jurisdiction has been conferred in certain criminal cases on the inferior courts.

The fees taxable in criminal cases in the probate court are the same as the fees taxable for similar services by the clerk of the common pleas court.

Section 1603 G. C. provides:

"Sec. 1603. For other services for which compensation is not otherwise provided by law, the probate judge shall be allowed the same fees as are allowed the clerk of the court of common pleas for similar services."

The fees to be charged by the clerk of court are provided by sections 2900 and 2901 G. C., which, because of their length, are not quoted.

Therefore, the schedule of fees provided in sections 2900 and 2901 G. C. determine the fees chargeable in the police court, for similar services, in all cases of which the police court has final jurisdiction concurrent with the probate court, and of which justices of the peace have not such final jurisdiction.

There still remains a third class of cases, namely, those specially designated cases above noted, in which concurrent jurisdiction is vested in all three of said courts. In this class of cases the schedule of fees applicable to probate courts and justices of the peace, in so far as they are in accord, for particular services, will be applicable and taxable also in the police court; but in so far as there is a conflict in said schedule of fees, under the ruling of the supreme court in the case of State ex rel. Ribble & Co. v. Kleinhoffer, supra, it is impossible to determine which of the conflicting provisions was intended to prevail, and therefore I hold that no fee has been determined by the legislature and none is chargeable.

Answering your third question specifically, I advise:

1. In those cases in which the police court exercises jurisdiction only as an examining magistrate, the schedule of fees provided for justices of the peace when acting as examining magistrates will be taxable in the police court for similar services.

2. In that class of cases in which the police court exercises final jurisdiction in state cases, concurrent with the probate court, and in which justices of the peace are not vested with such final jurisdiction, the schedule of fees provided for the probate court (the same fees as are chargeable by the clerk of court for similar services) will prevail in the police court for the same character of services.

3. In the remaining misdemeanor cases in which all three of said courts exercise final jurisdiction, the fees provided for particular services in the justices court and in the probate court, in so far as they are in accord, will prevail also in the police court, but in so far as such schedules of fees for similar services differ, it is impossible to determine which was intended to apply in the police court, and therefore no fee is chargeable for such services in the police court.

Your fourth question is as follows:

"4. To what fees are witnesses and jurors entitled under the fish and game laws, sections 1387 et seq.?"

An examination of the fish and game laws will disclose that there is no provision made therein for either witnesses' or jurors' fees.

Section 13438 G. C. provides:

> "Sec. 13438. In such prosecutions the jurors and the witnesses shall be entitled to like mileage and fees as in criminal cases in the court of common pleas."

In the foregoing section I am of the opinion that the term "such prosecutions" is to be construed as referring to all those cases comprehended by the special legislation conferring final jurisdiction on justices of the peace, police judges and mayors, and providing a distinct method of procedure to be pursued.

The substance of the provisions of section 13438 G. C., in fact of the whole chapter entitled "Justices of the Peace, Police Judges and Mayors (sections 13423 *et seq.* G. C.), was originally enacted as a part of section 3718a, Revised Statutes, and provided the procedure to be followed in all the classes of cases enumerated in the section, without regard to whether the case was triable to a court or to a jury.

In the codification of 1910, the provisions of section 3718a R. S. were subdivided into a number of sections and the substance of the section conferring jurisdiction in the cases therein enumerated, as well as certain later enactments conferring similar jurisdiction in other cases, was codified as section 13423 G. C., while the provisions relative to the procedure in such cases now appear in the separate chapter entitled "Justices of the Peace, Police Judges and Mayors."

The fact that the first section of this chapter, section 13432 G. C., relates to prosecutions in which a jury trial is authorized, may tend to confuse somewhat as to the meaning, in later sections, of the language "in such prosecutions," but there is no apparent legislative purpose in the codification to restrict the application of these provisions, and I am of the opinion that the provisions found in this chapter are applicable to all that class of cases which were originally comprehended in this special scheme of summary procedure, and that under the codification they are to have general application to all such cases as well as certain later enactments conferring jurisdiction on said lower courts by the same form of enactment, such as sections 1464 G. C. and 871-52b G. C. (106 O. L. 327), which respectively confer final jurisdiction on said courts in fish and game cases and cases arising under the laws providing censorship for motion picture films.

I, therefore, hold, in answer to your fourth question, that jurors and witnesses, in cases under the fish and game laws, are entitled to the same fees as are provided for criminal cases in the common pleas court.

Your fifth question is as follows:

> "(5) What officer should serve the process issuing from the various police courts and to what fees is he entitled? (See sections 4567 *et seq.* G. C., sections 14693 *et seq.* G. C. and O. L. vol. 106, p. 112.)

The sections of the statutes to which you refer pertain to police courts and criminal courts in the various cities.

Section 13500 G. C., which is a general statute, provides in part as follows:

> "Sec. 13500. The warrant shall be directed to the sheriff or to any constable of the county, or, when it is issued by an officer of a municipal corporation, to the marshal or other police officer thereof * * * ."

The phrase "an officer of a municipal corporation" refers to police judges,

mayors and judges of criminal courts, and the process issued by them should be directed to the marshal or other police officer of the municipal corporation.

I am of the opinion that said section authorizes the issuance of warrants to patrolmen and that section 4581 G. C. would authorize taxing in their favor the same fees as are authorized for similar services in state cases in the probate court.

In an opinion rendered by my predecessor, Honorable T. S. Hogan, on April 4, 1914, to your bureau (Annual Report of the Attorney-General of that year, vol. 1, p. 449) it was held:

> "As regards service in the police court, which as aforesaid is authorized by section 13500 General Code, I am of the opinion that this statute contemplates that the warrant be issued to the officer who is to serve the same, and if the same is issued to the chief of police he must himself perform the service, and when so doing would be entitled to have taxed in his name the fees for such services. When, however, it is desired to have a patrolman execute such warrant, the warrant must be issued directly to that official, in which case, the patrolman would be entitled to receive and retain the fees allowed for such service under section 4581, General Code."

I have heretofore advised as to the fees chargeable for marshals and chiefs of police in the answers to your first and second questions.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2058.

APPROVAL, LEASES OF CANAL AND RESERVOIR LANDS TO LON FISHER, ARTHUR STUTZ AND JOHN D. DOLEY.

COLUMBUS, OHIO, November 24, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication of November 22, 1916, transmitting to me for examination the following leases of canal and reservoir lands:

	"Valuation.
"Lon Fisher, land at Indian Lake	$250.00
"Arthur Stutz, land at Indian Lake	700.00
"John D. Doley, part of the abandoned Ohio canal in Scioto county	221.33"

I find these leases to be in regular form and am therefore returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2059.

TAXES AND TAXATION—LIEN OF STATE FOR FRANCHISE OR EXCISE TAXES WHEN SAME IS INFERIOR TO LIEN OF A MORTGAGE—TWO SPECIAL KINDS—SECTION 5506 G. C. CONSTRUED.

The lien of the state for franchise or excise taxes, created by section 5506 G. C. is inferior to the lien of a mortgage given by the grantor of the corporation or utility or by some other mortgagor or lienor in the chain of title prior to the acquisition of the property by the corporation or utility, and inferior also to that of a purchase money mortgage given by the corporation.

COLUMBUS, OHIO, November 24, 1916.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—You have asked me to advise you upon the following question:

> "Is the lien of the state for franchise or excise taxes prior to that of a mortgage given by the grantor of the corporation or utility or by some other mortgagor or lienor in the chain of title prior to the acquisition of the property by the corporation or utility?"

This question involves an interpretation and application of section 5506 of the General Code, which provides in part as follows:

> "The fees, taxes and penalties, required to be paid by this act, shall be the first and best lien on all property of the public utility or corporation. * * *"

General statements will be found in all the books and encyclopedias to the effect that it is within the power of the state to give to its lien for taxes absolute priority; and there are certain decisions which will hereafter be cited, the apparent purport of which is to extend this power so far as to enable the legislature to make a secondary tax lien prior to an encumbrance placed upon the property subject thereto before the title thereto was acquired by the person primarily liable for the tax. Yet on all hands it is agreed that legislation for which this effect is claimed will be strictly construed, being in derogation of the rights of bona fide encumbrances. See Central Trust Co. v. Third Avenue Railroad Company, 186 Fed. 291; Bibbins v. Clark & Co., 90 Iowa 230.

There can be no ambiguity as to the purport of the phrase "first and best" as found in section 5506. It is very clear that with respect to the property or interests to which the lien is to attach the general assembly intended its priority to be absolutely paramount. So far as the expression of the legislative intent embodied in section 5506 is concerned, the only doubt arises with respect to the meaning of the phrase "all property of the public utility or corporation." Is the word "property" used to designate the entire corpus of any estate, chattel, investment or fund, the primary right to which the corporation may ever acquire, or is it limited in its application to the extent of the interest primarily acquired by the corporation? Some evidence, at least, that the word now under examination is used in the narrower sense above indicated is found in the fact that particular kinds of property are not pointed out thereby. It is not expressly recited that the taxes and penalties shall be the first and best lien on all "real estate" of the corporation nor upon all "personal property" thereof. If it had been we might

have turned to the definitive sections found in the general property taxation code, which very clearly indicate that such terms are used to designate the corpus of the thing subject to taxation and lien. But the mere word "property" is not used in this sense in the general property tax statutes. The most similar use of this word which appears in the General Code is that found in section 5331 G. C. as amended 103 O. L. 363, which provides in part that:

> "Such (inheritance) taxes shall become due and payable immediately upon the death of the decedent and shall at once become a lien upon the property, and be and remain a lien until paid."

The phrase "and be and remain a lien until paid" has frequently been held to be synonymous with the phrase "first and best lien." That is to say, such a phrase as this naturally imports that the lien created by the statute shall have priority over all other liens. Eaton's Appeal, 83 Pa. St., 152. G. C. section 5671, creating the state's lien for taxes levied on real estate, is in this form, and has been given this interpretation, when read in connection with section 5724. Trust Co. v. Root, 72 O. S. 535. Yet under a similar provision of the New York inheritance tax law it was held in Kitching v. Shear, 26 Misc. Rep. (N. Y.) 436, 57 N. Y. Suppl. 464, that:

> "This lien, however, was not paramount to the lien of the mortgage, which was in existence prior to the decease of the testatrix. So far as the mortgagee is concerned, his rights could not well be impaired by subsequent devolutions of the title and the creation of liens associated therewith. The tax in question is not to be assimilated with the general taxes which are imposed by public authority, and which attach to property affected thereby as a whole, and without discrimination with respect to particular estates or interests therein. The right of the state in such cases is always paramount. It is not concerned with the particular estates or liens which affect the property, but, dealing with it as a whole, imposes the tax, leaving it to the parties interested in the property to secure, as between themselves, such an adjustment of the burden as the circumstances of the case may seem to require. But in the case of the transfer tax a different condition exists. It is imposed upon the right of succession, and is levied upon successors in respect to the shares to which they succeed. In re Hoffman, 143 N. Y. 327, 331, 38 N. E. 311. In no sense, then, can the tax be deemed to affect the interest of one who had a lien upon the property which was paramount to the ownership of the testatrix, and therefore superior to any estate or interest which the testatrix might assume to create in the property."

The franchise and excise taxes in question are similar in a way to inheritance taxes. Both are privilege taxes, not property taxes. In both cases the possibility that encumbered property will ever become surety for a tax, the primary liability for which is in personam, is contingent and speculative. The mortgagee could not be presumed to contemplate that the real estate, for example, upon which he was acquiring a lien would ever pass to a collateral relative by will or intestacy, though it is always within the bounds of possibility that it may so pass; so also the mortgagee of real estate would not be bound to take cognizance of the possibility that the land on which he had acquired an encumbrance might become the property of a corporation or a public utility.

In so far as the inheritance tax affords a fair analogy it tends to establish the conclusion that the word "property" as used in section 5506 imports the re-

stricted meaning above set forth. It would seem that the question which you have raised is similar to one that might possibly arise under the law imposing a special tax on the business of trafficking in intoxicating liquors. If the county treasurer is unable to collect such a tax from a person who has neglected to pay it, but is engaged in the business, the county auditor may, under favor of section 6080 G. C. place the amount thereof upon the tax duplicate of the county against the real estate in which the traffic is carried on, and it may be collected as other taxes and becomes by virtue of section 6072 G. C. (last amended 104 O. L. 166) "a lien upon the real property on and in which such business is conducted." It has been held in several cases that this lien is superior to the lien of any mortgage given by the owner of the premises on which the business is conducted regardless of the date thereof. See Trust Co. v. Stich, 71 O. S. 459; Loan Co. v. Hanson, 5 N. P., 162. However, in none of these cases was the exact question now under consideration, as it might have arisen under the liquor laws, concerned. Thus in Trust Co. v. Stich it appeared that the business on account of which the tax was assessed was carried on by the owner of the premises who had given the mortgage and created the lien, though the morgage was recorded prior to the assessment of the tax and the day as of which it became a lien. It is acknowledged by the supreme court, in referring with approval to the Hanson case, supra, that:

> "The question whether a mortgage *might* be made under such circumstances, that it would be held in equity to be superior to the subsequent lien for a Dow tax is argued. If such a defense could, under any circumstances, be maintained in equity, the burden would be upon the party claiming it to plead and prove the facts relied upon to sustain it. But that question does not arise in this case."

The court on this point held that the fact that at the time of the giving of the mortgage there was no reason whatever to suspect that any violation of the liquor law would occur on the premises and every reason to trust the owner of the premises not to violate the law, was not such an equitable consideration as would entitle the mortgagee to priority. Throughout the case, however, there is marked reliance upon the opinion of the common pleas court in the Hanson case There the priority of the lien over previously recorded mortgages is placed, in part at least, upon the ground that "the laws in force at the time and place where a contract is made, and where it is to be performed, which in their nature are applicable, enter into and become a part of the contract." It was accordingly held in that case that the lien did not acquire priority over encumbrances created before the passage of the act. If this is the true theory of priority as applied to the liquor tax, it would seem to affect only encumbrances created by the person who was the owner of the property at the time the business was being carried on, and who might therefore protect himself and his mortgagee against the consequences of the violation of the law. Thus it would seem hardly to extend to the case of a mortgage given by a prior owner and to make such mortgage subordinate to the lien of the liquor tax accruing against the premises after a change in the legal title thereof. However, as above stated, this question has not been decided in this state.

There is another provision of the liquor tax applicable to personal property which is more far reaching. I refer to section 6078 G. C. which authorizes a levy on the goods and chattels of the person carrying on the business, and those used by him in such business. That provision is as follows:

> "Such levy shall take precedence of all liens, mortgages, conveyances or incumbrances hereafter taken or had on such goods and chattels so used in carrying on such business; and no claim of property by a third person

to such goods and chattels so used in carrying on such business shall avail against such levy by the treasurer."

It is clear that under this provision the lien of the levy attaches to all goods used in carrying on the business whether belonging to the person carrying it on or not. Accordingly under such a provision no question like the one now under consideration could arise. But section 5506 stops far short of the effect of the provision last quoted. The phrase "property of the public utility or corporation" clearly imports ownership; in fact such ownership is even more clearly indicated by the remainder of the section, which is:

> "Whether such property is employed by the public utility or corporation in the prosecution of its business or is in the hands of an assignee, trustee or receiver for the benefit of the creditors and stookholders thereof."

That is to say, the fact upon which the attachment of the lien is predicated is the ownership of the corporation or utility, not the use of the property in its business.

It would seem from Baldwin v. Pelton, 19 O. D. N. P., 546, that the personal property lien provision of the liquor tax law has been applied so as to defeat prior interests of the kind now under consideration, but for reasons above pointed out this case is not in point.

In the state of Indiana there is a law which creates in favor of the state a lien upon all the property of a person liable for personal property taxes. The supreme court of Indiana has repeatedly held that this lien attaching to the real estate of a taxpayer is prior to that of a mortgage executed by the taxpayer's grantor and to that of a purchase money mortgage or vendor's lien. Bodertha v. Spencer, 40 Ind. 353; Isaacs v. Decker, 41 Ind. 410; Peckham v. Milliken, 99 Ind. 352. However, it is also held in Indiana that such lien does not attach to property held by a husband and wife as tenants by the entirety on the ground that the husband (who was the delinquent personal taxpayer) had no separate interest in such property. The decisions laying down the general rule are not supported by any reasoning. It may be said, however, of these Indiana cases that they are distinguishable from the case now under consideration in that the tax, as security for the payment of which the secondary lien was created, is a general property tax, the certainty of the accrual of which may be taken for granted; so that a mortgagee accepting an encumbrance upon real estate in Indiana, at least from a resident of Indiana, would be cognizant of the extreme probability, not to say certainty, of the creation of a superior secondary lien for the payment of personal property taxes, not only those due or to become due from his mortgagor, but also those to become due from a possible grantee of his mortgagor.

In line with the Indiana decisions and under similar statutes is California Loan, etc., Co. v. Weiss, 118 Cal. 489; Bibbins v. Clark & Co., supra, is opposed to the Indiana cases. The law of Iowa involved in that case was quite similar to the Indiana law applied in the cases in that jurisdiction above cited, but the supreme court of Iowa gave the law a strict interpretation and reached accordingly an opposite result. In Central Trust Co. v. Third Ave. Railroad Co., supra, the court declined to give priority to a tax lien where the statute did not clearly create such priority.

The cases above cited from Indiana and California and the Ohio cases under the liquor tax laws are the only ones which I have been able to find in the course of a somewhat exhaustive search, which would tend in any degree to support the priority of the lien created by section 5506 over that of a mortgage given under the circumstances described in your question.

In addition to the New York inheritance tax decision, above referred to, there are cases in which substantially the very question submitted by you is raised and resolved in the negative. In Salt City v. Padgett (Texas Civil Appeals, 1916), 186 S. W. 391, it appears that a statute of Texas made the general personal property tax a "first lien" as against assignments for the benefit of creditors or levies and attachments by creditors. It was held that this lien was inferior to that of a purchase money chattel mortgage. This case is not exactly in point because the statute did not purport to make the tax a first lien except as against creditors of the taxpayer.

In Sweeney v. Arrowsmith, 1 Berks County (Pa.) 353, 23 York County 76, it seems to have been held that a tax lien quite similar to that of section 5506, in that it was given for the purpose of securing the payment of a corporation tax and was expressly made a prior lien, was held inferior to the lien of a purchase money mortgage which upon familiar principles was regarded as an encumbrance when the corporation acquired the land. It was admitted apparently that the lien of the tax would be superior to all encumbrances created upon its property by act of the corporation even when so created prior to the accrual of the tax lien, but it was denied that the priority of the latter obtained as to encumbrances existing when the corporation acquired the property.

I regret that I have not been able to see a full report of this case. The Pennsylvania county reports in which it appears are not in the library of the supreme court. I have had access only to an abbreviated and fragmentary report thereof in a note in Purdon's Digest of Pennsylvania statutes, page 4580, sections 64 and 65. This publication, however, does show that the Pennsylvania statute is practically as far reaching as section 5506.

The question is to my mind a very doubtful one and little help is obtainable from the adjudicated cases. Nevertheless I am of the opinion that the lien of the state for franchise or excise taxes is upon principle to be regarded as inferior to that of a purchase money mortgage given by the corporation or utility, or that of any other encumbrance placed upon the property before it became the "property of the corporation"; and that the phrase "property of the corporation" embraces only the interest acquired by the corporation or utility.

In the first place, while it may be admitted that the legislative power of the state is without limit, so far as the adjudicated cases are concerned, in giving priority to liens for taxes, yet this doctrine has never been applied, so far as I am able to ascertain, to cases in which the principal tax was in no sense a property tax and in which the lien was secondary merely and in the nature of a security for the discharge of a primary liability purely in personam.

In the second place it is generally agreed that tax liens are in this country of statutory origin only, and that the statutes creating them must be given a strict construction. This is particularly true, I think, where the tax is in no sense a property tax.

In the third place where the tax is a privilege tax it would seem that the property to which the secondary lien would attach would be limited to the interest acquired through the exercise of the privilege. This is the doctrine of the inheritance tax case above cited.

In the fourth place it would seem that the basis of or justification for the theory that the legislative power extends to creating priority in favor of a subsequent tax lien over a prior encumbrance is found in the fiction or presumption that parties are deemed to create their private liens in the light of all laws which may effect the consequences of the act in which they are then engagd. This is the theory of Loan Co. v. Hanson and Trust Co. v. Stich, supra. This doctrine in my opinion does not extend to cases in which the probability nor possibility of

impairment of a contractual lien through the operation of a law then in force is so remote at the time of its creation as would be the case if it were applied to the solution of the question now under consideration. That is to say, I think it would be carrying the doctrine too far so to apply it as to hold that when two ordinary natural persons are engaged in the creation of a lien by the giving of a mortgage on the part of one of them, who is the owner of real estate, to the other, these parties must be held in contemplation of law to take into account the possibility of the sale of the property by the mortgagor to a corporation or public utility. The view which I express on this point does not, of course, account for the result which I have indicated with respect to purchase money mortgages. The other reasons which I have given, however, are applicable to that case, and while I am not so clear as to the correctness of my conclusions respecting the priority of a purchase money mortgage, yet on the whole I am inclined to adhere to the opinion which I have expressed thereon.

Lest my opinion be misunderstood, I wish to make it clear that the lien of the tax is superior to all other liens (excepting such charges as court costs) to the full extent of the largest interest in the property against which it is asserted, acquired by the corporation at any time. Thus if a corporation should acquire real estate encumbered by a mortgage and the corporation tax should accrue and be unpaid while the encumbrance still existed, but such encumbrance were subsequently removed, of course the lien of the state, on account of that tax, would apply to the entire property, because it would take priority over any interest therein that might subsequently be created by the corporation.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2060.

SAFE DEPOSIT COMPANIES—NOT AUTHORIZED TO ACCEPT TRUSTS OR ACT AS TRUSTEE—CANNOT ISSUE "PARTICIPATING CERTIFICATES"—MAY ACCEPT FOR SAFE-KEEPING SUCH PARTICIPATING CERTIFICATES.

Safe deposit companies are not authorized by the provisions of the General Code of Ohio to exercise trust powers.

Safe deposit companies cannot issue "participating certificates" which entitle the holders thereof to participate in the interest and principal collected from the securities which are held in trust by said company for that purpose.

Safe deposit companies may, under section 9773 G. C. accept properly issued participating certificates or other securities, and as agent for the depositor thereof disburse the principal and interest upon agreed terms.

COLUMBUS, OHIO, November 25, 1916.

HON. HARRY T. HALL, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of October 5, 1916, requesting my opinion as follows:

"A copy of what is known as a 'Participating Certificate' is hereunto attached.

"Will you kindly favor this office with an opinion covering the following questions:

"First—Can these 'participating certificates' be properly issued by savings banks or safe deposit companies?

"Second—Can a safe deposit company accept these 'participating certificates' and collect and disburse the principal and interest thereon?

"Third—Can safe deposit companies issue these 'certificates' and also hold the mortgages under which said 'certificates' are issued without qualifying as trust companies?"

The following is a copy of the participating certificate and coupon referred to in your letter:

"COUPON.

"ON THE FIRST DAY OF APRIL 1920

This coupon will entitle the bearer to receive from funds collected the sum of SIX AND 87-100----------DOLLARS $6.87 upon presentation at the main office of The----------Company, Cert. No. ----------, Ohio, being three months' interest payable on said date on the First Mortgage Certificate, Series A, Series A subject to the terms and conditions of said certificate.

Treasurer.

"FIVE AND ONE-HALF PER CENT.
FIRST MORTGAGE CERTIFICATE.

"Issued by

"----------

"No.---------- of $500.00

"Series A. ----------

"Series of two hundred certificates of five hundred dollars each, bearing like series letter herewith against notes secured by first mortgages aggregating One Hundred Thousand Dollars.

"THIS IS TO CERTIFY THAT THE----------COMPANY, hereinafter called the 'Company,' has received from the registered holder hereof, hereinafter called the 'Participant,' the sum of FIVE HUNDRED ($500.00) DOLLARS, for which said participant is entitled to a participating share equal to that amount in the promissory notes secured by first mortgages on real estate in ---------- county, Ohio, totaling One Hundred Thousand ($100,000) Dollars, deposited in the safe deposit department of the company, under the joint control of said department and the auditor of said company, and in any such notes and mortgages substituted therefor. Said notes and mortgages as per list marked 'Series A' are held by the company as depository and agent for the holders of this and other certificates of this series, upon the following terms and conditions which are agreed to by the holder of this certificate.

"FIRST. The company is appointed sole and irrevocable agent and attorney of all owners and holders of said certificates for the purpose:

"(a) Of collecting the interest and principal due on said mortgage notes and of satisfying, receipting for and discharging same in its own name on receiving full payment.

"(b) Of deciding when and how any provisions of said notes and mortgages shall be enforced and of enforcing them accordingly.

"(c) Of agreeing to any extension or anticipation of the time of payment of any of said notes and mortgages.

"SECOND. If the company decides that any action or proceeding should be begun, or for any other reason desires to withdraw any of said notes and mortgages, the company shall deposit with the safe deposit department of said bank other notes secured by like first mortgages of an equal amount and thereupon be entitled to make the desired withdrawal.

"THIRD. The company shall disburse out of the interest received from said notes 5½% per annum, payable quarterly on the first days of January, April, July and October each year upon presentation of the coupons hereto attached, to the bearer thereof, as they severally mature at the main office of the company, the company retaining from the interest received from said notes ½% per annum on the principal as compensation to it.

"FOURTH. The company may be the holder, or owner or pledgee of one or more of said certificates.

"FIFTH. The term of this certificate shall expire on the first day of October, A. D. 1920, and upon giving written notice to the undersigned on or before the expiration of this certificate, the registered holder hereof shall be entitled after such expiration to receive the amount represented hereby as rapidly as the undersigned in due course of business receives a sufficient amount of principal from said notes. Also, if sufficient principal be not collected and paid within thirty days after said expiration date, the registered holder hereof shall be entitled to receive in addition his pro rata share of any interest thereafter collected thereon, less one-half per centum upon the principal, deducted by the company for its compensation.

"SIXTH: If, prior, to the termination date hereof, any principal of said notes is collected, the company may, in its discretion, upon giving notice as hereinafter provided, use the same for the purpose of redeeming any of the then outstanding certificates upon any interest-paying date, and upon the final pro rata distribution of all principal collected this and all other certificates shall be deemed cancelled and be turned in for cancellation.

"SEVENTH. This certificate is assignable only upon the books of the company, upon proper endorsement and surrender hereof to the company for cancellation.

"EIGHTH. This certificate may be redeemed by the company at any time, upon mailing written notice of such redemption, directed to the registered holder hereof at his address last appearing upon the books of the company, after which this certificate shall cease to participate in the interest accruing upon said notes, and the company may, in its discretion, take from said safe deposit department an amount of notes equal to the certificate redeemed.

"IN WITNESS WHEREOF, THE_____has caused this certificate to be sealed with its corporate seal and to be signed by two of its officers, at _____, Ohio, this _____ day of _____ A. D., 19____.

"THE_____

"_____

"President.

"_____

"Treasurer"

I also have your letter of November 3, 1916, enclosing the following additional information:

> "The A. Company, an Ohio corporation, has executed a mortgage deed on real estate for $100,000.00 to the B. Company as trustee, the purpose of which is to secure the payment of 100 bonds of $1,000.00 each.
>
> "The B. Company has certified each bond as follows:
>
> "'It is hereby certified that this bond is one of the issue of bonds described in the mortgage deed of trust within mentioned.
>
> "'The B. Company, Trustee,
>
> "'By John Roe, Sec'y.'
>
> "After the certification, the bonds above mentioned were delivered to the A. Company, which in turn gave its receipt covering the entire issue.
>
> "The B. Company is chartered as a safe deposit company under the Ohio statutes, and has at no time uncertified bonds in its possession; its practice being to certify entire issues and deliver same to issuing company upon their receipt—in other words, to act only as agent representing the several interests involved."

Section 9702 of the General Code, authorizing the organization of a "commercial bank, a savings bank, a safe deposit company and a trust company" is as follows:

> "Any number of persons, not less than five, a majority of whom are citizens of this state, may associate and become incorporated to establish a commercial bank, a savings bank, a safe deposit company, a trust company, or to establish a company having departments for two or more, or all of such classes of business, upon the terms and conditions and subject to the limitations hereinafter and by law prescribed."

The powers which may be exercised by savings banks are set forth in sections 9762 to 9771 of the General Code. No authority is given to savings banks by any of these sections to act either as trustee or agent in the manner indicated in the so-called participating certificate. Sections 9772 and 9773 of the General Code, prescribing the powers of safe deposit companies, are as follows:

> "Sec. 9772. A safe deposit company may purchase, lease, hold and convey real estate whereon is erected or may be erected a building or buildings useful for the convenient transaction of its business, including fire and burglar proof vaults or safes, and from portions of which, not required for its own use, a revenue may be derived. The cost of such buildings and the real estate whereon they are erected in no case shall exceed fifty per cent. of the paid-up capital and surplus of the corporation. Any sum not so invested in buildings and real estate may be invested in the manner provided herein for the investment of the funds of savings banks.
>
> "Sec. 9773. A safe deposit company may receive property of every kind for safe keeping, collect and disburse the interest or income or principal of securities on such terms as are agreed upon, and also act as agent, for the purpose of registering, countersigning or transferring the certificate of stock, bonds or other evidences of indebtedness of any corporation, association, municipality, state or public authority, on such terms as are agreed upon."

Safe deposit companies, under the sections just quoted, may act as the bailee or agent for certain purposes, but they are clearly not authorized therein or in any other section of the General Code to accept trusts or to act as trustee.

The question therefore arises whether the safe deposit company designated as the "B. Company" in the information furnished me in your letter of November 3, 1916, is in the transaction therein referred to acting as agent or as trustee.

In "Words and Phrases," Vol. I, page 270, an "agent" is defined as:

> "Any one who by authority performs an act for another."
> "A person authorized by another to act for him."

In the case of Taylor v. May, 110 U. S. 330, the court distinguished a "trustee" from an "agent" in the following language:

> "A trustee is not an agent. An agent represents and acts for his principal, who may be either a natural or artificial person. A trustee may be defined generally as a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another. When an agent contracts in the name of his principal, the principal contracts and is bound, but the agent is not. When a trustee contracts as such, unless he is bound no one is bound, for he has no principal. The trust estate cannot promise; the contract is therefore the personal undertaking of the trustee. As a trustee holds the estate, although only with the power and for the purpose of managing it, he is personally bound by the contracts he makes as trustee, even when designating himself as such."

In the case of Everett v. Drew, 129 Mass. 150, the court say:

> "The trustee is in no sense an agent of the cestui que trust, and he cannot render them personally liable on his contracts without their consent."

The so-called participating certificate, a copy of which is above set forth, clearly indicates the relation created between the safe deposit company and a certificate holder is that of trustee and cestui que trust. The company has entire control of the property which it certifies that it holds for the payment of interest upon and the final redemption of the said certificates. The certificate holder has no control over this property or right therein except to participate with other certificate holders in a proper disposition of the proceeds thereof. The company, if it sees fit, may even substitute other property for that originally set aside for the payment of the certificates. If suit is brought for the collection of any of the trust securities such suit must of necessity be brought by and in the name of the company, and no certificate holder could maintain such suit in his own name. The language used by the company in certifying the bonds or participating certificate is further indicative of the nature of the transaction, viz:

> "It is hereby certified that this bond is one of the issue of bonds described in the mortgage deed of trust within mentioned."

The transaction simply amounts to this: The safe deposit company segregates and declares a trust in and names itself trustee for the distribution of certain securities or other property with the right of withdrawal or substitution, provided always that security equivalent in value shall be maintained in trust. The certificate holders are beneficiaries under the trust declaration.

Sections 9774 et seq. of the General Code, defining the powers and duties of trust companies, clearly indicate the legislative intent to limit the exercise of trust powers by corporations to such trust companies.

Sections 9778, 9779 and 9780 of the General Code are as follows:

> "Sec. 9778. No such corporation either foreign or domestic shall accept trusts which may be vested in, transferred or committed to it by an individual, or court, until its paid-in capital is at least one hundred thousand dollars, and until such corporation has deposited with the treasurer of state in cash fifty thousand dollars of its capital is two hundred thousand dollars or less, and one hundred thousand dollars if its capital is more than two hundred thousand dollars, except that the full amount of such deposit by such corporation may be in bonds of the United States, or of this state, or any municipality or county therein, or in any other state, or in the first mortgage bonds of any railroad corporation that for five years last past paid dividends of at least three per cent. on its common stock.
>
> "Sec. 9779. The treasurer of state shall hold such fund or securities deposited with him as security for the faithful performance of the trusts assumed by such corporation, but so long as it continues solvent he shall permit it to collect the interest on its securities so deposited. From time to time said treasurer shall permit withdrawals of such securities or cash, or part thereof, on the deposit with him of cash, or other securities of the kind heretofore named, so as to maintain the value of such deposit as herein provided.
>
> "Sec. 9780. No such corporation, foreign or domestic, authorized to accept and execute trusts, either directly or indirectly through any officer, agent or employe thereof, shall certify to any bond, note or other obligation to evidence debt, secured by any trust, deed or mortgage upon, or accept any trust concerning property located wholly or in part in this state without complying with the provisions of this and the two preceding sections. Any trust, deed or mortgage given or taken in violation of the provisions thereof shall be null and void."

It should be borne in mind that corporations have only such powers as are specifically conferred upon them by law and such additional powers as are incidental to the proper exercise of the conferred powers. The General Code confers no trust powers on safe deposit companies. It does confer such powers on trust companies and prescribed the conditions and terms upon which such trust powers may be exercised in Ohio. It follows that safe deposit companies cannot exercise trust powers, and that trust companies may exercise such powers only after full compliance with the mandatory provisions of the General Code.

Answering your several questions:

1. The participating certificate referred to in your enquiry cannot be issued by safe deposit companies.

2. A safe deposit company may, under section 9773 of the General Code, accept for safe-keeping such participating certificate (when properly issued by a qualified trust company) and as agent for the depositor thereof disburse the principal and interest upon agreed terms.

3. A safe deposit company cannot issue such certificate and also hold the mortgage under which said certificates are issued without also being and qualifying as a trust company.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2061.

STATE BOARD OF PUBLIC BUILDINGS—CERTAIN VOUCHERS DRAWN BY SAID BOARD SHOULD BE PAID—CASE OF LYONS V. SAID BOARD DECIDED IN COMMON PLEAS COURT OF FRANKLIN COUNTY DISTINGUISHED FROM ABOVE ITEMS OF EXPENSE.

Certain vouchers drawn by the state board of public buildings and presented to the state auditor should be paid.

COLUMBUS, OHIO, November 25, 1916.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Your request for an opinion under date of November 24, 1916, reads as follows:

> "I have had presented to me various vouchers drawn by the state board of public buildings, which said vouchers I herewith enclose.
>
> "In view of the opinion of Judge E. B. Kinkead, one of the judges of the common pleas court of Frankin county, in the case of State ex rel George A. Lyons Company v. State Board of Public Buildings, I desire an opinion from you in regard to the payment of the various bills mentioned. Mr. H. M. Myers, secretary of said board, has advised me that he will inform you as to the purpose of each of said vouchers."

As indicated in your letter, Mr. H. M. Myers, secretary of the state board of public buildings, has given me the following information in regard to the vouchers referred to by you:

The voucher for $25.56, in favor of the Pennsylvania lines, covers two railway tickets from Columbus to Washington, D. C., used by two United States government engineers, called in consultation by the state board of public buildings, and whose services cost the board only the expenses of the engineers.

The two vouchers each for $19.88, one in favor of C. P. Gliem, and the other in favor of Elliott Woods, cover the railroad fare of the two engineers above referred to from Washington, D. C., to Columbus, and their other traveling expenses. Mr. Woods is superintendent of the United States capitol building and grounds and Mr. Gliem is the chief electrical engineer of the United States capitol building.

The voucher for $572.00, in favor of the Standard Paving Company, is for materials furnished in repairing walks on the state house grounds.

The item of $320.44, covering painters' payroll, is for work done on the Wyandotte building and on the state house.

The voucher for $302.80, in favor of D. W. McGrath, is for repair work and material used on the state house.

The voucher for $70.48, in favor of D. W. McGrath, is for plastering done in the adjutant general's office in the state house, a part of the plastering in that office having fallen.

The item of $1,849.56, in favor of D. W. McGrath, relates entirely to repairs and alterations in the Wyandotte building.

The voucher for $4.00, in favor of the Zettler Hardware Company, is for materials furnished for the Wyandotte building.

The voucher for $1,567.50, in favor of the Livingston Seed Company, is for nursery stock, fertilizer and planting in connection with the embellishment of the state house grounds.

The voucher for $76.00, in favor of John McCarty, is for dirt and planting in connection with the embellishment of the state house grounds.

The voucher for $16.00, in favor of the Doddington Company, is for material furnished for use in the Wyandotte building.

The voucher for $62.00, in favor of the Avery & Loeb Electric Company, is for fire extinguishers for the Wyandotte building.

Six vouchers for $26.92, $13.45, $8.40, $10.15, $9.05 and $10.45 cover necessary traveling expenses of the members of the state board of public buildings.

The voucher for $247.40, in favor of the Standard Paving Company, covers an asphalt roof placed over a new drafting room constructed in the basement between the state house and the judiciary building for the use of the department of public works.

The voucher for $10.97, in favor of the Westwater Supply Company, covers materials furnished for the Wyandotte building.

As to the six items of traveling expenses of members of the state board of public buildings, such items are in no way affected by the opinion of the court in the case of State ex rel. Lyons v. the State Board of Public Buildings, referred to you by you.

As to such expenses, it is provided by section 3 of the act creating the state board of public buildings, 106 O. L., 463, that the members of the board shall be paid their necessary and actual expenses incurred while engaged in the business of the board, and that all such expenses shall be audited and paid upon vouchers signed by the chairman and secretary of the board. All of these vouchers bear the written approval of the chairman and secretary of the state board of public buildings, and I advise you that they should be paid.

As to the vouchers relating solely to work done upon, and material furnished for, the Wyandotte building, it may also be observed that the opinion of the court in the case referred to by you has no application. It is provided by section 3 of the act creating the board that the compensation and expenses of employes and assistants, and other expenses authorized to be incurred, shall be audited and paid upon vouchers signed by the chairman and secretary of the board, and since the vouchers relating solely to work done upon, and material furnished for, the Wyandotte building bear the written approval of the chairman and secretary of the board, I advise you that they should be paid.

Coming now to consider the remainder of the vouchers submitted by you, which cover materials furnished for, or work done upon, the state house, judiciary building and state house grounds, it is necessary to state briefly the nature of the action in the case of State ex rel. Lyons v. the State Board of Public Buildings, referred to by you.

This is a proceeding in mandamus, brought to compel the defendant to enter into a contract for lighting and decorating the rotunda of the Ohio state capitol. The defendant had prepared plans and specifications and advertised and called for sealed bids and proposals for the work. The relator had filed and submitted a bid, which bid he alleged in his petition was the lowest one submitted. An alternative writ was allowed and a demurrer to the petition upon the ground that it did not state facts sufficient to constitute a cause of action was sustained by the court and the petition dismissed. The question of competitive bidding was involved in this suit, but the court seems to have based its decision upon other grounds, and the question of competitive bidding need not now be considered, especially as none of the bills now under consideration exceed the sum of $3,000.00. The court pointed out that by general statute the adjutant general was made superintendent of the state house grounds and that ordinary repairs about the state house and grounds, not connected with any general plan adopted by the state board of public buildings, were to be carried forward by him.

The following is quoted from the opinion of the court in the case in question:

"The design of the act was to create a new board to determine the needs of all offices, departments and commissions of the state concerning such matters as floor space, sanitation, light and economical and efficient operation, and to decide upon a general method and plan to efficiently and economically house the offices, departments and commissions.

"In carrying out this purpose the board may buy either a suitable building or site contiguous to or conveniently near the state house.

"It is authorized to let contracts to construct additions to present buildings.

"Pursuant to its general purpose to efficiently and economically house the offices, in matters of floor space, sanitation, light and economically and efficient operation, it is authorized to do the following things:

"1. To make additions to state house or judiciary building.

"2. To alter these buildings.

"3. To repair them only when it is pursuant to a general plan to efficiently and economically house the offices.

"4. To enter into contracts to carry out these purposes.

"But these functions and duties are to be exercised and performed only:

"'after it has been decided upon the method and plan which will efficiently and economically house the offices, departments and commissions of the state upon and with the approval of the governor.'

"And these duties are incidental to the paramount purpose and design to provide for an efficient and economical housing of the offices, departments and commissions of the state.

"None of these things, except to purchase a building, can be singly done or independently of a general method or plan to accomplish the general purposes of the act.

"The improvement or repair disclosed by the petition appears to have no connection with any general plan contemplated by the act."

The court held that the petition of the plaintiff was bad on demurrer in that it was not stated therein that the work for which the relator was a bidder was a part of any general scheme or plan adopted by the state board of public buildings, in connection with the adequate housing of the officers, departments and commissions of the state.

A careful examination of the minutes of the meetings of the state board of public buildings discloses that the board took the very action which was held to be jurisdictional by the court in the case of State ex rel. Lyons v. the State Board of Public Buildings. The court in its opinion pointed out that the state board of public buildings was authorized to let contracts to construct additions to present buildings and that pursuant to its general purpose to efficiently and economically house the offices in matters of floor space, sanitation, light and economical and efficient operation, it was authorized to do the following things:

First, to make additions to state house and judiciary buildings; second, to alter these buildings; third, to repair them only when it is pursuant to a general plan to efficiently and economically house the offices; fourth, to enter into contracts to carry out these purposes.

The court further held that these functions and duties are to be exercised and performed only "after it has decided upon the method and plan which will efficiently and economically house the offices, departments and commissions of the state upon

and with the approval of the governor." The court held that the functions of the board, other than the purchase of a building, could not be exercised singly or independently of a general method or plan to accomplish the general purposes of the act. It appears from the minutes of the board that on February 16, 1916, the board determined that the most efficient and economical method and plan for the housing of the offices, departments and commissions of the state government was the purchase of a suitable site and the erection thereon of an office building, and indicated that the proper and appropriate location therefor was on Fourth street and that this site should be rendered accessible from the present state house grounds through a public park way or mall to be used in common with other state, county and city buildings to be erected in the future and the board determined upon this course of action, provided the chamber of commerce of the city of Columbus should, by purchase or otherwise, procure the dedication in fee for public park purposes, of certain real estate necessary therefor. The Chamber of Commerce of the city of Columbus, and other city organizations, being unable at the present time to meet these conditions, the State Board of Public Buildings, on July 25, 1916, having duly considered the inability of the Chamber of Commerce of the city of Columbus to provide necessary real estate for a pubic park way or mall, and the fact that the several departments of the state government not then housed in the state house or judiciary building were located in numerous buildings remotely situated from each other, and that some of these departments were compelled to pay high rents to individuals and corporations owning the buildings in which they were housed, determined to purchase for temporary purposes the Wyandotte building, being influenced, as is shown by the minutes, by the further considerations that such building was conveniently near the state house and could be purchased at a reasonable price and could be sold without loss at such time in the future as the state deemed necessary after a permanent building had been erected by the board. It is further to be fairly and even necessarily inferred from the minutes of the State Board of Public Buildings, evidencing its proceedings on said 25th day of July, 1916, that the board, as a part of a general plan and scheme, contemplated by the act of the general assembly creating the board, and referred to by the court in deciding the case of State ex rel. Lyons v. the State Board of Public Buildings, determined that the method and plan then adopted of efficiently and economically housing the offices, departments and commissions of the state, by purchasing the Wyandotte building for temporary purposes and for use until such time as the board might erect a permanent building, would render it necessary to make a large number of repairs and alterations in the present state house and judiciary building and provide therein certain additional accommodations, utilizing space not theretofore used, and providing adequate sanitary and lighting accommodations for the same. This general plan and design on the part of the board fully appears from the minutes of the meeting of July 25, 1916, referred to above, and also from the minutes of subsequent meetings held on August 15, 16, 30, 31, September 1, 26, October 17, 31, November 9 and November 16, 1916.

In so far as the bills now under consideration are concerned, it is my opinion that they are in no way affected by the decision of the court in the case referred to by you, which decision, in so far as the present matter is concerned, may be regarded solely as upon a question of pleading, and it appearing from the examination of said bills and from the minutes of the State Board of Public Buildings that the bills were incurred pursuant to a general plan and design, on the part of the board, to alter and repair the state house and judiciary building, and to improve and embellish the state house grounds, and the vouchers bearing the approval of the chairman and secretary of the board, I advise you that the same should be paid.

In so far as the broad equities of the matter are concerned, both the board and the persons performing services and furnishing materials in connection with repair and improvement of the state house and judiciary building and the improvement and embellishment of the state house grounds, appear to have acted in the best of faith, and so far as I know there is no claim whatever on the part of any person that the state has not received full value for every dollar which it is now claimed is due and owing. Under such circumstances the courts would not incline to give weight to merely technical objections unless absolutely required so to do by the law. However, giving full weight to any merely technical objection that might be urged against the payment of these claims, I am unable to conclude that any sound reason exists why the same should not be paid.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2062.

CLERK HIRE FOR COUNTY OFFICERS—COUNTY COMMISSIONERS FIX AGGREGATE SUM FOR EACH OFFICER—CANNOT SUBSEQUENTLY INCREASE—WHEN COMMON PLEAS JUDGE CAN MAKE ALLOWANCE—LIMITATION AS TO EXPENDITURE FOR ANY YEAR—SECTIONS 2979, 2980 AND 2980-1 G. C. CONSTRUED.

When the commissioners of a county have fixed an aggregate sum for clerk hire for any office during any year at the time designated in section 2980 G. C., they have no power subsequently to take further action increasing the amount whether the aggregate amount thus fixed be equal to or less than the maximum amount then allowable by them on the basis fixed by section 2980-1 G. C.

Under authority of said section 2980-1 G. C. and in the manner therein provided the judge of the court of common pleas of said county may, upon application, make an additional allowance for clerk hire in any case where he finds the necessity therefor, whether the sum fixed by the commissioners for such purpose be the maximum amount to which the office is entitled or less.

Any one of the officers mentioned in section 2979 G. C. is limited in his expenditure for clerk hire for any year to the aggregate allowance made by the county commissioners in November of the preceding year pursuant to the authority conferred upon said commissioners by section 2980 G. C., and such sum in addition thereto as may be allowed by the common pleas court of the county under authority of section 2980-1 G. C. upon application made as therein provided.

COLUMBUS, OHIO, November 25, 1916.

HON. C. H. CURTISS, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR:—Your letter of November 21 is as follows:

> "As required under the provisions of section 2980 of the General Code, on November 20, 1915, our county treasurer filed with the board of county commissioners a detailed statement of the probable amount necessary to be expended in his office for the year commencing January 1, 1916, for deputies, assistants, bookkeepers, clerks and other employes, and in accord with the provision of such section said board fixed the said amount at $1,250.00.

"This aggregate amount so fixed was considerably less than thirty per cent. on the first $2,000.00, or fractional part thereof, forty per cent. on the next $8,000.00 or fractional part thereof, and eighty-five per cent. on all over $10,000.00, of the fees, costs, percentages, penalties, allowances and other amounts collected for the use of the county in such office, for official services during the year ending September 30, next preceding the time of fixing such sum, as is provided in section 2980-1 of the General Code as amended in volume 105-106 of Ohio Laws, page 14, limiting the amount such board could allow.

"Of this sum so allowed up to November 1, of this year said officer has expended all but $60.00 of such allowance, a sum wholly insufficient to provide for the necessary deputies, etc., required in said office for the remaining two months of this year.

"Can the commissioners allow an additional sum at this time, for such purpose, and if not, can such an additional allowance be made by the common pleas court of this county under favor of said section 2980-1 above referred to? Your early reply desired."

The postscript to your letter is as follows:

"Supplementing the above, can the service for such deputies, if performed this month or next, be paid from next year's allowance?"

Your first question was carefully considered in an opinion of my predecessor, Hon. Timothy S. Hogan, found in the Annual Report of the Attorney-General for the year 1913, volume II, page 1322, in which it was held that when the county commissioners have fixed an aggregate sum for clerk hire during any year at the time designated in section 2980 G. C., they have no power subsequently to take further action increasing the amount of such allowance whether the aggregate amount thus fixed be equal to or less than the maximum amount then allowable by them on the basis fixed by the statute.

It was further held in said opinion that under authority of section 2980-1 G. C. and in the manner therein provided, the judge of the court of common pleas of the county may, upon application, make an additional allowance for clerk hire in any case where he finds the necessity therefor, whether the sum fixed by the commissioners for such purpose be the maximum amount to which the office is entitled or less.

I concur in the conclusions reached by my predecessor in said opinion as above expressed and therefore hold in answer to your first question that your county commissioners are without authority at this time to make an additional allowance to your county treasurer for clerk hire for the remainder of the year 1916, but application for an additional allowance may be made to the common pleas court of your county under authority of section 2980-1 G. C. and in the manner therein provided, and if upon such application being made the court finds that the necessity for an additional allowance exists he may allow such a sum of money as he deems necessary to pay the salaries of the employes, referred to in your letter, for the remainder of said year.

Your second question is answered by reference to the provisions of section 2980 G. C., which are as follows:

"On the twentieth of each November such officer shall prepare and file with the county commissioners a detailed statement of the probable amount necessary to be expended for deputies, assistants, bookkeepers, clerks and other employes, except court constables, of their respective

offices, showing in detail the requirements of their offices for the year beginning January 1 next thereafter with the sworn statement of the amount expended by them for such assistants for the preceding year. Not later than five days after the filing of such statement, the county commissioners shall fix an aggregate sum to be expended for such period for the compensation of such deputies, assistants, bookkeepers, clerks or other employes of such officer, except court constables, which sum shall be reasonable and proper, and shall enter such findings upon their journal."

In view of the above provisions of the statute it is clear that no part of the aggregate sum fixed by your county commissioners to be expended by your county treasurer for clerk hire during the year commencing January 1, 1917, may be expended for such purpose for services rendered during the remainder of the present year.

I am of the opinion, therefore, in answer to your second question that your county treasurer is limited in his expenditure for clerk hire for the year 1916 to the aggregate allowance made by your county commissioners in November, 1915, pursuant to the authority conferred upon said commissioners by the above provision of section 2980 G. C., and such sum in addition thereto as may be allowed by the common pleas court of your county under authority of section 2980-1 G. C. upon application made as therein provided, and that no part of the allowance made by your county commissioners to the county treasurer for the year commencing January 1, 1917, may be used by said county treasurer in paying for services rendered in said office during the remainder of the present year.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2063.

MUNICIPAL CORPORATIONS—MAY ENACT ORDINANCES TO PUNISH SAME ACTS AS ARE PUNISHED BY STATE LAWS—CITY LIMITED TO POWERS GRANTED—FINES COLLECTED UNDER SAID ORDINANCES GO INTO MUNICIPAL TREASURY.

A municipality, within the limits of the powers granted to it, may enact ordinances to punish the same acts as are punished by state laws, try cases under said ordinances and cover the fines collected thereunder into the treasury of the municipality.

COLUMBUS, OHIO, November 27, 1916.

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

GENTLEMEN:—I am in receipt of your letter of November 15, 1916, wherein you ask the following question:

"In cases in which the state laws provide fines and penalties for violation of state laws, and further provide, either specifically or by general statute, that such fines when assessed in municipal courts, police courts, mayors' courts, or other courts, shall be paid into the treasury of the

county, may the council of a municipality legally pass ordinances covering the same points, try such cases under said ordinances, and thereby divert the fines into the treasury of the municipality?'

Your question is so general that I shall not undertake to answer same except generally. The rule of law in Ohio is that a municipality, within the limits of the powers granted to it, may enact ordinances to punish the same acts as are punished by state laws, and having done so may punish the offenders under said ordinances. A prosecution under the ordinance, however, would not bar a prosecution under the state statutes.

See Koch v. State, 53 O. S. 433.

In cities other than charter cities it has been held, prior to the amendment of section 3664 G. C., 103 O. L. 168, that an ordinance could not be passed punishing assault and battery.

Wellsville v. O'Connor, 1 O. C. C. n. s. 253.

The case of in re Smith, 14 N. P. n. s. 497, decided that an ordinance could not be passed punishing the act of resisting a person called to assist an officer.

In Hughes v. Cincinnati, 14 N. P. n. s. 494, it was held that drunkenness not amounting to a disturbance of the peace could not be punished by ordinance.

Jeffries v. Defiance, 25 W. L. B. 68;
In re Fitzsimmons, 13 N. P. n. s. 104.

It would seem from the foregoing decisions that the power of council of non-charted cities to pass ordinances prescribing a punishment is limited to the powers conferred on municipalities by the legislature, but that in certain cases council may pass ordinance punishing the same acts as would constitute misdemeanors under state laws.

Answering your question, therefore, I am of the opinion that council of non-chartered municipalities may legally pass ordinances within the powers granted to them by statute covering the same acts as are covered by the penal statutes of the state, try such cases under said ordinances and cover the fines collected thereunder into the treasury of the municipality.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2064.

STATE OFFICER OR EMPLOYE RECEIVING REGULAR SALARY OUT OF STATE TREASURY NOT ENTITLED TO RECEIVE ADDITIONAL COMPENSATION FOR OVERTIME OR NIGHT WORK.

A state officer or an employe of a state department or institution who is receiving the full regular salary out of the state treasury, as fixed by the appropriation of the legislature, is not entitled to receive additional compensation for overtime or night work.

COLUMBUS, OHIO, November 27, 1916.

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

GENTLEMEN:—I am in receipt of yours under date of November 15, 1916, wherein you submit the following question:

> "May a state officer or an employe of a state department or institution who is drawing a regular salary out of the state treasury, fixed by appropriation of the legislature, receive additional compensation for overtime or night work, and if so, from what character of appropriation should it be paid?"

I assume that your question is referable to the appropriations made by the eighty-first general assembly. In said budget the general assembly appropriated for each particular state officer and employe a definite salary, and I assume that in the cases referred to by you the said officers and employes are drawing the maximum amounts so fixed by the legislature.

The legislature having determined the regular annual salary of the officer and employe, there is no power that I know of which would authorize the payment of an additional salary for the work to be done by such officer or employe, nor do I know of any statute which specifically designates the number of hours which officers or employes are required to spend at their daily tasks. The legislature in fixing the annual salary undoubtedly contemplated that each officer or employe should put in so much time daily as the necessities of the office should require. Furthermore, in so far as the salary of officers is concerned the matter is covered by article II, section 20 of the constitution which provides as follows:

> "The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

Specifically answering your question, therefore, I am of the opinion that a state officer or an employe of a state department or institution who is receiving the full regular salary out of the state treasury, as fixed by the appropriation of the legislature, is not entitled to receive additional compensation for overtime or night work.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2065.

OHIO NATIONAL GUARD—LIEUTENANT-COLONEL McQUIGG ENTITLED TO COMPENSATION HAVING PERFORMED SERVICES FOR NATIONAL GUARD.

Lieutenant-Colonel McQuigg having performed the services, represented by the voucher presented, under orders of the adjutant general of Ohio is entitled to his compensation therefor.

COLUMBUS, OHIO, November 28, 1916.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of November 15, 1916, which is as follows:

> "Herewith please find adjutant general's voucher No. 19465 in favor of Lieutenant Colonel John R. McQuigg of Cleveland, O., for $1,662.50 in payment of 133 days' services at Camp Willis and the Mexican border under general and special orders of the adjutant general thereto attached, payable from the appropriation for incidental expenses of camp and ask you to advise me at your earliest convenience if this bill may be legally paid out of said appropriation or any other appropriation made for the Ohio national guard."

The certified account presented by Lieutenant-Colonel McQuigg is for "services as inspector-instructor under S. O. No. 101, G. O. No. 12, S. O. No. 197, S. O. No. 223 and S. O. No. 227, current series A G. D. from July 1, 1916, to November 10, 1916, both dates inclusive, and being 133 days at $12.50 per day_____$1,662.50." The voucher calls for a warrant to be paid from maintenance O. N. G., incidental expenses of camp.

Special order No. 101 was dated May 15, 1916, and paragraph 4 thereof reads as follows:

> "Lieutenant-Colonel J. R. McQuigg, chief engineer officer, Ohio national guard, in addition to his duties as chief engineer, will supervise the instruction and work of all engineer troops. He will from time to time, inspect the personnel and all state and government property in the possession of headquarters and the several companies, and he may issue orders for such inspections to the commanding officers at such times as he may deem proper. He will make written report of all such inspections to the adjutant general of Ohio."

Paragraph 5 of special order No. 101 reads as follows:

> "Whenever two or more companies of engineer troops are ordered on duty either within or without the state, the chief engineer officer shall accompany them, in the capacity of inspector-instructor, and at the end of such tour of duty he shall report, in writing, to the adjutant general of Ohio on the work performed and the general efficiency of officers and men."

Paragraph 6 of special order No. 101 reads as follows:

"The commanding officer, corps of engineers, will provide the chief engineer officer with transportation and quarters whenever necessary to carry out the provisions of these orders."

Special order No. 197 under date of September 7, 1916, paragraph 1, is to the following effect:

"Pursuant to paragraphs 4 to 6, S. O. 101, c. s. A. G. D., and in continuance of his duties therein prescribed, Lieutenant-Colonel John R. McQuigg, chief engineer officer, Ohio national guard, will proceed to Fort Bliss, Texas, with the Ohio engineers, and remain on duty with said organization until October 7, 1916, on which date Lieutenant-Colonel McQuigg will return to his home station.

Special order No. 223 dated October 20, paragraph 4 is to the following effect:

"Paragraph 4. That part of special order No. 197, Par. 1, c. s. A. G. O., as reads 'October 7, 1916,, is changed to read October 27, 1916."

Special order No. 227, dated November 1, 1916, Par. 1 is to the following effect:

"That part of special order No. 223, paragraph 4, c. s. A. G. D. as reads 'October 27, 1916,' is changed to read November 10, 1916."

Special order No. 101 directed Lieutenant-Colonel McQuigg to supervise the instruction and work of all engineer troops and from time to time inspect the personnel and all state and government property, etc., and paragraph 5 ordered said officer to accompany engineer troops in the capacity of inspector-instructor either within or without the state.

Special order No. 197 ordered Lieutenant-Colonel McQuigg to proceed to Ft. Bliss with the Ohio engineers and remain with said organization until October 7.

Under special order No. 223 his time at Ft. Bliss was extended to October 27, and under special order No. 227 his time was again extended to November 10, 1916.

According to the certified account of Lieutenant-Colonel McQuigg he reported for duty on July 1, 1916, and served until November 10, 1916, under the order of the adjutant general of Ohio, a part of said time being served within the state and part without. The duties of Lieutenant-Colonel McQuigg were as inspector-instructor.

Section 5296 G. C. provides as follows:

"For service and attendance upon general courts-martial, courts of inquiry, and boards appointed by the commander-in-chief, as member, judge, advocate, recorder or witness, or upon inspection or other duty when ordered by the commander-in-chief, officers shall receive as pay the amount allowed by law for duty at annual encampments, together with transportation in kind and actual necessary expense for each day's service and the time actually employed in going to and returning from such duty, courts or boards.

The question of whether or not it is proper to send Lieutenant-Colonel Mc-

Quigg to Ft. Bliss, Texas, is a matter, as I view it, entirely within the discretion of the governor acting through the adjutant general of Ohio.

Having detailed Lieutenant-Colonel McQuigg on the special service mentioned I am of the opinion that the voucher presented for his said services is properly payable out of the state treasury.

You also inquire out of what appropriation the compensation of Lieutenant-Colonel McQuigg should be paid. The voucher drawn is drawn on the appropriation for incidental camp expenses.

The appropriation made to the Ohio national guard for the years 1916-1917 is found in 106 O. L. 790. Under personal service,

A-2, there is an appropriation for camp pay in the sum of.....$60,000.00
A-3 unclassified—Inspections and examinations..... 4,760.00
Under Maintenance—F, there is an appropriation made for "Incidental camp expense"..... 12,000.00

When Lieutenant-Colonel McQuigg was ordered to Camp Willis he was ordered to such camp on a special detail. The camp expenses at Camp Willis were taken care of by the United States government, and I do not think, therefore, that the compensation of Lieutenant-Colonel McQuigg on his special detail could in any way be considered as incidental camp expense.

If I understand the matter correctly Lieutenant-Colonel McQuigg was ordered to Camp Willis to perform services as inspector-instructor, but more particularly for the instruction rather than the inspection. Consequently, I do not think that his compensation should be paid out of the appropriation for inspections and examinations, but I think that his compensation should properly be paid out of "camp pay," since that is the appropriation from which the compensation of officers and men who attend camp is to be paid.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2066.

MUNICIPAL CORPORATIONS—ORDINANCES PROVIDING FOR COMPENSATION OF DISABLED OR TEMPORARY FIREMEN—WHEN TEMPORARY FIREMEN MAY BE EMPLOYED AND PAID COMPENSATION FOR PERFORMANCE OF DUTIES OF DISABLED FIREMEN —FROM WHAT FUNDS PAYMENT AUTHORIZED—CITY OF PIQUA.

There is no authority under the statutes and ordinance and rules of the city of Piqua herein considered for the payment of the compensation of firemen during periods of disability.

Where provision is made by an ordinance or resolution of the council of a city for the temporary employment of firemen to perform the services of disabled firemen, who are being paid their salaries during a period of disability, pursuant to an ordinance or resolution of council, providing therefor, such temporary firemen may be paid the compensation provided therefor within the appropriation of the fire fund.

Such temporary firemen may not be employed and paid compensation for the performance of the duties of disabled firemen who, pursuant to an ordinance or resolution of council, are paid their compensation during periods of disability, in the absence of provision by ordinance or resolution of council of a city for the employment and compensation of such temporary firemen.

Firemen may be paid from the contingent fund of a city only after the exhaustion of the appropriation of the safety fund for the fiscal half year, and when the council finds that the deficiency in the appropriation of the public safety fund has arisen from an unforseen emergency and passed an ordinance by a two-thirds vote of all members elected and approved by the mayor, authorizing payment from the contingent fund.

Payment of firemen may not be made from the general fund of a city.

There is no authority for the payment of firemen from any fund other than the safety fund and the contingent fund, in the manner pointed out herein.

COLUMBUS, OHIO, November 28, 1916.

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

GENTLEMEN:—Yours under date of October 5, 1916, is as follows:

"We would respectfully request your written opinion upon the following matters, in answer to request from the officials of the city of Piqua, Ohio.

"We enclose herewith copy of ordinance. Section 1 fixes the compensation of firemen, and we would call your attention to the provision for annual vacation in section 3, also to departmental rule No. 85. The city has no general ordinance covering the payment of firemen and policemen under the provisions of section 4383 General Code. The city has no firemen's pension fund, and it is claimed that the city does not pay anything to the workmen's compensation act.

"We respectfully ask the following questions:

"(1) Under the ordinance, laws and rules governing, if a fireman be disabled while on duty, can the city legally pay his salary for the time covering his inability to resume work owing to such injury?

"(2) If the city may pay such compensation legally, may the city also pay a special fireman appointed temporarily in his place, providing the

appropriations for salary of firemen, or special firemen, are sufficient to cover?

"(3) In case such appropriations are not sufficient to cover, may they pay such compensation of special firemen from the contingent fund or the general fund, or any other funds of the municipality?"

Accompanying your above request is a newspaper publication of an ordinance, section one of which provides in part as follows:

"That the fire department of the city of Piqua, Ohio, shall be composed of the following members, who shall receive the respective salaries hereinafter provided, payable semi-monthly. * * *

"(4) Twelve firemen who shall each receive $840.00 per annum. But no fireman shall receive more than $60.00 per month for his first six months of employment as fireman, and not more than $65.00 per month for his second six months of employment as fireman dating from the time of the employment as fireman."

Section 3 of said ordinance, as shown by the above mentioned publication, provides:

"That the members of the fire department shall each be given ten (10) days' vacation annually, with full pay, the time of said vacation to be determined by the director of public safety."

There is also submitted a book entitled "Rules and Regulations for the Government of the Sub. Department of Fire in the Department of Public Safety, City of Piqua, Ohio," purporting to set forth certain rules and regulations over the signatures of the president, secretary and clerk of the board of public safety. No date of the adoption of the rules set forth is given. The date of the publication borne by the book, however, is 1908.

Rule 85 referred to in your inquiry, and found in the above mentioned book, provides as follows:

"All members of the department, under the rank of assistant chief, will be allowed one day off in every 14, and then only when the service will permit. The chief of the fire department shall keep a record of time for each member to use in reporting off duty and return to duty, on all regular leave of absence, and each special leave of absence.

"The clerk of the board shall receive, record and keep a permanent record of the same."

It is stated in your inquiry that it is claimed that the city of Piqua does not pay the premium required by the workman's compensation law. Upon investigation I find the fact to be that such premium has been fully paid.

General provision for the determination of the number of officers, clerks and employes in each department of the government and fixing their compensation in cities is found in section 4214 G. C., as follows:

"Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation, and the amount of

bond to be given for each officer, clerk or employe in each department of the government, if any be required. Such bond shall be made by such officer, clerk or employe, with surety subject to the approval of the mayor."

Further provision applicable to the fire departments of cities is found in section 4377 G. C., as follows:

"The fire department of each city shall be composed of a chief of the fire department, and such marshals, assistant marshals, firemen, telephone and telegraph operators as are provided by resolution or ordinance of council. The director of public safety shall have the exclusive management and control of such other officers, surgeons, secretaries, clerks, and employes as are provided by ordinance or resolution of council."

Under the provisions of the foregoing sections, the number of regularly employed firemen, and the compensation of all firemen employed in cities, are subject to the determination of council by ordinance or resolution. In thus fixing the compensation of firemen it is clearly within the power of council to provide by ordinance or resolution that the salary or compensation of firemen may be paid during periods of disability within the term of their employment, resulting from injury received in the discharge of his duty.

The ordinance above quoted does not, in my judgment, however, contemplate the payment of firemen during such periods of disability. In order, therefore, that the payment of the compensation of firemen employed by the city of Piqua during periods of disability may be lawfully made, further provision therefor by resolution or ordinance of council would be necessary.

I have heretofore referred only to the payment of the compensation of firemen. Section 4383 G. C., to which reference is made, provides as follows:

"Council may provide by general ordinance for the relief out of the police or fire funds, of members of either department temporarily or permanently disabled in the discharge of their duty. Nothing herein shall impair, restrict or repeal any provision of law authorizing the levy of taxes in municipalities to provide for firemen's police and sanitary police pension funds, and to create and perpetuate boards of trustees for the administration of such funds."

This section gives to council authority to provide relief for firemen during periods of disability out of the fire funds by general ordinance. The term "relief" here used comprehends more than the mere payment of regular compensation during the period of disability and therefore operates to confer upon council a broader power than that derived from sections 4214 and 4377 G. C., supra. The power so conferred has, as you state, not been exercised, and there is no statutory provision directly conferring authority for the payment of the compensation of firemen during periods of disability. The authority for the payment of firemen during such periods of disability must be found in an ordinance or resolutioon of council.

Reference is made in the above inquiry to "Rule 85," supra. This rule must be considered in connection with section 4382 G. C., which provides as follows:

"The director of public safety shall classify the service in the police and fire departments in conformity with the ordinance of council determining the number of persons to be employed therein, and shall make all

rules for the regulation and discipline of such departments, except as otherwise provided in this subdivision."

It will be noted that the authority to make rules here conferred is confined to rules for the regulation and discipline of the departments and does not extend to the regulation of the payment of the compensation of employes and firemen which, as above pointed out, is governed by ordinance or resolution of council alone. Rule 85 has no direct reference to the payment of the compensation of firemen. Further provision for regulations governing firemen is found in subdivision 11 of division V of title XII, part first, of the General Code, in which section 4382 G. C., supra, appears.

In this connection attention is called to section 4393 G. C., which provides as follows:

"The council may establish all necessary regulations to guard against the occurrence of fires, protect the property and lives of the citizens against damages and accidents resulting therefrom, and for such purpose may establish and maintain a fire department, provide for the establishment and organization of fire engine and hose companies, establish the hours of labor of the members of its fire department, but after the first day of January, nineteen hundred and eleven, council shall not require any fireman to be on duty continuously more than six days in every seven, and provide such by-laws and regulations for their government as is deemed necessary and proper."

There is thus conferred upon council specific authority to provide by-laws and regulations for the government of firemen, and the provisions of this section modify the power conferred upon the director of public safety to make rules and regulations by section 4382 G. C.

It is specifically provided by section 4393 G. C. that no fireman shall be required to be on duty continuously more than six days in seven, and rule 85, being in conflict therewith in that it allows only one day off in fourteen, is therefore inoperative and of no effect in so far as it may be construed to require a fireman to be on duty in excess of six days in seven.

I am therefore of opinion, in answer to your first question, that there is no authority under the ordinance and rules submitted for the payment of the compensation of firemen in the city of Piqua during periods of disability. There is no authority therefor directly conferred by statute, although council may make provision for the same by ordinance or resolution.

Each fireman is, nevertheless, entitled, under the provisions of section 3 of the ordinance submitted, to ten days' vacation annually with full pay for such time. The time of such vacation is to be determined by the director of public safety. If the director of public safety so determines, a period or periods of disability not in excess of ten days in one year may be taken by a fireman as his vacation, in which event payment of compensation during such vacation may be made.

Since it is stated that the city of Piqua has established no firemen's pension fund under authority of section 4600 G. C., if the relief afforded under such ordinance, as is authorized by section 4383 G. C., goes only to the payment of regular salary during disability, an injured fireman may be paid from the workmen's compensation fund a reasonable allowance for medical, nurse and hospital service and medicines, as held in an opinion addressed to the bureau of inspection and supervision of public offices, under date of June 10, 1915, found at page 984 of the Opinions of the Attorney-General for 1915.

Further inquiry is made as to the authority for the payment of a "special fireman appointed temporarily" in place of a disabled fireman who is paid his salary during disability. This question is conditioned on the payment of the regular compensation of a fireman during a period of disability which, it has been heretofore held, is not authorized by law and the ordinance and rule of the city of Piqua above quoted and the answer thereto can, therefore, have no application to that city. It may nevertheless be observed that if in fixing the number of firemen to be employed provision should be made by council of a city, by ordinance or resolution, for the employment of temporary firemen to fill the places of injured firemen, as I think council would have power to do under the provisions of sections 4214 and 4377 G. C., then the fact that one fireman was being paid his compensation during a period of disability, under a provision therefor by ordinance or resolution of council, would be no bar to the payment of the compensation of a fireman temporarily employed to fill his place within the appropriation therefor and so long as the total number of firemen does not exceed the number authorized by ordinance or resolution to be employed.

In connection with the foregoing general provisions governing the fire department of cities, must be considered the provisions of section 4376 G. C., as follows:

> "The chief of the fire department shall have exclusive control of the stationing and transferring of all firemen and other officers and employes in the department, under such general rules and regulations as the director of public safety prescribes. In case of riot or other like emergency the mayor may appoint additional firemen and officers for temporary service who need not be in the classified list of the department. Such additional officers or firemen shall be employed only for the time during which the emergency exists."

The provisions of this section have no application to the employment of a fireman to temporarily perform the services of a disabled regular fireman, but is restricted in its operation to cases of riots and other like emergencies.

I am, therefore, of opinion, in answer to the second question submitted, that in cases where provision is made by the council of a city for the temporary employment of firemen to perform the services of disabled firemen who are being paid their salaries during a period of disability, pursuant to an ordinance or resolution of council, such temporary firemen may be paid the compensation provided therefor within the appropriation of the fire fund. Such temporary firemen may not be employed and paid compensation for the performance of the services of disabled firemen who, pursuant to an ordinance or resolution of the council of a city are paid their compensation during the period of disability, in the absence of provision by ordinance or resolution of council of a city for the employment and compensation of such temporary firemen.

The compensation of firemen in cities is paid from the public safety fund, and is subject to the provisions of section 3797 G. C. and section 5649-3d G. C., only the latter of which it is necessary to here quote. Section 5649-3d G. C. provides as follows:

> "At the beginning of each fiscal half year the various boards mentioned in section 5649-3a of this act shall make appropriations for each of the several objects for which money has to be provided, from the moneys known to be in the treasury from the collection of taxes and all other sources of revenue, and all expenditures within the following six months shall be made from and within such appropriations and balances thereof,

> but no appropriation shall be made for any purposes not set forth in the annual budget nor for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of receipts and balances."

Among the boards mentioned in section 5649-3a G. C. is the council of municipal corporation.

By force of the provisions of these sections, no expenditures of funds may be made within any fiscal half-year for any purpose in excess of the amount appropriated therefor.

The creation of a contingent fund is authorized by section 3800 G. C., as follows:

> "In making the semi-annual appropriations and apportionments herein required, council may deduct and set apart from any moneys, not otherwise appropriated, such sum as it deems proper as a contingent fund to provide for any deficiency in any of the detailed appropriations, which may lawfully and by any unforseen emergency happen. Such contingent fund or any part thereof may be expended for any such emergency only by ordinance passed by two-thirds of all the members elected to council, and approved by the mayor. Any balance remaining in such contingent fund at the end of the fiscal year shall thereupon become a part of the general fund, to be again appropriated as other moneys belonging to the corporation. This section shall not interfere with the provisions of law authorizing the transfer of funds by the court of common pleas."

Though the appropriation from the safety fund be insufficient to pay firemen for the fiscal half-year, the contingent fund would not be available for that purpose unless the deficiency in the safety fund should arise from some unforeseen emergency and the council, by a two-third vote of all members elected, pass an ordinance, with the approval of the mayor, authorizing such expenditures from the contingent fund.

Whether the deficiency in the appropriation for the payment of firemen has arisen from an unforseen emergency is a question to be determined in the first instance by the council and mayor in thus making provision for payment from the contingent fund, from all the facts in each particular case, no rule for which can be here laid down. Such determination by council and the mayor would not be disturbed by the courts unless upon consideration of all the facts and circumstances of the particular case it appear that such action was fraudulent or constituted a gross abuse of the discretion vested in them.

Obligations or claims against the city which are payable from a particular fund provided therefor may not be paid from the general fund in the absence of specific statutory authority therefor, and hence the compensation of special firemen may not be paid from the general fund of the city, nor is there any fund from which such compensation may be paid other than the firemen's fund and the contingent fund, in the manner above pointed out.

I am, therefore, of opinion, in answer to your third question, that firemen may be paid from the contingent fund of a city only after the exhaustion of the appropriation of the safety fund for the fiscal half-year and when the council finds that the deficiency in the appropriation of the public safety fund has arisen from an unforseen emergency and passes an ordinance by a two-thirds vote of all members elected and approved by the mayor, authorizing payment from the contingent fund. Payment of the compensation of firemen may not be made from the

general fund of a city. There is no authority for the payment of the compensation of firemen from any fund of a city other than the safety fund and the contingent fund in the manner hereinbefore pointed out.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2067.

COMMON PLEAS JUDGE—TERM OF JUDGE ELECTED AT NOVEMBER ELECTION, 1916, TO FILL UNEXPIRED TERM OF JUDGE MATTHIAS WILL END DECEMBER 31, 1916.

The term of office of a common pleas judge elected November 7, 1916, to fill the unexpired term of a judge elected in November, 1910, for a term of six years, beginning January 1, 1911, and who resigned in January, 1915, will end on December 31, 1916.

COLUMBUS, OHIO, November 28, 1916.

HON. EDWARD C. STITZ, *Judge of the Court of Common Pleas, Van Wert, Ohio.*

DEAR SIR:—Yours under date of November 21, 1916, is as follows:

"Having reference to the expiration of the short term of the judge of the court of common pleas, Van Wert county, present incumbent Edward C. Stitz:

"Inasmuch as I understand that this matter has been taken up with your office, and it has been suggested to me that I write you my notion of the matter, I beg to say I am filling this short term judgship, by election, and believe that my term expires on December 31, 1916. This short term is the unexpired term of Edward S. Matthias, who resigned to become a justice of the supreme court in January, 1915. There has been considerable discussion as to whether this term expires February 9 or January 1. This matter became a question of debate, because when Judge Matthias was first elected to the common pleas court his term began February 9. Mr. H. W. Blachly, who has been elected for the long term, would rather prefer that his term did not begin until February 9, for business reasons, and I would prefer that my term end before January 1, for business reasons. We desire the question to be decided positively so that there may be no question in the mind of anybody about this matter; so there may be no legal quibble.

"Judge Matthias was elected in 1904, for a term of five years, from February 9, 1905, under the act passed March 17, 1904, vol. 97 O. L., pages 41 and 42. His term was extended to January 1, 1911, by the act of March 22, 1905, vol. 98, page 120. In 1910 he was elected for six years, commencing January 1, 1911, and his term expires January 1, 1917. See vol. 98 O. L. page 120. These several acts have been passed in conformity to the various provisions of the constitution.

"I am handing a copy of this letter to Mr. Blachly."

By the provisions of article XVII of the constitution, section 2, as adopted November 7, 1905, the term of office of the judges of the court of common pleas was changed from five years, as then provided by section 12 of article IV, to

six years. By section 1 of article XVII, as amended in 1905, it was required that all state and county officers be elected in the even numbered years. In order to make the terms and election of common pleas judges conform to the above constitutional provision, section 2 of the act of March 22, 1906, 98 O. L., 120, provided as follows:

> "The existing term of office of any judge or additional judge of said court which would otherwise expire in any even numbered year, or in November or December of any odd numbered year, shall be and is hereby extended to the first day of January of the odd numbered year next succeeding such expiration, and the incumbent of said office at the time when such existing term would otherwise expire, shall hold the same until the expiration of said term as so extended, subject to all the provisions of the constitution or laws, relative to impeachment, removals or vacancies therein. Provided, however, that the term of any said judge expiring in the year one thousand nine hundred and six, whose successor has been elected prior to the passage of this act, shall not be so extended.
>
> "Provided that nothing contained in this act shall affect the term of office or extension thereof fixed by any special act passed by the 77th general assembly."

By the operation of this provision the then current term of Judge Matthias was extended to January 1, 1911, as stated in your inquiry. The term of six years for which he was elected in 1910, began January 1, 1911, and will therefore expire December 31, 1916. When the vacancy occurred in January, 1915, by the resignation of Judge Matthias, it is assumed that such vacancy was filled by appointment by the governor, pursuant to the provision of section 13 of article IV of the constitution, as follows:

> "In case the office of any judge shall become vacant before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is elected and qualified; and such successor shall be elected for the unexpired term, at the first annual election that occurs more than thirty days after the vacancy shall have happened."

The appointee was, then, under this constitutional provision, entitled to serve until his successor was elected at the November election, 1916, and thereafter qualified. The successor of such appointee was required to be elected for the unexpired term, which, as we have heretofore pointed out, ends December 31, 1916.

I am, therefore, of opinion, in answer to your inquiry that the term of the judge elected at the November election, 1916, to fill the unexpired term of Judge Matthias, will end on December 31, 1916.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2068.

BOARD OF EDUCATION—WHERE PUPIL HAS RECEIVED BOXWELL DIPLOMA AT TIME OF LAW'S REPEAL—HAS ALL RIGHTS AND PRIVILEGES CONFERRED BY SECTIONS 7747 AND 7748 G. C.—MAY ATTEND HIGH SCHOOL ALTHOUGH BOXWELL LAW IS REPEALED.

A pupil who held a diploma under the provisions of section 7744 G. C. at the time of its repeal, and is now of lawful school age, and has not completed the high school work, is entitled to all the rights and privileges conferred by sections 7747 and 7748 G. C., 104 O. L., 125, subject to the provisions of section 7750 G. C.

COLUMBUS, OHIO, November 28, 1916.

HON. ADDISON P. MINSHALL, *Prosecuting Attorney, Chillicothe, Ohio.*

DEAR SIR:—Yours under date of November 15, 1916, is as follows:

> "I have been requested to obtain from you an opinion upon the following proposition:
>
> "Under the Boxwell law a pupil passed a satisfactory examination and took part in the commencement exercises as provided by law. Does this entitle him to attend a high school and have his tuition paid for the number of years he would have been entitled to attend the high school if the Boxwell law had not been repealed?"

Under the Boxwell law, section 7740 G. C., et seq., provision was made for holding examinations of pupils of townships, special districts and village districts by the board of county school examiners and for conducting a commencement for such pupils as passed such examinations. Section 7744 G. C. provided as follows:

> "The board of county school examiners shall provide for the holding of a county commencement not later than August fifteenth, at such place as it determines. At this commencement an annual address must be delivered, at the conclusion of which a diploma shall be presented to each successful applicant who has complied with the provisions hereof. Such diploma shall entitle its holder to enter any high school in the state."

Under the facts stated in your inquiry and the provisions of section 7744 G. C., supra, prior to its repeal, the pupil in question was entitled to a diploma, which diploma it is assumed was received by the pupil prior to the taking effect of the repeal of section 7744 G. C., 104 O. L., 125, May 20, 1914, and this diploma entitled the holder thereof to enter any high school in the state. That is to say, any pupil who held a diploma, presented to him pursuant to the provisions of section 7744 G. C., prior to the taking effect of the repeal thereof, May 20, 1914, was eligible to any high school in the state. The diploma so held then evidenced the completion of the elementary school work.

Sections 7740 to 7746 G. C., inclusive, were repealed in 104 O. L., 125, and sections 7747 and 7748 were, in the same act, amended to provide as follows:

> "Sec. 7747. The tuition of pupils who are eligible for admission to high school and who reside in rural districts in which no high school

is maintained, shall be paid by the board of education of the school district in which they have legal school residence, such tuition to be computed by the month. An attendance any part of the month shall create a liability for the entire month. No more shall be charged per capita than the amount ascertained by dividing the total expense of conducting the high school of the district attended, exclusive of permanent improvements and repair, by the average monthly enrollment in the high school of the district. The district superintendent shall certify to the county superintendent each year the names of all pupils in his supervision district who have completed the elementary school work, and are eligible for admission to high school. The county superintendent shall thereupon issue to each pupil so certified a certificate of promotion which shall entitle the holder to admission to any high school. Such certificate shall be furnished by the superintendent of public instruction.

"Section 7748. A board of education providing a third grade high school as defined by law shall be required to pay the tuition of graduates from such school residing in the district at any first grade high school for two years, or at a second grade high school for one year. Should pupils residing in the district prefer not to attend such third grade high school the board of education of such district shall be required to pay the tuition of such pupils at any first grade high school for four years, or at any second grade high school for three years and a first grade high school for one year. Such a board providing a second grade high school as defined by law shall pay the tuition of graduates residing in the district at any first grade high school for one year; except that, a board maintaining a second or third grade high school is not required to pay such tuition when the maximum levy permitted by law for such district has been reached and all the funds so raised are necessary for the support of the schools of such district. No board of education is required to pay the tuition of any pupil for more than four school years; except that it must pay the tuition of all successful applicants, who have complied with the further provisions hereof, residing more than four miles by the most direct route of public travel, from the high school provided by the board, when such applicants attend a nearer high school, or in lieu of paying such tuition the board of education maintaining a high school may pay for the transportation of the pupils living more than four miles from the said high school, maintained by the said board of education to said high school. Where more than one high school is maintained, by agreement of the board and parent or guardian, pupils may attend either and their transportation shall be so paid. A pupil living in a village or city district who has completed the elementary school course and whose legal residence has been transferred to a rural district in this state before he begins or completes a high school course, shall be entitled to all the rights and privileges of a resident pupil of such district."

While the method of determining the completion of the elementary school work and eligibility of pupils to high schools was changed by the repeal and amendment of the above mentioned sections of the General Code, it is not believed that it was intended that the eligibility of pupils to high schools theretofore determined and established should be in any way affected thereby. I am, therefore, led to conclude that upon the taking effect of the amendment of section 7747 G. C., supra, it was the duty of the district superintendent to certify to the county

superintendent the names of all pupils in their respective supervision districts, of school age, who held diplomas under the provisions of section 7744 G. C., and it was the duty of the county superintendent to thereupon issue to such pupils a certificate of promotion, which would then have entitled the holder of such certificate to admission to any high school. The provisions of sections 7747 and 7748 G. C., supra, are subject, however, to modification by the provisions of section 7750 G. C., as follows:

> "A board of education not having a high school may enter into an agreement with one or more boards of education maintaining such school for the schooling of all its high school pupils. When such agreement is made the board making it shall be exempt from the payment of tuition at other high schools of pupils living within three miles of the school designated in the agreement, if the school or schools selected by the board are located in the same civil township, as that of the board making it, or some adjoining township. In case no such agreement is entered into, the school to be attended can be selected by the pupil holding a diploma, if due notice in writing is given to the clerk of the board of education of the name of the school to be attended and the date the attendance is to begin, such notice to be filed not less than five days previous to the beginning of attendance."

I am, therefore, of opinion, in answer to your inquiry, that a pupil who held a diploma under the provisions of section 7744 G. C., at the time of its repeal, and is now of lawful school age, and has not completed the high school work, is entitled to all rights and privileges conferred by sections 7747 and 7748 G. C., 104 O. L., 125, subject, however, to the provisions of section 7750 G. C., supra.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2069.

SCHOOLS—NO POWER IN APPOINTING AUTHORITY TO INCREASE COMPENSATION OF DISTRICT SUPERINTENDENT DURING TERM FOR WHICH HE WAS ELECTED AFTER APPOINTMENT HAS BEEN ACCEPTED BY PERSON SO ELECTED—WHEN CERTIFICATE ONCE MADE TO COUNTY AUDITOR NO SUBSEQUENT CERTIFICATION MAY BE MADE FOR THAT YEAR.

There is no power in the appointing authority provided by section 4739 G. C., 104 O. L., 140, to increase the compensation of a district superintendent during the term of service for which he was elected, and his compensation fixed pursuant to the provisions of section 4743 G. C., 104 O. L., 142, after the appointment has been accepted by the person so elected.

When a certification has once been made to the county auditor, according to the provisions of section 4744-2 G. C., 104 O. L., 142, no subsequent certification may be made for that year.

COLUMBUS, OHIO, November 28, 1916.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Yours under date of November 25, 1916, is as follows:

"Will you kindly render us an opinion on the following:

"1st. When the compensation of a district superintendent is made pursuant to section 4743 G. C. (104 O. L., 142) can the salary be raised after October 1 next following?

"2nd. After the certification provided for in section 4744-2 (104 O. L., 142) has been made and the apportionment therein provided for has been made, may the board of education change such certification so as to increase the salary of the district superintendent, and ask that a sum be retained from the settlement of the following February sufficient to meet such increase?

"This situation has arisen in the village district of Byesville, Guernsey county, and will come before us under the provisions of section 4744-3 G. C. (104 O. L., 143.)"

Considering the first question submitted, it may be observed that by the provisions of section 4738 G. C., 106 O. L., 396, the county board of education is required to divide the county school district any year, to take effect the first day of the following September, into supervision districts, each to contain one or more village or rural school districts, and the county board of education is also thereby required, upon application of three-fourths of the presidents of the village and rural school district boards of the county, to redistrict the county into supervision districts.

Section 4739 G. C., 104 O. L., 140, and section 4743 G. C., 104 O. L., 142, provide as follows:

"Sec. 4739. Each supervision district shall be under the direction of a district superintendent. Such district superintendent shall be elected by the presidents of the village and rural boards of education within such district, except that where such supervision districts contains three or less rural or village school districts the boards of education of such school districts in joint session shall elect such superintendent. The district superintendent shall be employed upon the nomination of the county superintendent, but the board electing such district superintendent may by a majority vote elect a district superintendent not so nominated.

"Sec. 4743. The compensation of the district superintendent shall be fixed at the same time that the appointment is made and by the same authority which appoints him; such compensation shall be paid out of the county board of education fund on vouchers signed by the president of the county board. The salary of any district superintendent shall in no case be less than one thousand dollars per annum, half of which salary not to exceed seven hundred and fifty dollars shall be paid by the state and half by the supervision district, except where the number of teachers in any supervision district is less than forty, in which case the amounts paid by the state shall be such proportion of half the salary as the ratio of the number of teachers employed is to forty. The half paid by the supervision district shall be pro-rated among the village and rural school districts in such district in proportion to the number of teachers employed in each district."

District superintendents are not officers and are, therefore, not subject to the provisions of section 20, article II of the constitution, as follows:

"The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no

change therein shall effect the salary of any officer during his existing term, unless the office be abolished."

A contrary holding in this regard would render that provision of section 4743 G. C., supra, authorizing the compensation of district superintendents to be fixed by the appointing authority, unconstitutional.

The presidents of the village and rural boards of education and the members of such boards, when in joint session, are, however, in the employment of district superintendents, subject to the familiar rule that public officers, in the discharge of their official duties, have only such powers as are expressly conferred by law or are necessary to the proper performance of duties imposed or the exercise of powers conferred by express provision of law.

The particular officers referred to, in the employment of district superintendents, and the fixing of their compensation, pursuant to sections 4739 and 4743 G. C., supra, have not conferred upon them the general power to contract and be contracted with, as in the case of boards of education, under the provisions of section 4749 G. C.

There is found no express statutory provision authorizing the presidents of the boards of education of rural and village districts, or the members of such boards in joint session, authorized by section 4739 G. C., supra, to increase or decrease the compensation of a district superintendent, after the same has once been determined, pursuant to the provisions of section 4743 G. C., supra, and the same accepted by the person so elected, and it is not believed that the exercise of such power is in any way necessary to a proper performance of the duties imposed by law upon such officers in respect to the election of and determining the compensation of district superintendents.

I am, therefore, of the opinion, in answer to your first question, that there is no power in the appointing authority provided in section 4739 G. C., supra, to increase the compensation of a district superintendent, during the term of service for which he was elected, and his compensation fixed pursuant to the provisions of section 4743 G. C., supra, after the appointment has been accepted by the person so elected.

Your second question involves a consideration of sections 4742 G. C., 104 O. L., 141, and 4744-2 G. C., 104 O. L., 142, which provide as follows:

"Section 4742. Not less than sixty days before the expiration of the term of any district superintendent, the presidents of the board of education within such supervision district, or in supervision district which contain three or less village or rural districts, the boards of education of such districts shall meet and elect his successor. The president of the board in the village or rural district having the largest number of teachers shall issue the call giving at least ten days' notice of the time and place of meeting. He shall also act as chairman and certify the results of such meeting to the county board of education.

"Sec. 4744-2. On or before the first day of August of each year the county board of education shall certify to the county auditor the number of teachers to be employed for the ensuing year in the various rural and village school districts within the county school district, and also the number of district superintendents employed and their compensation and the compensation of the county superintendent; and such board of education shall also certify to the county auditor the amounts to be apportioned to each district for the payment of its share of the salaries of the county and district superintendents."

Section 4742 G. C., supra, clearly requires that all district superintendents shall be elected prior to sixty days before September 1 each year, so that it is contemplated that on August 1 of each year the number and compensation of district superintendents will have been finally determined. As held, in answer to your first question, the compensation so fixed at the time of the election of district superintendents may not be changed after acceptance, during the term for which the superintendent is appointed, and this answers one branch of your second question. All elections of district superintendents should be made before July 2 of each year, and it is upon the election so made that the certification on or before August 1, required by section 4744-2 G. C., supra, is required to be made.

I am aware of no authority to make a second certification under this section and am of opinion that when a certification has once been made to the county auditor, according to the provisions of section 4744-2 G. C., supra, no subsequent certification may be made for that year.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2070.

INDUSTRIAL COMMISSION—WITHOUT AUTHORITY TO INSPECT BOILERS ON MUNICIPAL FIRE APPARATUS.

The industrial commission is without authority to inspect boilers on municipal fire apparatus and to collect fees for such inspection.

COLUMBUS, OHIO, November 28, 1916.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—On October 23 you sent to me a protest filed by the city solicitor of the city of Cincinnati against the jurisdiction of the industrial commission, chief boiler inspector and the board of boiler rules, in the matter of the inspection of fire apparatus and boilers and inspection fees therefor in the city of Cincinnati, together with a copy of a brief filed with the commission by the city solicitor of Cincinnati, and requesting my opinion as to the authority of the boiler inspection department of the industrial commission to inspect boilers on municipal fire apparatus and to collect fees for such inspection.

I have carefully run over the brief of the city solicitor and agree with the conclusions which he urges, though I am unable to agree with all the reasons therefor which he expresses.

The statute, the interpretation of which is involved, is section 1058-7 of the General Code as enacted 103 O. L. 649, Supplement to Page & Adams, vol. I, p. 289, which provides as follows:

> "Sec. 1058-7. All steam boilers and their appurtenances, except boilers of railroad locomotives, subject to inspection under federal laws, portable boilers used in pumping, heating, steaming and drilling, in the open field, for water, gas and oil, and portable boilers used for agricultural purposes, and in construction of and repairs to public roads, railroads and bridges, boilers on automobiles, *boilers of steam fire engines*

brought into the state for temporary use in times of emergency for the purpose of checking conflagrations, boilers carrying pressure of less than fifteen pounds per square inch, which are equipped with safety devices approved by the board of boiler rules, and boilers under the jurisdiction of the United States, shall be thoroughly inspected, internally and externally, and under operating conditions at intervals of not more than one year, and shall not be operated at pressure in excess of the safe working pressure stated in the certificate of inspection hereinafter mentioned. And shall be equipped with such appliances to insure safety of operation as shall be prescribed by the board of boiler rules."

The first principal urged by the city solicitor in his brief is the familiar one that the state and its government agencies are not bound by or intended to be included in the statute unless expressly mentioned therein. The authorities cited show that this principle applies even to police regulations. In other words, as a general rule, police regulations are intended to apply to persons and corporations in their private or proprietary capacity, and not to municipal corporations or subdivisions of the state in the exercise of governmental functions.

It is next shown by citation of Frederick v. Columbus, 58 O. S. 538, that the fire department of a city is a branch of its government which is of a public or governmental nature, as distinguished from a private or proprietary nature.

Therefore, it is argued, and I think correctly, that the presumption above referred to has proper application to a municipal corporation in the management and conduct of its fire department and in the ownership and use of the property incident thereto.

There would be no difficulty in the application of these principles were it not for the underscored provision of section 1058-7 as above quoted. The fact that the general assembly deemed it necessary to exclude from the operation of the statute boilers of steam fire engines brought into the state for temporary use in times of emergency, for the purpose of checking conflagrations, tends to support the conclusion that the legislature thought that without this exception the statute would have applied to the boilers of all fire engines; and inasmuch as most fire engines at least are owned and operated by municipal corporations in the exercise of the public or governmental function defined by Frederick v. Columbus, supra, it is therefore to be inferred that the general assembly intended to make the boiler inspection law apply to all boilers, whether used governmentally or not.

Therefore it might be argued that there is in this way sufficient evidence of the legislative intent to overthrow the presumption above referred to, which is rebuttable and which is after all but an expedient employed by the law for the purpose of arriving at the true legislative intent.

In answer to this possible argument, the city solicitor urges that when the property of other states is brought temporarily into this state for a purpose like that mentioned in the exception, it loses whatever governmental character it might have had in the state from which it comes, and would be regarded as purely private property in Ohio; so that it would come within the general terms of the statute and would suffer a discrimination as compared with similar agencies governmentally owned and used in Ohio, unless a special exception were made in its favor. This argument is persuasive, though perhaps not conclusive.

I am not entirely satisfied that if fire engines of another state were brought into this state and here used in case of temporary emergency, for the purpose of checking conflagration, they would be regarded here as purely private property, especially if used under the direction of the proper officers of a fire department in the state of Ohio. However, there is enough question about this, perhaps, to

justify the general assembly in making the matter entirely clear by creating the special exception which has been referred to.

In short, then, the special exception does not clearly show the legislative intent to make the general terms of the statute cover boilers used for governmental purposes. The rule of presumption, however, is that the purpose of the legislature to make a regulatory law apply to governmental agencies must be clearly expressed or necessarily implied. Black on Interpretation of Statutes. 94; State v. Board of Public Works, 36 O. S. 409.

An implication is relied upon by the argument above suggested to make the general terms of the statute cover governmental agencies. That implication, as has been seen, is by no means direct and conclusive. I find myself, therefore, unable to hold that there is such "*necessary* implication" derivable from the exception which has been discussed as is sufficient to overthrow the presumption referred to.

Aside from all this, however, there is another consideration which to my mind is equally as conclusive as anything which is urged by the city solicitor. Manifestly the substantive provisions of section 1058-7 G. C., above quoted, extend no further than the remedial provisions by which it is to be enforced.

Section 1058-28 G. C. provides in this respect as follows (103 O. L. 649):

> "Whoever being the owner, or operator of any steam boiler, herein required to be inspected, operated the same in violation of any provision of the law or of any rule promulgated by the board of boiler rules, and approved by the governor, or without having the same inspected and a certificate issued therefor as provided in this act, or who hinders or prevents a duly qualified inspector from entering any premises in or on which a steam boiler is situated for the purpose of inspection, shall be fined not less than twenty dollars nor more than five hundred dollars."

This offense in my judgment could not be committed by any fireman or fire chief, unless the municipality employing him should furnish the fee to be paid or otherwise authorize and direct him to have the inspection made. It is certainly not the duty of a city employe, under the related statutes, to have the inspection made at his own expense. No interpretation which can be given to the sections can create such a duty.

Therefore in my opinion a city employe could not be prosecuted and convicted, under section 1058-28 G. C. The liability, if any under this section, rests elsewhere.

Some question might be made as to whether the director of public safety of a city, or other similar officer exercising such authority as the director of pubic safety is authorized to exercise with respect to the police and fire departments governed by the general laws, could be punished under this section. However this may be, it is clear to my mind that the city itself can not be fined as "owner" as therein provided. Our laws of criminal procedure fail to provide any means of prosecuting a municipal corporation as a defendant charged with crime.

I conclude, therefore, that because the city could not be proceeded against under these statutes as an owner, it necessarily follows that the statutes do not apply to the city in such capacity, at least when acting in a governmental capacity.

What I have said does not of course apply to a city when acting in a proprietary capacity, as the decision in Frederick v. Columbus, supra, implies that it may act. I shall not, however, within the scope of this opinion, attempt to point out the circumstances under which a city may be said to be acting in such proprietary capacity.

For all the above reasons, then, I am of the opinion that the industrial commission of Ohio, the board of boiler rules and its inspectors are without authority to compel an inspection of municipal fire engine boilers and to exact fees therefor, under the present laws.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2071.

STATE BOARD OF HEALTH—APPROVAL OF ORDER REQUIRING CITY OF CANTON TO INSTALL SANITARY TRUNK SEWERS TO CORRECT POLLUTION OF EAST AND WEST BRANCHES OF NIMISHILLEN CREEK.

COLUMBUS, OHIO, November 28, 1916.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Enclosed you will find order of the state board of health, requiring the city of Canton to install and have in use the necessary sanitary trunk sewers to correct the pollution of the east and west branches of the Nimishillen creek, said order to become effective when you have approved the same.

I have examined the order which is issued under section 1251 of the General Code of Ohio and find the same regular, and it is my opinion that it should be approved. Having approved the same, under the provision of section 1251 of the General Code, I am transmitting the order to you for your approval.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2072.

STATE BOARD OF HEALTH—APPROVAL OF ORDER FOR SEWERAGE SYSTEM, VILLAGE OF WORTHINGTON.

COLUMBUS, OHIO, November 28, 1916.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Enclosed you will find order of the state board of health, directed to the village of Worthington, requiring the installation and operation of necessary sewers and sewage treatment works to correct the pollution of water courses tributary to the Olentangy river, said order to become effective when you have approved the same.

I have examined the order, which is issued under section 1251 of the General Code of Ohio, and find the same regular, and it is my opinion that it should be approved. Having approved the same, under the provision of section 1251 of the General Code, I am transmitting the order to you for your approval.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2073.

APPROVAL, ORDER OF STATE BOARD OF HEALTH REQUIRING CITY OF WOOSTER TO INSTALL SATISFACTORY WATER SUPPLY.

COLUMBUS, OHIO, November 28, 1916.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Enclosed you will find order of the state board of health requiring that the city of Wooster shall install and have in operation prior to January 1, 1916, a public water supply satisfactory to the state board of health, said order to become effective when you have approved the same.

I have examined the order, which is issued under section 1254 of the General Code of Ohio, and find the same regular and it is my opinion that it should be approved. I have accordingly approved the same and am transmitting the order to you for your approval.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2074.

BUILDING AND LOAN ASSOCIATIONS—MAY PREVENT WITHDRAWAL OF STOCK OF DEPOSITORS BEFORE SUCH STOCK HAS BEEN PAID UP IN FULL—SECTIONS 9651 AND 9652 G. C. CONSTRUED IN CONNECTION WITH CONTEMPLATED CONSTITUTION AND BY-LAWS OF SUCH ASSOCIATION.

A building and loan association under sections 9651 *and* 9652 *G. C. may so frame its constitution and by-laws as to prevent the withdrawal of stock of depositors before such stock has been paid up in full.*

After such stock has been paid up in full the stockholder may, subject to the constitution and by-laws of the company, withdraw his stock deposits.

COLUMBUS, OHIO, November 29, 1916.

HON. L. G. SILBAUGH, *Inspector of Building and Loan Associations, Columbus, O.*

DEAR SIR:—I have your letter of November 21, 1916, requesting my opinion as follows:

> "I respectfully request your opinion upon the following queries:
> "Under sections 9651 and 9652 of the General Code, can a building and loan association so frame its constitution and by-laws as to not permit anyone who has stock in the association to withdraw any part of what he has already deposited before the stock has been paid up in full?
> "Also, after the stock has once been paid up in full, can the stockholder withdraw his stock at will, subject to the by-laws of the company?"

Section 9643 of the General Code relative to the organization of building and loan associations is as follows:

> "A corporation for the purpose of raising money to be loaned to its members, and others, shall be known in this chapter, and in the laws

relating to the bureau of building and loan associations, as a 'building and loan association,' or as a 'savings association.' Associations organized under the laws of this state shall be known as 'domestic associations,' and those organized under the laws of other states or territories, as 'foreign' associations. Associations may be organized and conducted under the general laws of Ohio relating to corporations, except as otherwise provided in this chapter."

Under authority of the above section, building and loan associations organized under the laws of Ohio are governed by the general corporation laws of the state unless they are granted special powers or otherwise limited by succeeding sections of the chapter relative to building and loan associations.

Section 9649 of the General Code, authorizing the issuance of stock by building and loan associations, is as follows:

"To issue stock to members on such terms and conditions as the constitution and by-laws provide. Each member may vote his stock in whole or fractional shares, as the constitution and by-laws provide, but no person shall vote more than twenty shares in any such corporation in his own right, nor have the right to cumulate his votes. But every subscriber for stock in accordance with the constitution of the association, may vote the amount of stock so subscribed for, in no event to exceed twenty shares."

Section 9651 and 9652 of the General Code, referred to in your letter, relative to the withdrawal of stock deposits and ordinary deposits, are as follows:

"Sec. 9651. To permit members to withdraw all or part of their stock deposits, at such times, and upon such terms, as the constitution and by-laws provide. Any member, however, who withdraws his entire stock deposit, or whose stock has matured, shall be entitled to receive all dues paid in and dividends declared thereon, less all fines or other assessments, and less the pro rata share of all losses, if any have occurred.

"Sec. 9652. To permit withdrawal of deposits upon such terms and conditions as the association provides except by check or draft. But no such association shall be permitted to carry for any member or depositor any demand, commercial or checking account. Nothing in this chapter shall prevent members or depositors from withdrawing funds by non-negotiable orders."

The powers conferred by the last two sections are clearly permissive and not mandatory.

I, therefore, advise you, in answer to your first question, that a building and loan association may so form its constitution and by-laws as not to permit one who has stock in the association to withdraw any part of the amount paid or deposited on said stock before such stock has been paid up in full.

Answering your second question, I advise you that after stock in building and loan associations has been paid up in full the stockholder may withdraw his stock deposit at will if authorized by and subject to the constitution and by-laws of said company.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2075.

APPROVAL OF RESOLUTION FOR IMPROVEMENT OF OTTAWA-FINDLAY ROAD IN PUTNAM COUNTY.

COLUMBUS, OHIO, November 29, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication of November 24, 1916, transmitting to me for examination final resolution relating to the improvement of section "F" of the Ottawa-Findlay road, I. C. H. No. 223, petition No. 2844-T in Putnam county.

I find this resolution to be in regular form and am therefore returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2076.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY VILLAGE OF GREENFIELD, HIGHLAND COUNTY, OHIO.

COLUMBUS, OHIO, November 28, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the village of Greenfield, Highland county, Ohio, in the sum of $12,000.00 for sewer construction purposes, being twenty-four bonds of $500.00 each."

I have examined the transcript of proceedings of the council and other officers of the village of Greenfield relative to the above bond issue, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds properly drawn and executed will constitute valid and binding obligations of said village.

As there was no bond form attached to the transcript I should be given an opportunity to examine the bonds when presented for delivery to the treasurer of state.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2077.

APPROVAL, RESOLUTION FOR IMPROVEMENT OF ROADS IN BROWN, CARROLL AND WASHINGTON COUNTIES.

COLUMBUS, OHIO, December 1, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication of November 29, 1916, transmitting to me for examination final resolutions relating to the improvement of the following roads:

"Brown County—Sec. 'B' Ripley-Hillsboro road, Pet. No. 2112-T, I C. H. No. 177.

"Carroll County—Sec. 'D' Carrollton-Salineville road, Pet. No. 1068, I. C. H. No. 377.

"Washington County—Sec. 'K' Marietta-McConnelsville road, Pet. No. 3058, I. C. H. No. 393. (Also duplicate.)"

I find these resolutions to be in regular form and am, therefore, returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2078.

RODMEN AND AXEMEN ON COUNTY ROAD WORK—NO AUTHORITY FOR SUCH EMPLOYMENT BY COUNTY SURVEYOR AS SUCH—MAY EMPLOY ASSISTANTS, SEE SECTION 7181 G. C.—RODMEN AND AXEMEN MAY BE EMPLOYED IN DITCH CONSTRUCTION.

In so far as county road work is concerned, there is no authority for the employment by the county surveyor of rodmen and axemen aside from the general authority for the employment of assistants conferred by section 7181 G. C. and the county commissioners are not authorized to allow a bill for services as rodman or axeman to any person other than an assistant of the county surveyor, appointed under authority of section 7181 G. C.

The county surveyor is authorized to employ rodmen and axemen when their services are necessary in supervising the construction of a ditch. It is not necessary that such rodmen and axemen be deputies or assistants of the county surveyor, giving their full time to the duties of that office and the commissioners are authorized to allow bills for their services at the rate provided in section 6530 G. C. Payment for their services should be made from the special fund created by a bond issue for the construction of the particular ditch in connection with which such services were performed.

COLUMBUS, OHIO, December 1, 1916.

HON. A. A. SLAYBAUGH, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—Your request for an opinion, under date of November 9, 1916, reads as follows:

"I wish to submit to you for your opinion the following proposition, to wit:

"What, if any, authority have the county commissioners to allow a bill to some person other than the surveyor or one of his assistants for services rendered as rodman or axeman in the construction of a county ditch or county road, where such services are performed after the ditch or road improvement has been sold and partly completed, and which service has been rendered after the original survey, and plans and specifications have been made, approved and confirmed by the board of commissioners? If such bill is allowable, out of what fund should the same be paid?

"For your information I enclose a copy of the bill presented to the board of county commissioners for allowance, with the O. K. of the county surveyor attached."

In so far as the services of rodmen and axemen on county road work are concerned, I find no unrepealed sections authorizing their employment. Services rendered by the county surveyor on county road work are now rendered under the provisions of the Cass highway law, amended senate bill No. 125, 106 O. L. 574. Section 138 of that act, section 7181 G. C., provides that the county surveyor shall be county highway superintendent, and that in the event the county highway superintendent cannot properly perform all the duties of his office, the county commissioners shall fix the aggregate compensation to be expended for assistants by the county highway superintendent during the year. Not only do I find no unrepealed sections of the General Code authorizing the employment of rodmen and axemen on county road work, but it is also true that the language of section 7181 G. C., taken in connection with the other provisions of the Cass highway law, indicates that it was the intention of the legislature that all duties in connection with county roads, not performed by the county surveyor in person, should be performed by the assistants, whose appointment is authorized by said section.

In view of the foregoing I advise you that in so far as county road work is concerned, there is no authority for the employment of rodmen and axemen aside from the general authority for the employment of assistants conferred by section 7181 G. C., and that the county commissioners are not authorized to allow a bill for services as rodman or axeman to any person other than an assistant of the county surveyor, appointed under authority of section 7181 G. C.

This condition does not exist, however, as to county ditch work. Section 6523 G. C., being a part of the chapter of the General Code relating to single county ditches, provides that for services actually rendered, under the provisions of said chapter, all officers and persons other than the county commissioners, shall receive compensation for their services, as provided in the subdivision of said chapter in which said section 6523 G. C. is found. Section 6530 G. C., which is a part of the same subdivision in which section 6523 G. C. is found, provides that each chainman, axeman and rodman shall receive two dollars per day for the time actually employed.

Sections 6454, 6455, 6482, 6484, 6485, and other related sections of the General Code, found in the chapter relating to single county ditches, enjoin upon the county surveyor certain duties to be performed in connection with surveying and leveling a proposed ditch, setting stakes, making and returning schedules of the lands that will be benefited and apportionments of the cost of location and construction, receiving bids, letting contracts and taking bond.

Section 6487 G. C. provides that the work shall be done under the supervision of the county surveyor. It is clear from this section that the duty of the county

surveyor does not cease when the contract for a county ditch is let, but that it is his duty to supervise the work until the ditch is completed and allow estimates to the contractor from time to time. It is also clear, from a consideration of sections 6523 and 6530 G. C., that the surveyor in performing his duties in connection with county ditches is authorized to employ rodmen and axemen, and no distinction is made between the time preceding and the time following the letting of the contract. I find no statutory provision warranting the inference that it was the intention of the legislature to authorize the county surveyor to employ rodmen and axemen in the preliminary work and to deny him that right in carrying forward the work of supervision.

It is therefore my opinion that the county surveyor is authorized to employ rodmen and axemen when their services are necessary in supervising the construction of a county ditch, and that they may be employed as well after the contract is let and the work partly performed as they may at any time during the preliminary proceedings.

It is not necessary that such rodmen and axemen be deputies or assistants of the county surveyor, giving their full time to the duties of that office, and the commissioners are authorized to allow bills for their services at the rate provided in section 6530 G. C.

When bills for such services are allowed, payment should be made out of the special fund created by a bond issue for the construction of the particular ditch in connection with which such services were performed. It is customary for county surveyors, in making an estimate of the probable cost of a county ditch, to include an item covering the cost of supervision, and I am informed by the county surveyor of your county that such practice is followed by him.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

2079.

CLEVELAND MUNICIPAL CHARTER—WHETHER OR NOT PROVISIONS OF CHARTER OR STATE LAW GOVERN EXPENDITURES IN MUNICIPAL COURT—WHAT COSTS ARE TAXABLE FOR PUBLICATION IN LEGAL NEWS—WHEN NOTARY PUBLIC FEES ARE TAXABLE AS COSTS—DISCUSSION OF BAILIFF'S AUTHORITY IN SALE OF PROPERTY TAKEN ON EXECUTION—MUNICIPAL JUDGES WITHOUT AUTHORITY TO COMMIT PERSONS TO COUNTY JAIL WHO HAVE BEEN ACCUSED OR CONVICTED OF VIOLATION OF CITY ORDINANCES—SHOULD BE COMMITTED TO CITY PRISON.

1. *The provisions of the Cleveland municipal charter govern the appropriation and expenditure of the city's portion of the cost and expense of maintaining the municipal court of the said city.*

2. *The clerk of the Cleveland municipal court is authorized by sections* 1695 *et seq. of the General Code to publish the calendar and other information pertaining to cases in the Legal News (a daily law journal published in Cuyahoga county) and to tax and collect therefor a charge of fifteen cents in each case.*

3. *The fees of a notary public for the administration of an oath to an affidavit of verification to a pleading are taxable as costs in the case in which such pleading is filed.*

4. *The bailiff of the Cleveland municipal court is not authorized by law or by virtue of his office to apply funds received by him from the sale of property taken on execution to the satisfaction of claims of holders of liens against such property. Such action on his part is purely voluntary and done at his own risk.*

5a. *The judges in the criminal branch of the Cleveland municipal court are not authorized to commit persons to the county jail who are accused of violation of city ordinances and pending trial are unable to furnish bond. Such persons should be committed to the city prison.*

5-b. *Judges in the criminal branch of the Cleveland municipal court are without authority to sentence persons convicted of violation of city ordinances to the county jail. Persons so convicted should be sentenced to city prison or workhouse.*

COLUMBUS, OHIO, December 4, 1916.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I have your letter requesting my opinion as follows:

"We are herewith transmitting you copy of the charter adopted by the city of Cleveland, Ohio, and respectfully request your written opinion upon the following matters:

"Sec. 45 of the city charter—'No money shall be drawn from the treasury of the city nor shall any obligation for the expenditure of money be incurred, except pursuant to appropriations made by the council.' * * *

"Sec. 124—'No contract involving an expenditure in excess of $1,000.00 shall be awarded except upon the approval of the board of control.' (Is not limited to the department of service and safety, as is the limitation in the statutes.)

"Sec. 118—'The commissioner of purchase and supplies shall make all purchases for the city in the manner provided by the ordinance. * * *'

"Section 50 of the act creating the municipal court of the city of Cleveland, among other things provides:

"'The expense of maintaining the court shall be paid out of the treasury of the city of Cleveland.'

"Question 1.—Do the provisions of the charter, above cited, govern expenditures in the municipal court, or does the state law give the clerk of the court unlimited control over the expenses of the court?

"Question 2.—The calendar of the court, and other information pertaining to cases, in the civil division, is published in the Legal News, and a uniform charge of 15 cents for each case is made, and the same is taxed by the clerk as a part of the costs and collected, together with other costs. Is this action on the part of the clerk legal?

"Question 3.—In many cases one or more notary fee is taxed as a part of the costs, and collected by the clerk, and the same is paid to the notary, usually a lawyer in charge of the case, or some one in his office. Is this legal?

"Question 4.—In many instances the bailiff, without order from the court, pays claim of parties, other than the litigants, out of moneys received on executions, for alleged liens on the property, incurred before the property was seized by the bailiff. In some cases he has paid out all the money received on such executions, to such claimants, and made no payment on the judgment. Has he the authority to do this? Should not a person who claims a lien on chattel property which has been taken on an execution, establish his lien in court before the bailiff can legally recognize it? Has the bailiff the authority to pay out any money received on executions except upon the order of the court?

"Question 5.—Have the judges in the criminal branch the right to send persons to the county jail who have been accused or convicted of the violation of city ordinances?"

Your several questions will be considered in the order asked.

In connection with question 1. I call attention to the following provisions of the act creating the municipal court of Cleveland, found in sections 1579-1 to 1579-45 of the General Code, as amended, 103 O. L., 683, and 106 O. L., 274.

Section 1579-3 of the General Code (103 O. L., 274) is, in part, as follows:

"Judges of the municipal court shall receive such compensation, payable out of the treasury of Cuyahoga county not less than two thousand five hundred dollars per annum, as the county commissioners may prescribe, and such further compensation, not less than two thousand dollars per annum, payable in monthly installments out of the treasury of the city of Cleveland, as the council may prescribe. * * * "

Section 1579-40 of the General Code (103 O. L., 693) provides, in part, as follows:

"* * * At the municipal election of 1911 and every four years thereafter, there shall be nominated and elected a clerk of the municipal court in the same manner as other municipal officers are nominated and elected, who shall serve until his successor is elected and qualified.

"He shall receive such compensation payable out of the treasury of

Cuyahoga county not less than two thousand dollars per annum as the county commissioners may prescribe, and such further compensation not less than twenty-five hundred dollars per annum, payable in monthly installments out of the treasury of the city of Cleveland as the council may prescribe. Deputies to the clerk shall be designated as hereinafter provided for in this act."

Section 1579-44 of the General Code (103 O. L., 694) provides in part as follows:

"The chief deputy clerk shall receive such compensation, not less than one thousand five hundred dollars per annum as the council may prescribe. The other deputy clerks shall receive such compensation, not less than one thousand two hundred dollars per annum as the council may prescribe. * * * "

Section 1579-45 of the General Code (106 O. L., 278) provides in part as follows:

" * * * The bailiff shall receive such compensation, not less than three thousand six hundred dollars, per annum and deputy bailiffs shall each receive such compensation, not less than one thousand two hundred dollars per annum, as the council may prescribe, payable in monthly installments out of the treasury of the city of Cleveland. Before entering upon his duties, the bailiff shall make and file in the office of the auditor of the city of Cleveland a bond in the amount of not less than ten thousand dollars to be determined by the judge, with two or more securities to be approved by the chief justice. The terms of said bonds shall be subject to the approval of the judges of the court. The said bonds shall be given for the benefit of the city of Cleveland and of any persons who shall suffer loss by reason of a default in any of the conditions of said bond. The bailiff may require any of the deputy bailiffs to give a bond of not less than one thousand dollars, the terms whereof shall be subject to the approval of the judges of the court. The sureties on said bonds shall be approved and said bonds shall be filed in the manner prescribed for the approval and filing of the bailiff's bond. The bailiff may, with the consent and approval of the judges of the court, appoint a stenographer to be assigned to duty in the bailiff's department."

Section 1579-48 of the General Code (103 O. L., 696) provides as follows:

"The council of the city of Cleveland shall provide suitable accommodations for the municipal court and its officers including a private room for each judge and sufficient jury room. The council shall also provide for the use of the court complete sets of the reports of the supreme and inferior courts of Ohio and such other authorities as are deemed necessary, and shall provide for each court room the latest edition of the General Code of Ohio, and necessary supplies including telephone, stationery, furniture, heat and light. The expense of maintaining the court shall be paid out of the treasury of the city of Cleveland."

Section 1579-50 of the General Code (103 O. L., 696) provides in part as follows:

"The solicitor of the city of Cleveland shall also be the prosecuting attorney of the municipal court. He may designate such number of assistant prosecutors as the council of the city of Cleveland may authorize. The persons thus appointed shall be subject to the approval of the city council and such assistants shall receive for their services in city cases such salaries as the council may prescribe, and the county commissioners may allow such further compensation as they deem proper, which shall be paid from the county treasury.

* * * * * * * *

"Probation officers and interpreters shall be appointed by the judges of the municipal court, and serve at their pleasure. They shall receive such compensation as the council by ordinance may prescribe. * * * "

From the above provisions it is clear that the city's share of the cost and expense of maintaining the Cleveland municipal court is within the control of the council of that city, and that the funds therefor must be appropriated by council and disbursed in like manner as other city expenditures.

Sections 45 and 46 of the charter of the city of Cleveland are as follows:

"Section 45. No money shall be drawn from the treasury of the city, nor shall any obligation for the expenditure of money by incurred, except pursuant to appropriations made by the council; and whenever an appropriation is so made the clerk will forthwith give notice to the director of finance. At the end of each year all unexpended balances of appropriations shall revert to the respective funds from which the same were appropriated and shall then be subject to future appropriations; but appropriations may be made in furtherance of improvements or other objects or work of the city which will not be completed within the current year.

"Section 46. Moneys appropriated as hereinbefore provided shall not be used for other purposes than those designated in the appropriation ordinance without authority from the council. The mayor and director of finance shall supervise all departmental expenditures, and shall keep such expenditures within the appropriations."

Section 118 of said charter provides that the commissioner of purchase and supplies shall make all purchases for the city in the manner provided by ordinance. Section 119 requires the commissioner of purchase and supplies to give opportunity for competition under such rules and regulations as council may establish. Sections 122, 124 and 125 of the charter are as follows:

"Section 122. No contract, agreement, or other obligation, involving the expenditure of money, shall be entered into, nor shall any ordinance, resolution, or order for the expenditure of money be passed by the council, or be authorized by any officer of the city, unless the director of finance first certify to the council or to the proper officer, as the case may be, that the money required for such contract, agreement, obligation, or expenditure, is in the treasury, to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose, which certificate be filed and immediately recorded. The sum so certified shall not thereafter be considered unappropriated until the city is discharged from the contract, agreement or obligation."

"Section 124. No contract involving an expenditure in excess of one thousand dollars ($1,000.00) shall be awarded except upon the approval of the board of control.

"Section 125. All contracts, agreements, or other obligations entered into and all ordinances passed, resolutions and orders adopted, contrary to the provisions of the preceding sections, shall be void, and no person whatever shall have any claim or demand against the city thereunder, nor shall the council, or any officer of the city, waive or qualify the limits fixed by any ordinance, resolution or order, as provided in section 122, or fasten upon the city any liability whatever, in excess of such limits, or release any party from an exact compliance with his contract under such ordinance, resolution or order."

The Cleveland municipal court act confers no authority on the clerk of the court to purchase supplies or make expenditures, and its provisions imposing upon the city the duty of paying a part of the salary of the judges and certain other officers of the court and the entire expense of maintaining the court are not in conflict with the Cleveland charter.

I, therefore, advise you that the provisions of the Cleveland charter govern the appropriations and expenditures of the city's portion of the cost and expense of maintaining the municipal court of the said city. It is, however, the duty of the city, under the method of procedure set out in its charter, to appropriate and expend such funds as are reasonably necessary to properly maintain the court.

Question 2. Answering this question I call attention to sections 1695, 1696 and 1697 of the General Code, which are as follows:

"Section 1695. In the counties of Hamilton, Cuyahoga, Franklin and Lucas, the judges of the courts of record, other than circuit court, shall jointly designate a daily law journal published in the county, wherein shall be published all calendars of the courts of record in such county, which shall contain the numbers and titles of causes, and names of attorneys appearing therein, together with the motion dockets and such particulars and notices respecting causes, as may be specified by the judges, and each notice required to be published by any such judges.

"Section 1696. In all cases, proceedings, administrations of estates, assignments and matters pending in any of the courts of record of such counties wherein legal notices or advertisements are required by law to be published, such law journal shall once a week and on the same day of the week, publish an abstract of each such legal advertisement, but the jurisdiction over, or irregularity of a proceeding, trial or judgment, shall not be affected by anything therein.

"Section 1697. For the publication of such calendars, motion dockets and notices, the fees for which are not fixed by law, the publisher of the paper shall receive a sum to be fixed by the judges, not exceeding thirty-five cents for each case brought, to be paid by the party filing the petition, or transcript for appeal or lien, and to be taxed in the costs and collected as other costs, and for the publishing of abstracts of legal advertising, a sum to be fixed by the judges, not exceeding one dollar for each case, proceeding or matter, in which such advertising is had, to be taxed and collected as a part of the costs thereof."

The Cleveland municipal court, by section 1 of the act creating it (1579-1 G. C.) is made a court of record. I am informed that the Legal News referred to in your question is a daily law journal published in Cuyahoga county, and that the judges of courts of record of Cuyahoga, other than the court of appeals, have jointly designated it as a medium of publication for the court calendars under authority of the section of the General Code above quoted. Assuming that this information is correct, I advise you that the action of the clerk of the municipal court in publishing the calendar and other information pertaining to that case in the Legal News and taxing and collecting a charge of 15 cents in each case filed is legal.

Question 3. Answering this question I call attention to an opinion of my predecessor, Honorable Timothy S. Hogan, rendered to your bureau on November 17, 1914, found in vol. II, page 1444 of the Report of the Attorney-General for the year 1914, wherein you were advised that:

> "The fees of a notary public for the administration of an oath on an affidavit of verification to a pleading are taxable as costs in the case in which the pleading is filed."

I concur in this opinion, and in harmony therewith advise you that the clerk of the Cleveland municipal court is authorized to tax, collect and pay to the person entitled to receive the same the notary fees for taking and subscribing to the oath of verification to pleadings in cases filed in that court. Such notary fees, however, must be for services required in the prosecution or defense of the particular case.

Question 4. In connection with this question I have before me further information furnished in a letter from an examiner in your department, which by setting forth a concrete example of the practice referred to is intended as explanatory of the question. This letter is as follows:

> "I do not have the data to give you an exact case, to illustrate the question in point, but I remember the facts, which are as follows:
>
> "The bailiff has taken property on execution and sold the same, and then instead of paying the judgments, he has paid all or a part of the proceeds of the sale to persons who claimed liens on the property for accounts which were dated before the time the property was taken by the bailiff.
>
> "In one instance he sold an automobile, and instead of paying the proceeds on the judgment, he paid it to the proprietor of the garage, who claimed that the owner of the machine owed him for storage and repairs, which indebtedness was incurred prior to the time the judgment was rendered and the machine taken on the execution."

The bailiff of the Cleveland municipal court is not authorized by law or by virtue of his office to apply funds received from the sale of property taken by him on execution to the satisfaction of claims of holders or liens against such property. Such action on his part is purely voluntary and he assumes the risk of any mistake made by him in any such transaction. If all the parties, i. e., the owner of the property, the lienholder, and the execution creditor, consent to his action, then no harm is done and the rights of no person infracted.

Unless all parties interested consent to the seizure and sale of the property by the bailiff and agree upon a distribution of the proceeds, the better and safe

practice is for him to insist that all claimants by proper action secure a judicial determination of the amount and priority of their respective claims.

Question 5. Two separate and distinct questions are embodied in your fifth question:

(a) Have the judges in the criminal branch the right to send persons to the county jail who are accused of violation of city ordinances and pending trial are committed for safe-keeping in default of bail?

(b) Have such judges the right to sentence persons to imprisonment in the county jail who have been convicted of violation of city ordinances?

Question 5-a will be first considered.

The jurisdiction of the municipal court of Cleveland is prescribed in section 1579-12 of the General Code, as amended 103 O. L., 685, as follows:

> "The municipal court shall have jurisdiction of all misdemeanors and of all violations of city ordinance of which police courts in municipalities now have or may hereafter be given jurisdiction. In felonies the municipal court shall have the powers which police courts in municipalities now have or may hereafter be given."

Section 4577 of the General Code, conferring jurisdiction upon the police courts in municipalities, is as follows:

> "The police court shall have jurisdiction of, and to hear, finally determine, and to impose the prescribed penalty for, any offense under any ordinance of the city, and of any misdemeanor committed within the limits of the city, or within four miles thereof. The jurisdiction of such court to make inquiry in criminal cases shall be the same as that of a justice of the peace. Cases in which the accused is entitled to a jury trial, shall be so tried, unless a jury be waived."

Two kinds of jurisdiction are conferred upon police courts, and consideration of the powers of police courts in enforcing these two kinds of jurisdiction will determine the corresponding powers of the municipal court of Cleveland.

Police courts have jurisdiction to make inquiry in criminal cases in the same manner as justices of the peace; that is to say, to conduct preliminary examinations to determine whether there is probable cause for holding the accused for trial in the proper court, and in exercising this jurisdiction they should follow the provisions of section 13506 *et seq.* of the General Code.

Section 13507 G. C. provides as follows:

> "If it is necessary, for just cause, to adjourn the examination of the accused, the magistrate may order such adjournment and commit him to the jail of the county, until such cause of delay is removed, but the entire time of such confinement in jail shall not exceed four days. The officer having custody of such person, by the written order of the magistrate may detain him in custody in a secure and convenient place other than the jail, to be designated by such magistrate in his order, not exceeding four days. The officer in whose custody any person is detained shall provide for the sustenance of such prisoner while in custody."

This section originally applied only to justices of the peace and was clearly limited to the matter of preliminary hearings to determine the question of probable

cause for holding the accused for trial. The word "examination" appeared in the section as originally enacted and clearly means the same now that it did then; so that it does not furnish authority for a police court or the municipal court of Cleveland to commit a person accused of a violation of the city ordinance to the county jail, pending trial, but only permits such commitment by a police court or said municipal court in cases in which such courts are acting as examining magistrates.

Jurisdiction to hear and finally determine cases arising under violations of city ordinance is conferred upon police courts by virtue of section 4577 G. C., supra, and upon the municipal court of Cleveland by sections 1579-12, G. C., supra.

The power to issue writs of commitment before or during trial in such cases is conferred upon said courts by section 4576 G. C., which provides as follows:

> "Sec. 4576. The police court shall have power to issue process, preserve order ,punish contempts, summon and impanel jurors, grant new trials and motions in arrest of judgment, suspend executions of sentence upon notice of intention to apply for leave to file a petition in error, and such other powers incident to the court of common pleas as may be necessary for the exercise of the jurisdiction herein conferred, and the enforcement of the judgments and orders of the court."

The power to commit, of course, requires a place of commitment and the only provision for the place of committment before or during the trial is provided by sections 3616 and 3624 G. C., which provide:

> "Sec. 3616. All municipal corporations shall have the general powers mentioned in this chapter, and council may provide by ordinance or resotion for the exercise and enforcement of them.
>
> "Sec. 3624. To establish, erect, maintain and regulate jails, morgues, houses of refuge and correction, workhouses, station houses, prisons and farm schools."

Under these sections council has ample power to provide a city prison or a station house and permit its use for this purpose, and I have no doubt has done so in the city of Cleveland.

I, therefore, advise you that the judges in the criminal branch of the Cleveland municipal court may not commit persons to the county jail who are accused of violations of city ordinances and who pending trial are unable to furnish bond. Such persons should be committed to the city prison under proper action of council.

This question is not entirely free from doubt and I would suggest that while the practice of committing such persons to the county jail, under the circumstances described in your question, should be discontinued, at the same time I do not think findings for recovery should be made against officials who have been following this course.

Question 5-b is answered by my opinion No. 1699 given to your bureau on June 15, 1916, wherein I advised you, in answer to a similar question concerning the police court of the city of Columbus, that the judge of said court was without authority to sentence persons convicted of violations of city ordinances to the Franklin county jail, said city at that time owning and operating its own city prison and workhouse. The conclusion expressed in that opinion was based on the provisions of section 4564 of the General Code, which section is as follows:

"Sec. 4564. Imprisonment under the ordinances of a municipal corporation shall be in the workhouse or other jail thereof, if the corporation is provided with such workhouse or a jail. Any corporation not provided with a workhouse, or other jail, shall be allowed, for the purpose of imprisonment, the use of the jail of the county, at the expense of the corporation, until it is provided with a prison, house of correction or workhouse. Persons so imprisoned in the county jail shall be under the charge of the sheriff of the county, who shall receive and hold such persons in the manner prescribed by the ordinances of the corporation, until discharged by due course of law."

The provisions of the above section are equally applicable to the Cleveland municipal court, and assuming that the city of Cleveland has a workhouse or jail available, I advise you that the judges of the criminal branch of its municipal court are without authority to sentence to the county jail persons convicted of violations of city ordinances.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2080.

APPROVAL, LEASES OF CANAL AND RESERVOIR LANDS TO ELIZA H. McELVAIN, MABEL V. BROWN, THE EAGLEPORT OIL AND GAS COMPANY AND WILLIAM SCHNEIDER.

COLUMBUS, OHIO, December 5, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication of November 24, 1916, transmitting to me for examination the following leases of canal and reservoir lands:

"Valuation.
"Eliza H. McElvain, land at Lake St. Marys_____$100.00
"Mabel V. Brown, Newark, Ohio, land at Buckeye Lake_____ 200.00
"The Eagleport Oil and Gas Co., Zanesville, Ohio, portion of Ohio canal in Muskingum county, 1-8 royalty and bonus of_____ 100.00
"William Schneider, Columbus, Ohio, land at Buckeye Lake_____ 500.00"

I find these leases to be in regular form and am, therefore, returning the same with my approval endorsed upon the triplicate copies thereof.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2081.

WORKMEN'S COMPENSATION ACT—NO AUTHORITY FOR INDUSTRIAL COMMISSION TO DIRECT AN EMPLOYER WHO IS SELF-INSURER TO PAY COMPENSATION DUE AN INJURED EMPLOYE, TO WIFE AND CHILDREN OF SAID EMPLOYE, SO LONG AS EMPLOYE IS LIVING.

1. *There is no authority under section 41 of the Ohio Workmen's Compensation Act, section 1465-88 G. C., 103 O. L. 88, or any other section of said act, for the industrial commission to direct an employer who is a self-insurer to pay compensation due an injured employe, to the wife and children of said employe so long as the employe is living.*

2. *If an employer who is a self-insurer voluntarily pays the compensation due an injured employe to his wife and children, who have been abandoned by said employe, for their support and maintenance, the employer could set up such payment to said wife and minor children as a set-off should the employe afterward claim or seek to recover the amount of compensation due him.*

COLUMBUS, OHIO, December 5, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your communication of November 23, 1916, requesting my opinion as follows:

> "The Industrial Commission of Ohio respectfully requests of you an opinion as to whether or not it is authorized by the provisions of section 41 of the compensation act, or any other provisions of the act or any other law, to direct the employer, who is a self-insurer under section 22 to pay the amount of compensation due the claimant to his dependents, namely his wife and children, under the following statement of facts:
>
> "Claimant is entitled to compensation for permanent partial disability, which the employer is willing to pay. Claimant has disappeared, leaving a family consisting of a wife and a number of minor children; when he left he was accompanied by another woman, the wife of another man, and his present whereabouts are unknown."

Section 41 of the Workmen's Compensation Law, or section 1465-88 of the General Code (103 O. L. 88), referred to in your letter, is as follows:

> "Compensation before payment shall be exempt from all claims of creditors and from any attachment or execution, and shall be paid only to such employes or their dependents."

This section provides that "compensation shall be paid *only* to such employes or their dependents." The answer to your question depends upon the definition to be given to the word "dependents" as used in the compensation act. Section 22 of the Workmen's Compensation Act, General Code section 1465-69 (103 O. L. 80), which provides the plan for the direct payment of the compensation is, in part, as follows:

> "* * * Provided, however, * * * that such employers who will abide by the rules of the state liability board of awards and as may be of

sufficient financial ability or credit to render certain the payment of compensation to injured employes, or *to the dependents of killed employes* * * *."

Paragraph 2 of section 21 of the Workmen's Compensation Act, or section 1465-68 of the General Code (103 O. L. 79) provides, in part, as follows:

"Every employe mentioned in subdivision two of section fourteen hereof, who is injured, and the *dependents of such as are killed* in the course of employment * * * shall be entitled to receive * * * such compensation for loss sustained on account of such injury or *death*, * * *"

Section 25 of the Compensation Act, section 1465-72 of the General Code (103 O. L. 82) provides, in part, as follows:

"* * * All employers electing directly to compensate their injured employes, in compliance with this act, shall pay to such injured employes, or to the *dependents of employes who have been killed* in the course of their employment, * * *"

Section 35 of the General Compensation Act, section 1465-82 of the General Code (103 O. L. 86) provides, in part, as follows:

"In case the injury causes death within the period of two years, the benefits shall be in the amounts and to the persons following: * * *

"4. The following persons shall be presumed to be wholly dependent for support upon a *deceased* employe:

"(a) A wife upon a husband with whom she lived at the time of his *death.*

"(b) A child or children under the age of sixteen years * * * upon the parent with whom he is living at the time of the *death of such parent.*" * * *

The last subdivision of paragraph 4 of section 35 provides in part as follows:

"But *no person shall be considered a dependent unless a member of the family of the deceased employe.* * * *"

It seems clear from the provisions of the compensation act, supra, that a wife or child or children of an employe cannot be classified as dependents unless the employe has been killed in the course of his employment, or that the injury has caused his death within the period of two years.

In your letter you state that the "claimant is entitled to compensation for a permanent partial disability which the employer is willing to pay, but that the claimant has disappeared, leaving a family consisting of a wife and a number of minor children and his whereabouts at present are unknown."

Section 33 of the Compensation Act, or section 1465-80 of the General Code (103 O. L. 85) is the section which provides for compensation for partial disability, and in part provides as follows:

"In case of injury resulting in partial disability the *employe* shall receive, * * *"

It seems clear that compensation payable for an injury which does not cause death is payable only to the injured employe. The fact that the claimant has abandoned his wife and children would in no way release the employer from paying compensation to the employe for such a disability as described in your letter, nor does the fact of abandonment of the wife and children make them his dependents as that word is used in the Workmen's Compensation Act. Your attention is called to section 7997 of the General Code, which is as follows:

> "The husband must support himself, his wife, and his minor children out of his property or by his labor. If he is unable to do so, the wife must assist him so far as she is able."

It is here provided that a husband must support his wife and minor children out of his property or by his labor. If the employer in this claim would *voluntarily* pay the compensation due the injured employe to his wife and minor children for their support and maintenance under the facts as stated in your letter, I am of the opinion that the employer could set up payment to the said wife and minor children as a set-off should the employe afterward claim or seek to recover the amount of compensation due him.

Directly answering your question, I am of the opinion that there is no authority under the provisions of section 41 of the Workmen's Compensation Act, or any other provision of said act, for your commission to direct a self-insurer under section 22 to pay compensation to the wife and children of an injured employe as long as the employe is living.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2082.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY SHELBY COUNTY, OHIO.

COLUMBUS, OHIO, December 5, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

> "RE:—Bonds of Shelby county, Ohio, in the sum of $4,300.00 for the county's share of the Schmitmeyer-Baker road improvement No. 53, being ten bonds of $350.00 each and two bonds of $400.00 each; and in the sum of $3,150.00 for McLean township's share of said improvement, being five bonds of $350.00 each and one bond of four hundred dollars."

I have examined the transcript of the proceedings of the county commissioners and other officers of Shelby county relative to the above bond issues, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of said county.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2083.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY SHELBY COUNTY FOR IMPROVEMENT OF SIDNEY-PLATTSVILLE ROAD.

COLUMBUS, OHIO, December 5, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Shelby county, Ohio, for the improvement of the Sidney-Plattsville road improvement No. 11, in the amount of $3,100, being five bonds of $500 each and one bond of $600."

I have examined the transcript of the proceedings of the county commissioners and other officers of Shelby county relative to the above bond issue; also the bond and coupon form attached; and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of said county.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2084.

SCHOOLS—TEACHER'S CERTIFICATE OF QUALIFICATION QUESTIONED BY STATE INSPECTOR—BOARD OF EDUCATION NOT LIABLE PERSONALLY FOR COMPENSATION PAID TEACHER ALTHOUGH CERTIFICATE OF GRADE OF HIGH SCHOOL IS WITHDRAWN.

If a teacher has a certificate of qualification, or a copy thereof, on file with the clerk of the board of education, evidencing the qualification of the teacher to teach in the school in which he is employed, covering the entire time of his service, so long as such teacher performs his duties according to the terms of his contract of employment, no liability will attach to members of the board of education for the compensation paid such teacher by reason of the withdrawal of the certificate of the grade of the high school in which such teacher is employed, by the superintendent of public instruction.

COLUMBUS, OHIO, December 6, 1916.

HON. JOSEPH W. HORNER, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—Yours under date of November 28, 1916, is as follows:

"The board of education of one of our second grade high schools in Licking county, Ohio, hired a principal for the school year to teach said school. Some time during the month of October, I believe, a state inspec-

tor came over to Licking county and inspected said school, and as I have learned, owing to the fact that this teacher had not quite sufficient college work, as is required by law, and that the school was not properly equipped with apparatus, etc., he took from said school the charter.

"Since the taking of said charter, the board of education has refused to pay this principal. He is still teaching and so far as I know, has had no notice to discontinue. The question is if this school board shall pay said principal, whether or not they would be liable personally?"

Section 7831 G. C., 104 O. L. 100, provides as follows:

"No person shall be employed or enter upon the performance of his duties as a teacher in any recognized high school supported wholly or in part by the state in any village, or rural school district, or act as a superintendent of schools in such district, who has not obtained from a board of examiners having legal jurisdiction a certificate of good moral character; that he or she is qualified to teach six branches or more selected from the following course of study (three of which branches shall be algebra, rhetoric and physics): Literature, general history, algebra, physics, physiology, including narcotics, Latin, German, rhetoric, civil government, geometry, physical geography, botany and chemistry, and high school agriculture; and that he or she possesses an adequate knowledge of the theory and practice of teaching."

Section 7786 G. C., 104 O. L. 225, provides in part as follows:

"No clerk of a board shall draw an order on the treasurer for the payment of a teacher for services until the teacher files with him such reports as are required by the superintendent of public instruction and the board of education, a legal certificate of qualification, or a true copy thereof, covering the entire time of the service, and a statement of the branches taught. * * *"

While it is not so stated by you, it is assumed that the qualification of the teacher referred to is evidenced by a certificate issued by the proper authority, as required by the statutes above quoted. If the teacher, as is here assumed, has a certificate of qualification, as above required, covering the entire time of his service, and such certificate, or a copy of the same, is on file with the clerk of the board of education, and such teacher continues to perform all his duties, according to the terms of his contract of employment, no personal liability will attach to the members of the board of education for the money paid to the teacher, according to the terms of his contract of employment, by reason of the fact alone that the certificate of the grade of the high school in which such teacher is employed has been withdrawn by the superintendent of public instruction. The obligation of the contract of employment with the teacher is dependent in no way upon the grade of the high school in which he is employed to teach.

I am therefore of opinion, in answer to your inquiry, that if a teacher has a certificate of qualification, or a copy thereof, on file with the clerk of the board of education, evidencing the qualification of the teacher to teach in the school in which he is employed, covering the entire time of his service, so long as such teacher performs his duties according to the terms of his contract of employment, no liability will attach to the members of the board of education for the compensation paid such teacher by reason of the withdrawal of the certificate of the grade of the high school in which such teacher is employed by the superintendent of public instruction.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

2085.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY SHELBY COUNTY, OHIO.

COLUMBUS, OHIO, December 7, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Shelby county, Ohio, in the amount of $3,100.00 for the improvement of Dawson-Fort Loramie road improvement No. 24, being five bonds of $500.00 each, and one bond of $600.00."

I have examined the transcript of the proceedings of the county commissioners and other officers relative to the above bond issue; also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of said county.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2086.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY VILLAGE OF LINDEN HEIGHTS, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, December 7, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the village of Linden Heights, Franklin county, Ohio, in the amount of $20,000 for the improvement of West Aberdeen avenue, being forty bonds of $500 each."

I have examined the transcript of the proceedings of the council and other officers of the village of Linden Heights relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of said village.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2087.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY VILLAGE OF LINDEN HEIGHTS, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, December 7, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE: Bonds of the village of Linden Heights, Franklin county, Ohio, in the amount of $18,000.00 for the improvement of Manchester avenue, being thirty-six bonds of five hundred dollars each."

I have examined the transcript of the proceedings of the council and other officers of the village of Linden Heights relative to the above bond issue; also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of said village.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2088.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY VILLAGE OF LINDEN HEIGHTS, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, December 7, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE: Bonds of the village of Linden Heights in the sum of $15,000.00 for the improvement of Minnesota avenue, being thirty bonds of $500.00 each."

I have examined the transcript of the proceedings of the council and other officers of the village of Linden Heights relative to the above bond issue; also the bond and coupon form attached; and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of said village.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2089.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY VILLAGE OF LINDEN HEIGHTS, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, December 7, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE: Bonds of the village of Linden Heights, Franklin county, Ohio, in the amount of $17,000.00 for the improvement of West Genessee avenue, being thirty-four bonds of $500.00 each."

I have examined the transcript of the proceedings of the council and other officers of the village of Linden Heights relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of said village.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2090.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY VILLAGE OF LINDEN HEIGHTS, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, December 7, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE. Bonds of the village of Linden Heights, Franklin county, Ohio, in the amount of $4,000.00 for the improvement of East Genessee avenue, being eight bonds of five hundred dollars each."

I have examined the transcript of the proceedings of the council and other officers of the village of Linden Heights relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of said village.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2091.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY VILLAGE OF LINDEN HEIGHTS, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, December 7, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE: Bonds of the village of Linden Heights, Franklin county, Ohio, in the amount of $10,000.00 for the improvement of Arlington avenue, being twenty bonds of $500.00 each."

I have examined the transcript of the proceedings of the council and other officers of the village of Linden Heights relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligation of said village.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2092.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY VILLAGE OF LINDEN HEIGHTS, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, December 7, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE: Bonds of the village of Linden Heights, Franklin county, Ohio, in the amount of $10,000.00 for the improvement of Myrtle avenue, being 20 bonds of five hundred dollars each."

I have examined the transcript of the proceedings of the council and other officers of the village of Linden Heights relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of said village.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2093.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY VILLAGE OF WEST PARK, CUYAHOGA COUNTY, OHIO.

COLUMBUS, OHIO, December 7, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE: Bonds of the village of West Park, Cuyahoga county, Ohio, in the amount of $9,000.00 for the purpose of purchasing a fire engine, equipping and furnishing an engine house, etc., being nine bonds of one thousand dollars each."

I have examined the transcript of the proceedings of council and other officers of the village of West Park relative to the above bond issue; also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of said village.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2094.

DISAPPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY CITY OF MOUNT VERNON, OHIO.

COLUMBUS, OHIO, December 9, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE: Bonds of the city of Mount Vernon, Ohio, in the sum of $8,000.00 to refund an indebtedness to the water works, being sixteen bonds of $500.00 each."

I have examined the transcript of the proceedings of council and other officers of Mount Vernon submitted to me relative to the above bond issue, and I am unable to approve the same or advise the purchase of the bonds for the reason that the transcript fails to show that the indebtedness which the city seeks to refund is an existing, valid and binding obligation of the city. The city is apparently attempting to pay a supposed indebtedness to the water works department of the city. I know of no provision of law under authority of which the city could become indebted to its own water works department.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2095.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY CITY OF MOUNT VERNON, OHIO.

COLUMBUS, OHIO, December 9, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE: Bonds of the city of Mount Vernon, Ohio, in the amount of $6,861.97 for paving and curbing Gambier avenue, being one bond of $111.97 and nine bonds of $750.00 each."

I have examined the transcript of the proceedings of the council and other officers of the city of Mount Vernon relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of said city.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2096.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY CITY OF MOUNT VERNON, OHIO.

COLUMBUS, OHIO, December 9, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE: Bonds of the city of Mount Vernon, Ohio, in the sum of $3,406.65 for the construction of a sanitary sewer in Norton-Burgess streets, being one bond of $406.65, five bonds of $400.00 each, and two bonds of $300.00 each."

I have examined the transcript of the proceedings of the council and other officers of the city of Mount Vernon relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of said city.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2097.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY CITY OF MOUNT VERNON, OHIO.

COLUMBUS, OHIO, December 9, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE: Bonds of the city of Mount Vernon, Ohio, in the amount of $2,571.87 for the construction of a sanitary sewer in Braddock street, with laterals, being one bond of $321.87 and nine bonds of $250.00 each."

I have examined the transcript of the proceedings of the council and other officers of the city of Mt. Vernon relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of said city.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2098.

APPROVAL, LEASE OF CANAL LAND TO THE DAYTON GAS COMPANY IN CITY OF DAYTON.

COLUMBUS, OHIO, December 9, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication of November 28, 1916, transmitting to me for examination a least to The Dayton Gas Company, covering a right of way over the outer slope of the canal embankment in the city of Dayton, for a distance of 5,010 feet.

I find this lease to be in regular form and am, therefore, returning the same with my approval endorsed upon the triplicate copies thereof.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2099.

APPROVAL, SALE OF THREE TRACTS OF CANAL LANDS IN MADISON TOWNSHIP, LICKING COUNTY, OHIO, TO THE FOLLOWING: NELLIE M. BOLIN, MARY C. BOLIN, R. W. LILLARD.

COLUMBUS, OHIO, December 9, 1916.

HON. FRANK R. FAUVER, Superintendent of Public Works, Columbus, Ohio.

DEAR SIR:—I acknowledge the receipt of your communication of November 28, 1916, which reads as follows:

> "Herewith I transmit for your approval duplicate copies of resolutions providing for the sale of three small tracts of the abandoned Ohio canal property in Madison township, Licking county, Ohio.
>
> "The first is to Nellie M. Bolin for 2.5 acres, appraised at $250.00.
>
> "The second tract is to Mary C. Bolin for 2.5 acres, appraised at $450.00.
>
> "The third tract is to R. W. Lillard for 6.5 acres appraised at $487.50."

I find that the three resolutions transmitted to me are properly drawn and recite the existence of the necessary jurisdictional facts, and I am, therefore, returning these resolutions with my signature attached to the duplicate copies thereof.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2100.

INSURANCE—TAXATION OF AGENTS' BALANCES FOR LIFE AND FIRE COMPANIES DISTINGUISHED—SEE OPINION NO. 1821, JULY 31, 1916, TO TAX COMMISSION OF OHIO.

This opinion being confined to, and the conclusions herein expressed being based upon the statements of facts herein set forth, holds that, generally speaking, balances, existing on the tax listing day in any year, belonging to a fire insurance company or a life insurance company organized under the laws of this state and arising out of business transacted in this state, must be returned for taxation by the proper officers of the company at the principal place of business of such company, and that such balances belonging to a foreign fire or life insurance company are not returnable for taxation as property of the company under any of the provisions of the statutes herein set forth governing such return.

COLUMBUS, OHIO, December 9, 1916.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—In your letter of August 29th, in re taxation of balances belonging to insurance companies, you request me to consider the brief of Mr. J. W. Mooney, attorney for certain fire insurance companies, on the question of the taxability of such balances belonging to fire insurance companies.

This question was answered in opinion No. 1821 of this department rendered to your commission July 21, 1916. The conclusion in that opinion was based on the application of the laws now in force to the facts as stated in a brief filed with the department by Mr. O. B. Ryon, general counsel for the National Board of Fire Underwriters. The correctness of the conclusion expressed in said opinion in view of the statement of facts presented by Mr. Ryon does not seem to be questioned by any one concerned, but it is contended by Mr. Mooney that said statement is incorrect and does not express the true relation existing between the insurance companies doing business in this state and their agents. Said question will therefore be reconsidered in connection with the facts submitted by Mr. Mooney in his brief.

Permit me to state further that since receiving your letter of August 29th Mr. Arthur I. Vorys, of the firm of Vorys, Sater, Seymour & Pease, this city, representing certain insurance companies, has filed with the department a brief supplemental to that filed by Mr. Mooney and Mr. Frederic G. Dunham, of New York City, of counsel for the Association of Life Insurance Presidents, has filed with the department a memorandum of facts and law which, as stated by Mr. Dunham, is submitted in behalf of life insurance corporations transacting business in Ohio for the purpose of placing before the attorney-general the facts as to the methods of business pursued by such corporations, including the character of credits due companies and the limitations upon the authority of their agents in that state, and their view as to the application to such credits of the laws of the state of Ohio relative to the taxation of personal property. I am in receipt also of a letter from Mr. J. C. Campbell of this city, state agent for the John Hancock Mutual Life Insurance Company of Boston, Mass., in the states of Ohio and West Virginia, bearing on the question of the taxability of balances belonging to said company and arising out of business transacted in this state. Reference will hereafter be made to the above mentioned memoranda.

I shall consider first the question of the taxability of balances belonging to fire insurance companies doing business in this state and, second, the taxability of balances belonging to life insurance companies doing business in this state, as said balances are determined on the tax listing day in any year.

As stated in my former opinion to your commission, above referred to, the provisions of the statutes governing the return of the property of all incorporated companies, excepting banking or other corporations whose taxation is otherwise specifically provided for, are found in sections 5404, 5405 and 5406 of the General Code, as now in force, read in connection with sections 13, 14 and 15 of the Parret-Whittemore Law (sections 5406-1, 5406-2 and 5406-3 of the General Code, 106 O. L. 249), and section 6 of said law (section 5372-1 G. C., 106 O. L. 247). Said provisions are as follows:

> "Sec. 5404. The president, secretary, and principal accounting officer of every incorporated company, except banking or other corporations whose taxation is specifically provided for, for whatever purpose they may have been created, whether incorporated by a law of this state or not, shall list for taxation, verified by the oath of the person so listing, all the personal property thereof, and all real estate necessary to the daily operations of the company, moneys and credits of such company or corporation within the state, at the true value in money.
>
> "Sec. 5405. Return shall be made to the several auditors of the respective counties where such property is situated, together with a statement of the amount thereof which is situated in each township, village, city, or taxing district therein. Upon receiving such returns, the auditor

shall ascertain and determine the value of the property of such companies, and deduct from the aggregate sum so found of each, the value as assessed for taxation of any real estate included in the return. The value of the property of each of such companies, after so deducting the value of all the real estate included in the return, shall be apportioned by the auditor to such cities, villages, townships, or taxing districts, pro rata, in proportion to the value of the real estate and fixed property included in the return, in each of such cities, villages, townships, or taxing districts. The auditor shall place such apportioned valuation on the tax duplicate and taxes shall be levied and collected thereon at the same rate and in the same manner that taxes are levied and collected on other personal property in such township, village, city or taxing district.

"Sec. 5406. The auditor of each county, on or before the first Monday of May, annually, shall furnish the president, secretary, principal accounting officer, or agent as provided in the next two preceding sections, the necessary blanks for the purpose of making such returns, but neglect or failure on the part of the county auditor to furnish such blanks shall not excuse such president, secretary, accountant, or agent, from making the returns within the time specified herein. If the county auditor to whom returns are made is of the opinion that false or incorrect valuations have been made, that the property of the corporation or association has not been listed at its full value, or that it has not been listed in the location where it properly belongs, or if no return has been made to the county auditor, he must have the property valued and assessed. This section and the next preceding section shall not tax any stock or interest held by the state in a joint stock company.

"Sec. 5406-1. If the property of an incorporated company is situated in more than one county, return shall be made to the county auditor of the county wherein the principal place of business of the company is located, or if the company has no principal place of business in this state, to the county auditor of any county wherein it transacts business or its property is situated. The county auditor to whom return is made shall certify the fact, together with the return and all information in his possession relating thereto, to the tax commission of Ohio, which shall ascertain and determine the aggregate value of the entire property of the company required to be listed in this state, and, from the aggregate sum so found, make the deductions provided in section fifty-four hundred and five of the General Code. The commission shall apportion the value of the property of such company, after making such deductions, among such counties in proportion to the value of the property located in each, and certify its findings to the county auditors, who shall severally apportion the amount certified to their respective counties, to the cities, villages, townships and other taxing districts, therein, in the manner prescribed in section 5405 of the General Code.

"Sec. 5406-2. The county auditor shall enter the apportioned valuation provided for in the preceding section on the tax list and duplicate, separately entering the real estate belonging to the company at the assessed value thereof.

"Sec. 5406-3. In determining the location of property for the purpose of the two preceding sections, all moneys and credits used in or appertaining especially to a separate business transacted by an incorporated com-

pany at a particular place shall be deemed to be located at such place where the business is transacted, and moneys and credits not used in or appertaining especially to such separate business transacted at any particular place shall be deemed to be located at the principal place of business of such company.

"Sec. 5372-1. Personal property, moneys, credits, investments in bonds, stocks, joint stock companies or otherwise in the possession or control of a person as parent, guardian, trustee, executor, administrator, assignee, receiver, official custodian, factor, agent, attorney, or otherwise, on the day preceding the second Monday in April in any year, on account of any person or persons, company, firm, partnership, association or corporation, shall be listed by the person having the possession or control thereof and be entered upon the tax lists and duplicate in the name of such parent, guardian, trustee, executor, administrator, assignee, receiver, official custodian, factor, agent, attorney, or other person, adding to such name words briefly indicating the capacity in which such person has possession of or otherwise controls said property, and the name of the person, estate, firm, company, partnership, association or corporation to whom it belongs; but the failure to indicate the capacity of the person in whose name such property is listed or the name of the person, estate, firm, company, partnership, association or corporation to whom it belongs shall not affect the validity of any assessment thereof."

With respect to each of the questions above stated it is evident that on the tax listing day in any year the amount or balance, due the company, in the hands of an agent in this state of either a fire or life insurance company organized under the laws of Ohio, must be returned for taxation. The only question to be determined in so far as the domestic corporation of either of the above mentioned classes is concerned, is whether said balance must be considered as personal property of said corporation and deemed to be located at the principal place of business of such corporation and, as so located, must therefore be returned by the officers of the company referred to in section 5404 G. C., supra, or whether said balance is to be considered as "appertaining especially to a separate business" transacted by said corporation at a particular place within the meaning of section 5406-3 G. C., supra, and as "moneys or credits" in the hands of the agent within the meaning of section 5372-1 G. C., supra, and therefore returnable by such agent at the place where such agent resides and transacts such business.

I deem it advisable before determining the answer to this question to first determine the answers to the two questions hereinbefore stated as limited to foreign insurance companies, of the two classes referred to in said questions, doing business in this state.

As limited to foreign insurance companies doing business in this state the first question may be stated as follows: Are balances due foreign fire insurance companies from local agents in this state taxable under any of the foregoing provisions of the statutes?

The answer to this question necessarily depends upon the true relation existing between such a company and its agent, to be determined by your commission in view of the facts in each particular case. I can do nothing more in determining the answer to the question just stated than to consider the foregoing provisions of the statutes as applied to the facts stated in Mr. Mooney's brief. I quote the following from said brief:

"There has grown up in the state of Ohio a distinct business known as the local fire insurance business. The nature of this business is the sale of fire insurance contracts issued by companies engaged in the fire insurance business. There are individuals, partnerships, and corporations in Ohio engaged extensively in the sale of fire insurance contracts to their customers and this is the sole and exclusive business of these corporations, partnerships and individuals. There are many corporations, partnerships and persons in Ohio engaged in the sale of fire insurance contracts who have invested large sums of money in their business. They have extensive offices, employ a large corps of clerks, and are completely and fully equipped to engage in the sale of fire insurance contracts to their clients who come to them for insurance.

"Many of these individuals, partnerships and corporations are engaged in the sale of fire insurance contracts for a large number of companies. It is necessary to represent a large number of companies in order to cover large and extensive lines which many of these men engaged in the fire insurance business secure.

"From the above statement it will be seen that the sale of fire insurance contracts is a separate and distinct business in which a large number of men in the state of Ohio are engaged, and in which there is a large amount of capital invested.

"The men engaged in the sale of fire insurance contracts have organizations, and through these organizations have built up a uniform custom in reference to the sale of fire insurance contracts, and built up a uniform relation between the persons so engaged and the fire insurance companies for which they are engaged in selling fire insurance contracts.

"Usually there are no written contracts entered into between the fire insurance companies and the persons engaged in the sale of fire insurance contracts. This relation is formed by a uniform custom or practice which exists in Ohio between all companies engaged in the fire insurance business and the person, partnership, or corporation engaged in the sale of these contracts. Usually companies apply to the party engaged in the sale of fire insurance contracts asking that they represent their company in the sale of fire insurance contracts. This relation is formed and continues at the will of the parties. Either party can terminate the relation at any time. This is the uniform practice in the state of Ohio. This practice and custom also provides that the parties engaged in the sale of contracts must be responsible to the companies for all premiums whether or not the party engaged in selling the contracts collects from the insured the premiums. This, we desire to emphasize, is the uniform custom throughout the entire state of Ohio.

"The compensation for the sale of fire insurance contracts is a certain per cent. of the premiums. This is the uniform custom. It is also a uniform custom that the companies give to the parties selling fire insurance contracts a certain period of credit in which to pay premiums. At the end of the period of credit it becomes the legal duty of the party who has sold the contracts to remit to the companies the amount of premiums, less commissions, it being immaterial whether the party selling the contracts of insurance has collected the premium from the insured or not.

"It is also the uniform custom through the state that the parties selling the contracts of insurance shall give such period of credit to the insured as they see fit. The general custom is that the companies look exclusively to the party selling the contracts of insurance for their money due from the sale of these insurance contracts.

"Where it becomes necessary to sue an insured for an unpaid premium this suit is brought in the name of the party selling the contract of insurance for the reason that the title to the unpaid premium is in the party selling the contract of insurance under the uniform arrangement between the companies and the party selling the contracts of insurance. As between the party selling the contract of insurance and the insurance company, the companies have no legal right to sue an insured for an unpaid premium, and this because of the arrangement existing between the companies and the parties selling the contracts of insurance.

"It is the uniform custom of all of the agents in the state of Ohio to collect the premiums and deposit all of the same in their individual bank account, and to pay any money due to the different companies for premiums by giving their individual check drawn on their individual account at the end of the agreed period of credit. This practice is universally known to all of the companies and is authorized and acquiesced in by them. It is the uniform custom not to deposit the money collected in the way of premiums in the name of the company or in the name of the party selling the contracts of insurance as the agent of the companies. Parties engaged in selling contracts of insurance in the state of Ohio own the business, and it is through their influence and acquaintance that they are able to sell contracts of insurance to their customers. The insurance companies have no acquaintance and no good will with the majority of purchasers of insurance. When a customer applies to an agent for insurance the agent as a rule determines the company in which the policy of insurance is written. Occasionally a customer is familiar enough with the insurance companies to request an agent to place the insurance in a certain company.

"All contracts of insurance contain a cancellation provision which provides that the company may cancel upon five days' notice, and that the insured may cancel at any time. All contracts of insurance in Ohio are written with reference to the statutes of Ohio which expressly provide that the insured may cancel at any time.

"It therefore follows that every contract of fire insurance is sold with reference to the provision of cancellation contained in the policy and also the statutes. Policies are frequently cancelled at the request of the insured. Where this is done the insured is entitled to repayment of the unearned premium if the premium has been paid. If the premium has not been paid the insured is entitled to credit of the unearned premium and must pay the agent the earned premium. It is the uniform custom of the agent to pay out of his own money in his individual bank account all unearned premiums. If the premiums have been paid to the company by the agent, then the agent charges back to the company the amount of unearned premium paid. If the agent has retained his commission out of the unearned premium and the policy is cancelled, then the agent must credit the company with the proportion of the commission which was paid on the unearned portion of the premium. In other words, the company is only entitled to the earned premium and the agent is entitled to a commission only on the earned portion thereof.

"All sellers of insurance contracts in keeping their accounts with the insured charge the insured with the amount of premium and the transaction is had between the agent and the insured solely in so far as the money transaction is connected with the sale of the contract of insurance. The agent sends out bills for the premiums to the insured made out in his

own name. Bills are never sent to the insured made out in the name of the companies. The bills upon their face show that the insured owes the agent as an individual the amount of premium, and all terms of credit for the payment of the premium of the insured are made between the insured and the agent.

"In the account kept between the seller of the contracts of insurance and the companies, the agent or seller of the contracts of insurance credits the company with the amount of premium less commission, and this amount is remitted at the end of the agreed period of credit by the seller of the contracts of insurance, unless the transaction has been modified by cancellation. In that event, the agent pays to the insured out of his individual bank account the amount of unearned premium and charges it to the company, and if the agent has already deducted his commission out of the entire premium he credits the company with that portion of the commission which has been collected on the unearned portion of the premium.

"The method of keeping accounts shows upon its face that the insured owes exclusively the agent, individually, for the amount of the premium and the agent or seller of the contracts of insurance owes the company the amount agreed upon shall be paid for these contracts, and that the company can look solely and only to the agent for its pay."

Atttached to said brief are certain exhibits which are in keeping with the foregoing statement of facts and which consist of (Exhibit A) copies of bills taken from the ledger of one of the insurance agents in this city showing the method of transacting the business as between said agent and the insured: (Exhibit B) a copy of an account taken from the ledger of said agent, and (Exhibit C) a statement showing how the insurance companies keep their accounts with the local agent.

The following authorities may be cited in support of the proposition that where the company charges the premium to the agent directly the relation of creditor and debtor exists. In other words, that the local agent is the owner of the credit against the insured for unpaid insurance premiums.

Walters v. Wandless, 35 S. W. 184 (Texas);
Lamb v. Connor, 146 Pac. Rep. 174 (Wash.)
Elkins & Co. v. Susquehanna Fire Ins. Co., 113 Pa. St. 387;
Lebanon Mutual Ins. Co. v. Hoover, 113 Pa. St. 591;
Long v. North British, etc., Ins. Co., 137 Pa. St. 335;
Wiley v. Fidelity & Casualty Co., 77 Fed. 961.

If the foregoing statement of facts is correct, it seems clear that the true relation of the foreign fire insurance company doing business in this state to its local agent engaged in transacting such business, is that of creditor and debtor, i. e., the company being the creditor and the agent the debtor under said relation.

If this is the true relation between the agent and the company, then it must necessarily follow that the balance in question is a credit of the company arising out of said relation and must be so considered in determining the answer to the question first above stated. Moreover, if said statement of facts is correct it seems equally clear that this same relation exists between domestic fire insurance companies doing business in the state and their agents transacting such business, and the credit of the company arising therefrom is the basis for determining the answer to the question last above stated.

Section 5372-1 G. C., supra, provides that moneys and credits in the possession or control of a person as *agent* must be returned for taxation in the manner therein prescribed. If the conclusion that the agent is the owner of the moneys derived from premiums and the owner of credits on unpaid premiums be correct, then neither are in his possession as agent to be listed for taxation by him in his representative capacity under provision of said statute, but the same should be listed by him as his own personal property under the provision of the statutes governing such return.

If the balances in question are credits of the insurance company charged against the agent and considered as a debt of the agent to the company it is evident that such credits belonging to a domestic fire insurance company must be returned for taxation at the principal place of business of said company and cannot be considered as credits "appertaining especially to a separate business" transacted at a particular place in the state within the meaning of section 5406-3 G. C., supra, and therefore returnable at the place where the agent resides and transacts the business out of which such credits arise. In so far as the domestic company is concerned the business relation existing between the company and its agents and the business transacted in the state by said agents is the same throughout the state. It seems equally clear that such credits belonging to a foreign fire insurance company and arising out of business transacted in this state would not be returnable for taxation under the foregoing provisions of the statutes, it being well settled that, generally speaking, the situs of the credit is the domicile of the creditor which in the case of the foreign company is not within the jurisdiction of this state. The following authorities support this proposition:

R. R. Co. v. Pennsylvania, 15 Wall. 300;
Myers v. Seaberger, 45 O. S. 232;
Green v. Jones, 39 O. S. 506.

The possible exceptions to this general rule are in the case of a foreign corporation having all of its assets and doing all of its business within the state or of a foreign corporation having its principal place of business in a county in this state and transacting all its business here. The holding of the court in the case of Hubbard v. Brush, 61 O. S. 252, applies to a corporation of the first class above mentioned and the syllabus in that case is as follows:

"1. Where all the business of a foreign corporation is transacted in this state, and all of its property situated and taxed here, shares of its capital stock held in this state are exempt from taxation by force of section 2746, Revised Statutes.

"2. Choses in action, whether book accounts, promissory notes, or the like, of foreign corporations that are kept in this state and arise out of the corporate business transacted here, are subject to taxation under the provisions of section 2744, Revised Statutes.

"3. Such corporation, in listing for taxation its 'credits' liable to taxation in this state, may, under the provisions of section 2730, Revised Statutes, deduct from its claims and demands that arise out of the business it transacts in this state, such of its *bona fide* debts as arise from the same source."

In the case of Sims v. Best et al., 1 C. C. (n. s.) 41, it was held that:

"The residence of a foreign corporation having its principal office in a county in this state, from which office all its business is transacted, is for purposes of taxation in such county."

Coming now to a consideration of the second question above stated as limited to foreign life insurance companies doing business in the state, it will be remembered that my former opinion hereinbefore referred to was limited to the question of the taxability of balances in the hands of agents in this state, belonging to fire insurance companies doing business in the state, and did not deal with the taxability of such balances belonging to life insurance companies. It must further be observed that in said opinion, balances, as therein defined, belonging to fire insurance companies doing business in the state, were held to be taxable upon the ground, based upon the facts therein presented, that such balances in the hands of the agent on the tax listing day in any year were in the possession *and* control of such agent as the representative of the company in the particular locality in which said agent transacted the business of the company, and were not in his hands temporarily and merely for the purpose of transmitting the same to said company.

The conclusions reached in this opinion are based on the relation existing between such companies and their agents, as developed from the facts hereinbefore set forth.

As expressing the relation existing between life insurance companies doing business in this state and their agents I quote from Mr. Dunham's brief as follows:

> "Like the savings banks, life insurance companies are essentially trustees of savings; and their business consists principally in the receipt of deposits and their investment and return in accordance with the policy contract.
>
> "All of this business, except the bare collection of premiums from policy holders in foreign states, is transacted at the companies' home offices. As between such corporations and their agents and policy holders there is no system of business credits employed. Each policy specifies a periodic premium on consideration therefor; rules of the company, which are strictly enforced and are scrupulously observed by their agents, forbid the delivery of a policy until the first premium stipulated therefor has been paid. Neither under the terms of the policy nor otherwise, is there any obligation on the policy holder's part to pay either the initial or any renewal premium. On the contrary, the payment of each premium is wholly optional with the policy holder. If the initial premium be not paid the policy, which expressly provides that it shall not constitute an obligation on the company's part unless delivered during the good health of the assured, is not delivered. If renewal premiums be not paid on the anniversary date or within the period of grace allowed by law, the policy lapses.
>
> "At every stage the contract of insurance is unilateral (N. Y. Life Ins. Co. v. Stratham, 93 U. S. 24). It consists in a promise by the company to afford life insurance protection and certain other benefits or advantages in consideration of an annual premium, the payment of which is absolutely optional with the policy holder or his representative. This situation is not even changed by the statutory provision giving the policy holder one month's grace for the payment of renewal premiums. Although the company is liable for death within this period it has no means of collecting the cost of insurance therefor from surviving policy holders who may elect to discontinue their insurance. In other words, the policy holder's option to pay renewal premiums after the due date and during the period of grace remains unchanged, except for the obligation to pay interest upon the amounts overdue if required by the company.
>
> "The principal provisions of policies issued by life insurance companies

are in substance uniform, being prescribed by statute, and their terms are generally familiar. They usually provide that all premiums are payable at the home office, and limit the right to pay premiums otherwise, to designated agents in exchange for receipts signed by an executive officer of the company and countersigned by such agents. The custom likewise prevails among companies of limiting the authority of their agents to represent them. Such power as it might otherwise be inferred they possessed to vary the terms of the company's policy contracts or change the time or manner of paying premiums is expressly denied them. Once the policy is delivered the collection of such renewal premiums as the policy holders may care to pay through them is their only function. They have no funds of the company in their possession or control for any purpose except for transmission to the home office; and the companies have no funds in the hands of agents employed in the transaction of their business in the state of Ohio."

In view of the foregoing, it is evident that balances belonging to foreign life insurance companies doing business in this state and arising out of such business may consist of moneys in the hands of the local agent or credits on account of unpaid premiums due the company. It is clear, however, that moneys in the hands of the agent on the tax listing day in any year are not in his permanent possession or control, but are in his hands temporarily and merely for the purpose of transmission to the company. Under these circumstances can it be said that said balances are taxable under provision of section 5372-1 G. C., supra?

The case of Myers v. Seaberger, supra, involved the attempted assessment of a levy of tax upon personal property of a non-resident consisting of loans secured by mortgages upon real property situated in Ohio which were in the hands of a resident attorney for collection. In that case the court in its opinion quoted the following from the opinion of Welch, J. in Worthington v. Sebastian, Treas., 25 Ohio St. 8.

"Intangible property has no actual situs. If, for the purposes of taxation, we assign it a legal situs, surely that situs should be the place where it is owned, and not the place where it is owed. It is incapable of a separate situs, and must follow the situs either of the creditor or the debtor. To make it follow the residence of the latter, is to tax the debtor and not the creditor."

Commenting on the rule laid down by Welch, J. the court said.

"Such has been the uniform view taken of the question in this state, and elsewhere, except in the state of Pennsylvania, and possibly some others. Bradley v. Bauder, 36 O. S. 28; Grant v. Jones, 39 O. S. 506. In Railroad Co. v. Pennsylvania, 15 Wall. 300, it was held by the supreme court of the United States, that a state cannot tax the credits of non-residents, though secured by mortgage on property in it, on the ground that the situs of a credit being that of the creditor, is not within the jurisdiction of the state, and therefore not subject to taxation by it. While in Kirtland v. Hotchkiss, 100 U. S. 491, it was held that when the creditor resides in the state, his credits are subject to taxation by it, without regard to where the debtor may reside, because the credit, following the residence of the creditor, is within the jurisdiction of the state.

"The rule as above stated is qualified as to 'money' by section 2734 R. S. By this section every person of full age and sound mind is required

to list for taxation 'all moneys invested, loaned, or otherwise, controlled by him, as agent or attorney, or on account of any other person or persons.' But the case before us does not come within this provision. The agent of the defendant had no power to loan or invest money for her in this state. His duties were confined to the collection of that which had been loaned, and transmitting it to his principal as fast as it was collected. The phrase, 'or otherwise controlled by him,' must be construed to mean, in a manner similar to the loaning and investing of money. For it is a settled rule of construction that, in accordance with the maxim *noscitur a sociis,* the meaning of a word may be ascertained by reference to the meaning of words associated with it; and again, according to a similar rule, the coupling of words together shows that they are to be understood in the same sense. * * * To loan or invest money is one thing; to collect and transmit it to the owner when collected, is another and different thing. Any other construction would require every attorney in the state engaged in making collections for non-residents, to return the same for taxation. Such could not have been the intention of the legislature, nor does the language of the statute require that such construction should be placed on it."

The case of Insurance Co. v. Hard, 10 O. D. 469, involved the question of the taxability in this state of uncollected premiums and agents' balances due the company from residents of other states. The court in its opinion said:

"I think it is not tenable that moneys and credits in the hands of agents in other states than Ohio and owned by the company are not taxable in Ohio. The company, in the prosecution of its business, issues its policies through its agents; these agents, wherever they are, in the state or out of it, collect the premiums; perhaps cash is paid, possibly in some instances notes are taken; the agents collect the notes and in due time, under such rules as the company prescribes, these credits are returned to the company in Ohio and to its general office in Medina county. My judgment is that such assets whether in the form of notes for premiums, or cash balances in the hands of agents, are assets taxable in the state of Ohio. * * *

"I think it is the rule in the state of Ohio; that is, that intangible personal property, choses in action, moneys and credits, have no situs apart from the domicile of the owner. A resident of Ohio investing money in the states of Indiana, Illinois or any other state, holding notes therefor which are secured by mortgage in other states, cannot shield himself from taxation for such property, even though the note is made payable in another state, is paid there. Many of our large industrial corporations extend their business into many if not all of the states of this Union, perhaps even farther. They are obliged to extend credit, take notes or hold accounts, and this business is often transacted in other states by the hands of agents who collect these choses in actions and remit the money to the principal office or place of business in this state. Such personal property is clearly taxable in this state where the owner or owners have their domicile and not in the state where the debtor lives or the notes may be payable."

It may be observed in this connection that while the decisions above cited involve the consideration of the statutes of this state as in force prior to the going into effect of the so-called Parrett-Whittemore Law (106 O. L. 246-272), the provisions of said statutes as then in force were not materially changed by said

law in so far as they related to the question now under consideration. By provision of section 5370 of the General Code, formerly section 2734 of the Revised Statutes, considered by the court in the case of Myers v. Seaberger, supra, agents having possession or control of the personal property of non-resident principals were required to list such property for taxation. I think it may be said therefore that the holding of the court in said case operates as a limitation on the duty of the agent to list for taxation the principal's property in his "possession or control" on the tax listing day in any year under provision of said section 5372-1 G. C., supra.

The case of the Metropolitan Life Insurance Co. v. Newark, 62 N. J. L. 74, involved the interpretation of a statute which provided:

> "That every person shall be assessed in the township or ward where he resides for all personal estate in his possession or under his control as trustee, guardian, executor or administrator; and in case the owner or owners of personal estate shall be non-residents of this state, then and in that case the said personal estate shall be taxed in the township or ward where the same may be situated."

An attempt was made under this statute to levy and collect a tax upon an account standing in the name of the company's local superintendent through whom the weekly collections of the Newark district were transmitted to the home office in New York. The court in its opinion said:

> "This money is not the capital of such corporation used or to be used here. It has no situs here whatever. It is intangible, invisible, and in a state of transmission from one hand to the other, and whilst in that state cannot be the subject of taxation."

In the case of Commonwealth v. Prudential Life Insurance Co., 149 Ky. 380, an attempt was made to tax cash in the hands of defendant's agent and deposited in bank for the purpose of transmitting the same to the company's St. Louis office, as personal property in Kentucky. From the statement of facts in that case it appeared that the agent's practice was to forward all moneys collected by him from the business transacted in the state as soon as practicable after receipt of the same and the current expenses incident to the transaction of such business were paid out of other funds forwarded to the agent for that purpose. The court in its opinion said:

> "The exception to the general rule that money and intangible property has only a situs for taxation at the residence of the owner is put distinctly upon the ground that the owner by his conduct in relation to it, or his manner of doing business with it, has given it what may be termed a permanent situs in some other state or locality. It is the permanent feature of the thing which gives the property its situs for taxation in some locality or state other than the residence of the owner."

To the same effect see Board of Assessors of Orleans Parish v. New York Life Insurance Co., 216 U. S. 517.

In view of the foregoing I do not think it can be said that the balances in question are moneys or credits in the hands of the local agent and in his "possession or control" which must be returned for taxation under provision of section 5372-1 G. C., supra. It remains to be determined whether such balances are moneys

or credits "appertaining especially to a separate business" transacted by the company in a particular place within the meaning of section 5406-3 G. C., supra, and as such returnable by the agent at the place where the business is transacted.

What has already been said in this connection relative to the business of fire insurance companies will I think apply with equal force to the business of life insurance companies and the holding of the court in the cases of Hubbard v. Brush and Sims v. Best et al., supra, can only relate to the possible case of the foreign fire insurance company having all of its assets in this state and transacting all its business therein or to the case of such a company having its principal place of business in this state and transacting all of its business here.

As observed by Mr. Vorys in his brief, the legislature in enacting the provisions of section 5406-3 G. C. supra

> "intended to draw a line of demarcation between a company transacting the same business at several places and whose credits appertain to the general business of the company, and a company which transacts separate businesses at several particular places and whose credits respectively and especially appertain to the separate businesses so transacted at the several particular places."

Answering the questions above stated as specifically as the premises will permit and basing my conclusion on the facts hereinbefore set forth, I am of the opinion that balances, existing on the tax listing day in any year, belonging to a fire insurance company or a life insurance company organized under the laws of this state and arising out of business transacted in the state, must be returned for taxation by the proper officers of the company at the principal place of business of such company, and that such balances belonging to a foreign fire or life insurance company are not returnable for taxation as property of the company under any of the foregoing provisions of the statutes.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2101.

SECRETARY OF STATE—CERTIFICATE OF REGISTRATION OF TRADE MARKS—ADVISED TO ACCEPT AND FILE MARK OF OWNERSHIP SHOWING PICTURE OF BOY SCOUT OR COWBOY ON HORSEBACK—EXCELSIOR SHOE COMPANY, PORTSMOUTH, OHIO—SEE OPINION NO. 2002, OCTOBER 30, 1916.

Secretary of state advised to accept and file certificate of registration presented by the Excelsior Shoe Company of Portsmouth, Ohio, for mark of ownership consisting of a picture or representation of a boy scout or cowboy on horseback.

COLUMBUS, OHIO, December 9, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of November 10, 1916, requesting my opinion as follows:

> "We are submitting to your department certificate of registration of marks of ownership on personal property consisting of the picture of

a boy scout and kindly request an opinion upon the question as to whether the same should be filed in this department.

"In view of a former opinion rendered by your department relative to the trade name 'Boy Scouts,' we have refused to file the aforesaid certificate.

"We are also enclosing postal money order to the amount of $1.00."

The certificate of registration which the Excelsior Shoe Company now seeks to file is as follows:

"REGISTRATION OF MARKS OF OWNERSHIP OF PERSONAL PROPERTY.

"APPLICATION OF The Excelsior Shoe Company, an Ohio corporation of Portsmouth, Ohio.

"Witnesseth, That the Excelsior Shoe Company above named, in compliance with 'An Act' of the general assembly of the state of Ohio, passed May 31, 1911, and approved June 7, 1911 (102 O. L., 513), 'to provide for the registration of marks of ownership on personal property, and to make such registered mark prima facie evidence of ownership of property bearing such mark,' hereby makes application for the registration in the office of the secretary of state of the state of Ohio and in the office of the clerk of the court of common pleas of Scioto county, Ohio, said the Excelsior Shoe Company having its principal place of business in the city of Portsmouth, county of Scioto and state of Ohio by filing this written statement or description verified by affidavit of said mark of ownership used by said the Excelsior Shoe Company, to wit:

"The trademark consists of the picture of a scout.

"The class and particular description of goods to which the said trademark has been and is intended to be appropriated are: Class, footwear. Particular description of goods, shoes.

"The said trademark has been continuously used in the business of said corporation since about the fifteenth day of October, 1910.

"The said trademark is usually applied by stamping the same directly on the goods or by means of printed labels showing the trademark or by stamping or printing the same upon the packages containing the goods."

"(Here appears a copy of the trademark consisting of a picture of a fully equipped scout on horseback.)

"(Seal) The Excelsior Shoe Company,
"By J. W. Bannon ,Jr.,
"Secretary.

"State of Ohio, Scioto County, ss:

"J. W. Bannon, Jr., being duly sworn says that he is the secretary of the above named corporation, in whose behalf the foregoing application is made; that said the Excelsior Shoe Company has the right to use such mark of ownership, and that no other person, firm, association, union or corporation has the right to use such mark of ownership, either in the identical form or any such near resemblance thereto as may be calculated to deceive, and that the fac simile or counterparts filed therewith are true and correct.

"J. W. Bannon, Secretary,
"The Excelsior Shoe Company.

"Subscribed in my presence and sworn to before me this 25th day of September, A. D., 1916. "E. H. Hammer,
"Notary Public."

In my former opinion to you to which reference is made in your letter I had under consideration an application made by the Excelsior Shoe Company of Portsmouth, Ohio, for the registration of a trademark consisting of a picture of a fully equipped scout on horseback, labeled over the head with the words: "Boy Scout" in large letters, and underneath with the words: "The Excelsior Shoe Company, Portsmouth, Ohio," in smaller letters.

In that opinion, upon the information before me that the Excelsior Shoe Company at the date of the passage of the federal act incorporating the Boy Scouts of America had no established or vested right to use the name "Boy Scouts" within the meaning of the exceptions contained in section 7 of that act, and that the association known as the Boy Scouts of America at that time had and now have the sole and exclusive right to have and use such name, I advised you that the Excelsior Shoe Company was not entitled to use the name "Boy Scouts" for the purpose recited in its certificate of registration and that you would be fully justified in refusing to accept and file the same.

The basis of my opinion at that time was the unauthorized use of the mark or term "Boy Scouts" by the Excelsior Shoe Company.

In the certificate of registration which the Excelsior Shoe Company now seeks to file, the words "Boy Scouts" do not appear on the trademark, which consists of a fully equipped scout on horseback. So far as I have been able to learn, the Boy Scouts of America do not claim to have originated or that they are the exclusive owners of this mark or emblem. They do protest against its registration and suggest that the purpose of the Excelsior Shoe Company in seeking to secure such registration is to evade or circumvent the effect of your former ruling.

The verified certificate of the Excelsior Shoe Company recites that the company is the owner of and for more than six years past has used the mark which it seeks to register. The Boy Scouts of America do not deny this claim or assert a prior right or claim to the mark or emblem, and it is not to be presumed that the Excelsior Shoe Company will make improper use of a trademark which it registers under section 6240-1, 6240-2 and 6240-3.

I, therefore, advise you upon the information before me that you should accept and file the certificate of registration presented by the Excelsior Shoe Company and enclosed in your letter.

I am returning the enclosures of your letter, also the correspondence belonging to your files which I later secured from your office.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

2102.

BANKS AND BANKING—CIRCULATION OF ADVERTISEMENT—STATEMENT THAT ALL BANKS ARE NOT SAFE AND BANKS WHICH CARRY BANK DEPOSITORS' INSURANCE ARE SAFER THAN THOSE WHICH DO NOT CARRY SUCH INSURANCE, NOT A VIOLATION OF SECTION 13383-1 G. C.

The circulation of an advertisement reciting in substance that all banks are not safe and that banks which carry bank depositors' insurance are safer than banks which do not carry such insurance is not a violation of the provisions of section 13383-1 *G. C.*

COLUMBUS, OHIO, December 11, 1916.

HON. HARRY T. HALL, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of November 21, 1916, requesting my opinion as follows:

> "The following is a copy of an advertisement which is being extensively circulated by certain banks in Ohio:
>
> "'Don't carry the money that you have saved in your pockets or in a belt around your waist.
>
> "'You might meet with an accident and have it stolen while unconscious.
>
> "'Don't bury it in the ground in a can—someone might dig it up and keep it.
>
> "'If you put it in the mattress of your bed or attempt to hide it somewhere in your house, burglars can find it or if your house catches fire the money will burn.
>
> "'There is only one SAFE place to put your money—in a SAFE BANK.
>
> "'Every bank is not a SAFE BANK.
>
> "'A safe bank insures your money against any loss just as your life or house is insured.
>
> "'This bank is a SAFE BANK, because it insures your money. This insurance costs you nothing. Don't put your money in any bank unless it is insured.
>
> "'When you open an account with this bank, we give you a certificate showing that your money is INSURED and will be given back to you whenever you want it.
>
> "'The United States postal banks are as strong and safe as we are, but they pay you only 2%, while we pay you more on all savings.'
>
> "Will you kindly advise if such an advertisement conflicts with section 13383-1 of the banking laws of Ohio?"

Section 13383-1 of the General Code (103 O. L. 469), to which you call my attention, is as follows:

> "Whoever, directly or indirectly, wilfully and knowingly makes or transmits to another, or circulates, or counsels, aids, procures or induces another to make, transmit or circulate, any false or untrue statement, rumor or suggestion derogatory to the financial condition, solvency or

financial standing of any bank, savings bank, banking association, building and loan association or trust company, doing business in this state, or with intent to depress the value of the stocks, bonds or securities of any corporation, directly or indirectly, wilfully and knowingly makes or transmits to another, circulates or counsels, aids, procures or induces another to make, transmit or circulate, any false or untrue statement, rumor or suggestion derogatory to the financial condition, or with respect to the earnings or management of the business of any corporation, or resorts to any fraudulent means with intent to depress in value the stocks, bonds or securities of any corporation shall be fined not more than one thousand dollars or imprisoned in the penitentiary not more than two years, or both."

It is clear from the language of the above section that "the untrue statement, rumor or suggestion," which it is intended to prohibit must be directed against or made concerning a particular bank, savings bank, banking association, building and loan association or trust company. An affidavit or indictment charging the offense punishable under said section would be defective unless it named the bank or other institution injured or intended to be injured.

The advertising matter set forth in your letter does not name or indicate the identity of any bank which is represented to be unsafe. It is ostensibly issued to promote the business of banks which carry insurance for the benefit of their depositors as opposed to banks which do not carry insurance. Its chief purpose is perhaps to advertise the bank deposit insurance company. In substance, it expresses the opinion or conclusion that a bank which carries insurance guaranteeing payment to its depositors is safer than a bank which does not carry such insurance.

I, therefore, advise you that the advertising matter referred to in your letter does not constitute a violation of the provisions of section 13383-1 of the General Code.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2103.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY CITY OF MOUNT VERNON, OHIO.

COLUMBUS, OHIO, December 11, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE: Bonds of the city of Mount Vernon, Ohio, in the amount of $11,653.65, for the improvement of Adams street sewer district No. 1, by the construction of sanitary sewers therein, being one bond of $653.65, two bonds of $500.00 each and ten bonds of one thousand dollars each."

I have examined the transcript of the proceedings of the council and other officers of the city of Mount Vernon relative to the above bond issue; also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of the city of Mount Vernon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2104.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY CITY OF MOUNT VERNON, OHIO.

COLUMBUS, OHIO, December 11, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE: Bonds of the city of Mount Vernon, Ohio, is the amount of $13,162.47, for the improvement of Vine street from Main to Norton streets, being one bond of $162.47, ten bonds of $300.00 each, and ten bonds of one thousand dollars each."

I have examined the transcript of the proceedings of the council and other officers of the city of Mount Vernon in connection with the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds when drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of the said city.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2105.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY CITY OF WAPAKONETA, OHIO.

COLUMBUS, OHIO, December 11, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE: Bonds of the city of Wapakoneta, in the amount of $5,300.00 to provide funds to pay the city's portion of the cost and expense of certain improvements, viz: West Anglaize street improvement from the end of the present asphalt pavement to the west line of Pearl street. The Middle street improvement extending from Water street east to the corporation line, and on Johnson street extending from Auglaize street to Middle street, and on Water street extending from Auglaize street to Mechanic street, being ten bonds of $530.00 each."

I have examined the transcript of proceedings of the council and other officers of the city of Wapakoneta, in connection with the above bond issue, also the bond and coupon form attached, and I find the same regular and in accordance with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of the said city.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2106.

APPROVAL, LEASE FOR OIL AND GAS PURPOSES TO J. R. ELDER, PORTION OF HOCKING CANAL PROPERTY IN HOCKING AND ATHENS COUNTIES.

COLUMBUS, OHIO, December 12, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication of December 5, 1916, transmitting to me for examination a lease for oil and gas purposes to J. R. Elder of a portion of the abandoned Hocking canal property in Hocking and Athens counties. I find this lease to be properly drawn and am therefore returning the same with my approval endorsed upon the triplicate copies thereof.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2107.

YOUNGSTOWN ARMORY—APPROVAL OF ABSTRACT OF TITLE FOR CERTAIN REAL ESTATE IN CITY OF YOUNGSTOWN, OHIO.

COLUMBUS, OHIO, December 12, 1916.

The Ohio State Armory Board, Columbus, Ohio.

GENTLEMEN:—At your request I have examined the abstract of title to the following described premises:

> "Situated in the city of Youngstown, county of Mahoning, and state of Ohio, and known as being the west fifteen (15) feet of city lot number six hundred and forty-three (No. 643), all of city lots numbers six hundred and forty-four (No. 644) and six hundred and forty-five (No. 645), according to the latest enumeration of Youngstown city lots and out-lots, bounded and described in one parcel as follows:
>
> "Beginning on the south-westerly side of West Rayen avenue at a point which is distant north-westerly 275 feet from the intersection of the south-westerly line of West Rayen avenue, with the north-westerly line of Holmes street; thence south-westerly parallel with the north-westerly line of Holmes street, a distance of two hundred (200) feet to the north-easterly line of Pine alley; thence north-westerly along the north-easterly line of said Pine Alley, a distance of one hundred and fifty (150) feet to the south-easterly corner of city lot No. 646; thence north-easterly along the south-easterly line of said city lot No. 646, a distance of one hundred and ninety-nine (199) feet to the south-westerly line of West Rayen avenue; thence south-easterly along the south-westerly line of West Rayen avenue, a distance of one hundred and fifty (150) feet to the place of beginning; formerly known as a part of sub-lot No. 21 and all of sub-lot No. 22 of Parmelee's sub-division, plat of which is recorded in volume 1, page 25, Mahoning County Records of Maps."

From my examination of said abstract of title I am of the opinion that the state of Ohio has a good and indefeasible estate in said premises, subject only to the payment of the taxes for the year 1916.

The abstract and papers accompanying it, which you submitted to me, are herewith returned.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2108.

JUDGE OF COURT OF APPEALS—HOW COMMISSION SHOULD READ —"APPELLATE" INSTEAD OF "JUDICIAL."

A commission which describes the person to whom it is issued as "judge of the court of appeals, Sixth judicial district," is valid, but, to be exact, such commission should be drawn to read "judge of the court of appeals, Sixth Appellate district."

COLUMBUS, OHIO, December 13, 1916.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—You have handed me a communication addressed to you by Hon. Silas S. Richards, judge of the court of appeals of the Sixth appellate district, with the request that I advise you as to the matter referred to therein. The communication from Judge Richards reads as follows:

> "I have received through the clerk of courts my commission as judge of the court of appeals for this district. This commission reads in two places: 'Judge of the court of appeals, Sixth judicial district.' By the amendment to the constitution made in 1912, article IV, section 6, the state was divided into 'appellate' districts. It occurs to me that by reason of this provision, it would be preferable if the commission read: 'Sixth appellate district,' instead of 'Sixth judicial district.' If you or the attorney-general think the commission should be corrected to read as I suggest, I will return the same for that purpose, but the correction, if made, should be done promptly as the statute requires that the person holding the commission shall qualify within a limited time."

Section 6 of article IV of the constitution of Ohio contains the following provision:

> "The state shall be divided into appellate districts of compact territory bounded by county lines, in each of which there shall be a court of appeals consisting of three judges, and until altered by law the circuits in which the circuit courts are now held shall constitute the appellate districts aforesaid."

From the above it appears that the observation of Judge Richards as to the language proper to be used in his commission is correct. He should have been commissioned as "judge of the court of appeals, Sixth appellate district." An appellate district is, however, a judicial district. It is one of the districts into which the state is divided for judicial purposes. It can not, therefore, be said that the language used in the commission is wholly incorrect and Judge Richards aptly puts the matter when he says that the expression suggested by him would have been preferable to that actually used. The commission as actually drawn identifies its holder as a judge of the court of appeals and sets forth the number of the district in and for which he was elected.

I have no doubt whatever that any court called upon to consider the validity of this commission would reach the conclusion that the commission sufficiently identifies the office to which its holder was elected and it is my opinion that the commission in its present form is valid. However, if time permits and Judge

Richards is so disposed it might be well in the interest of exactness and in order to avoid any possible question in the future, to return the commission and have the same corrected to read "Sixth appellate district."

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2109.

MUNICIPAL CORPORATION—WHERE COUNCIL AUTHORIZED TO ENACT ORDINANCES FIXING SALARY OF DIRECTOR OF PUBLIC SERVICE PAYABLE PARTLY FROM SERVICE AND PARTLY FROM WATER WORKS FUNDS—PROPORTION WITHIN DISCRETION OF COUNCIL.

Council of a city is authorized to pass ordinances fixing the salary of the director of public service and making same payable part from the public service fund and part from the water works fund.

The division between the two funds is within the sound discretion of council and should be according to amount of time spent for each activity.

COLUMBUS, OHIO, December 13, 1916.

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

GENTLEMEN:—Under date of November 28, 1916, you submitted for my opinion the following:

> "We respectfully request your written opinion on the following matter:
>
> "The council of the city of Ravenna, Ohio, on December 21, 1915, passed an ordinance fixing the salary of the director of public service at $1,800.00 per year, payable monthly, half to be paid from the public service fund and half from the water works fund.
>
> (1) In view of the provisions of sections 3956 and 3959 G. C., is such ordinance legal, and are such payments from the water works fund legal?
>
> (2) Under the provisions of the sections above mentioned, if part payment of the salary of the director of public service is legal from the water works fund, would it not be necessary to ascertain exactly what proportion of his time is devoted to the management and control of the water works?"

Section 4214 G. C. relative to council of cities provides:

> "Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation * * * ."

The title referred to is title XII, part first of the General Code. I do not find in the said title any provision of the statute for the fixing of the salary of the director of public service otherwise. Therefore, the salary of the director of public service is to be fixed by council.

While section 4327 G. C. authorizes the director of public service to establish such sub-departments as may be necessary and determine the number of superintendents, etc., necessary for the execution of the work and the performance of the duties of that department, nevertheless section 3956 G. C. provides as follows:

> "The director of public service shall manage, conduct and control the water works, furnish supplies of water, collect water rents and appoint necessary officers and agents."

Therefore, the director of public service is entrusted by virtue of the statutes with the duty of managing the water works department.

Section 3959 G. C. provides as follows:

> "After paying the expenses of conducting and managing the water works, any surplus therefrom may be applied to the repairs," etc.

It would seem to me, therefore, entirely proper for council to provide for the payment of a part of the salary of the director of public service from the revenues derived from the water works, and it would be entirely within the reasonable discretion of council to determine what part of the time of said director was so employed and could therefore determine the proportion of the salary that was to be paid from the water works revenues, the balance of course to be paid from the general revenue fund.

Specifically answering your questions, therefore, I am of the opinion:

First: That an ordinance of council fixing the salary of the director of public service, part to be paid from the public service fund and part to be paid from the water works fund, would be legal.

Second: In view of the discretion vested in council I do not believe that it is necessary to ascertain *exactly* what proportion of the time of the director of public service is devoted to the management and control of the water works, but that council should determine the approximate amount of time so devoted and pay from the water works revenues such proportion of the salary of said director of public service.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2110.

CORPORATIONS—FAILURE TO FILE CERTIFICATE REDUCING CAPITAL STOCK OF CORPORATION WHICH HAD REDUCED SAME BEFORE MONTH OF MAY—SUCH CERTIFICATE WHEN FILED WILL RELATE BACK TO TIME OF REDUCTION.

A corporation that has reduced its capital stock before the month of May, but has failed to file its certificate of such action with the secretary of state, must file such certificate before the tax commission can take cognizance of the fact. After such certificate is filed, it will, so far as the franchise tax is concerned, relate back to the time of the reduction.

COLUMBUS, OHIO, December 13, 1916.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of December 1, 1916, wherein you submit the following inquiry:

> "The Miles-Harvard Park Company, a domestic corporation for profit, by the board of directors upon the consent of the stockholders, reduced the authorized capital stock of said company on April 5, 1916, from $60,000.00 to $600. The certificate of reduction, as required by section 8700 G. C., was filed with the secretary of state July 14, 1916.
>
> "We inquire whether the company in making its report as a domestic corporation for profit in May, should have given the amounts of authorized, subscribed, issued and outstanding and paid-up capital stock as before or after the reduction was made?"

Section 8700 G. C. provides as follows:

> "With the written consent of the persons in whose names a majority of the shares of the capital stock thereof stands on its books, the board of directors of such a corporation may reduce the amount of its capital stock and the nominal value of all the shares thereof, and issue certificates therefor. The rights of creditors shall not be affected thereby; and a certificate of such action shall be filed with the secretary of state."

Said section authorizes the reduction of capital stock on the written consent of the person in whose name the majority of shares stands on its books. With such written consent the board of directors may reduce the amount of the capital stock and the nominal value of the shares and issue certificates therefor. In other words, whenever the written consent of the owners of the majority of the capital stock of a corporation is obtained, that constitutes sufficient authority for the board of directors to proceed to reduce the capital stock and to issue the certificates at the reduced value. The filing of the certificate of the action taken by the directors in reducing the capital stock, filed in the office of the secretary of state, is only evidentiary of the fact that the reduction has taken place.

Section 5495 G. C. requires each domestic corporation for profit to report during the month of May.

Section 5497 G. C. states what the report shall contain. Paragraph 5 thereof states as follows:

"The amount of authorized capital stock and the par value of each share."

Paragraph 6 states:

"The amount of capital stock subscribed, the amount of capital stock issued and outstanding, and the amount of capital stock paid-up."

The actual condition of the corporation as it exists during the month of May is what is to be reported.

If under section 8700 G. C. a corporation has proceeded to and has completed the reduction of the capital stock, all prior to the time of the filing of the report in May, the mere fact that the evidence of the reduction of the capital stock is not filed with the secretary of state would not, so far as the Willis law tax is concerned, change the actual fact that the reduction had taken place. The state could not take cognizance of the fact of the reduction until the certificate is filed, but after the certificate has been filed showing that the reduction took place prior to the time of the filing of the report, the amount of subscribed or issued and outstanding stock as shown by the report should be certified to the auditor of state.

I am, therefore, of the opinion that a corporation making its report as a domestic corporation for profit in May, having reduced its capital stock prior to that time should give the amount of authorized, subscribed, issued and outstanding, and paid-up capital stock as the same cannot be considered by the tax commission until the certificate provided for by section 8700 G. C. has been filed. After having been filed, however, the actual condition of the corporation at the time of the filing of the report should govern.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2111

LOCAL OPTION ELECTION—APPROVAL OF FORM OF PETITION AUTHORIZED BY SECTION 6119 G. C.—TOWNSHIP OUTSIDE OF A MUNICIPAL CORPORATION.

Approval of petition for a township local option election, pursuant to section 6119 G. C. et seq, therein set forth, as to form.

COLUMBUS, OHIO, December 14, 1916.

HON. DEAN E. STANLEY, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—I have your inquiry under date of December 12, 1916, as follows:

"I desire to inquire if the form of petition which follows will justify and make it the duty of township trustees in a township in which there is a village to call an election under G. C. 6119. You will note the last sentence says Salem township and makes no reference to the village and that it also sets forth the section of the code. The petition reads as follows:

"'To the trustees of Salem township, Warren county, Ohio: We, the undersigned, being qualified electors of the township of Salem, Warren county, Ohio, residing outside of any municipal corporation, respectfully petition your honorable body to order an election in accordance with section 6119, General Code, to ascertain the will of the voters of Salem township whether the sale of intoxicating liquor as beverage shall be prohibited therein.'"

Section 6119 G. C., to which reference is made, provides as follows:

"When one-fourth of the qualified electors of a township, residing outside of a municipal corporation, petition the trustees of such township for the privilege to determine by ballot whether the sale of intoxicating liquors as a beverage shall be prohibited within the limits of such township and without the limits of a municipal corporation, such trustees shall order a special election for such purpose to be held at the usual place or places for holding elections in the township."

No form of petition is specifically required by statute. The petition, however, makes specific reference to section 6119 G. C., which authorizes or requires elections to be held only in the territory of townships outside of a municipal corporation. It will be further noted that the petition itself states that the signers thereof are residents of the township named residing outside of any municipal corporation. The reference in the petition to section 6119 G. C. serves to direct the attention of the township trustees to the provisions of that section and it is the duty of the township trustees to take notice of said provisions, which by the terms thereof are applicable only to the territory of a township outside of a municipal corporation. It seems clear that the provisions of this section taken together with the statement of the petition that the signers thereof are residents only of the territory of the township outside of any municipal corporation, are amply sufficient to give full notice to the trustees and to such other persons as may be concerned therein of the character of election sought to be held.

I am, therefore, of opinion that the petition set forth in your inquiry is a substantial compliance with the provisions of section 6119 G. C. and, therefore, warrants the township trustees, upon their determination that the same has been duly signed by at least one-fourth of the qualified electors of the township residing outside of a municipal corporation, in ordering the election as prayed for in said petition pursuant to the provisions of section 6119 et seq. of the General Code.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2112.

APPROVAL, SALE OF CANAL LANDS IN LICKING COUNTY TO SYLVESTER A. MEARS.

COLUMBUS, OHIO, December 14, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication of December

11, 1916, transmitting to me a resolution providing for the private sale to Sylvester A. Mears of a tract of abandoned canal property in Madison township, Licking county, Ohio, appraised at $442.00.

I find that the resolution is properly drawn and recites the necessary jurisdictional facts and I am, therefore, returning the same with my signature attached to the duplicate copies thereof.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2113.

TAXES AND TAXATION—PROPER EXCISE TAX TO BE CHARGED AGAINST D. B. TORPY AS RECEIVER OF MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY.

It appearing that the property of the Marietta, Columbus and Cleveland Railroad Company was sold by the receiver of said company under the order of the court on July 18, 1916*; that said sale was confirmed by the court on the* 30*th day of September,* 1916, *and that the operation of the property has been wholly discontinued since October,* 31, 1916, *this opinion recommends to the state tax commission that the offer of the receiver of said company to pay the excise tax for four months or one-third of the current year, be accepted.*

COLUMBUS, OHIO, December 15, 1916.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your letter of December 1 enclosing a letter and affidavit of Hon. D. B. Torpy relative to the excise tax charged against the Marietta, Columbus and Cleveland Railroad Company for the year 1916. You refer the same to me for such recommendation as I see fit to make.

Mr. Torpy's affidavit is in part as follows:

"D. B. Torpy, of Marietta, Ohio, being by me first duly sworn, deposes and says that on the 10th day of July, 1914, he was duly appointed and qualified as receiver of the Marietta, Columbus and Cleveland Railroad Company by the common pleas court of Washington county, Ohio, and was thereafter by said court duly appointed and qualified as a special master commissioner to sell all the property of said company; that he sold said property at public sale on the 18th day of July, 1916, to H. H. Isham, of Elizabeth, New Jersey, for one hundred thousand dollars ($100,000). Said sale was confirmed by the court on the 30th day of September, 1916, on which last named day the court ordered all passenger, mail and express business discontinued on the 10th day of October, 1916, and all freight business on the 31st day of October, 1916, owing to the unsafe condition of the track and trestles of the road, the owners being wholly unable to procure funds to put the property in safe condition. This order was strictly observed and the operation of the property wholly discontinued since October 31, 1916.

"The treasurer of the state of Ohio has notified affiant that the excise

tax due the state for the year ending June 30, 1917, and payable by December 15, 1916, is $2,656.40, and, unless the same is paid by that date, a penalty will be added and the collection of the tax and penalty enforced."

From the above statement of facts it appears that while the property of the railroad company in question was sold at public sale on July 18, 1916, this sale was not confirmed by the court until September 30 and Mr. Torpy, as receiver for said company, continued to operate said road in respect to all kinds of traffic until after this latter date.

Section 5415 G. C. provides:

"The term 'public utility' as used in this act means and embraces each corporation, company, firm, individual and association, their lessees, trustees, or receivers elected or appointed by any authority whatsoever, and herein referred to as * * * railroad company * * * , and such term 'public utility' shall include any plant or property owned or operated, or both, by any such companies, corporations, firms, individuals or associations."

Section 5416 G. C. provides:

"That any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated: .

* * * * * * *

"When engaged in the business of operating a railroad, either wholly or partially within this state, on rights-of-way acquired and held exclusively by such company, or otherwise, is a railroad company."

In view of the provisions of sections 5415 and 5416 G. C., supra, it is evident that the receiver of the railroad company in question, so long as he is engaged in operating said railroad, is a "public utility" within the meaning of that term as above defined.

Section 5470 G. C. (106 O. L., 571) provides:

"* * * each * * * railroad company, shall, annually, on or before the first day of September, under the oath of the person constituting such company, if a person, * * * make and file with the commission (the tax commission) a statement in such form as the commission may prescribe."

Section 5472 G. C. provides:

"In the case of each railroad company such statement shall also contain the entire gross earnings, including all sums earned or charged, whether actually received or not, for the year ending on the thirtieth day of June next preceding, from whatever source derived, for business done within this state, excluding therefrom all earnings derived wholly from interstate business or business done for the federal government. Such statement shall also contain the total gross earnings of such company for such period in this state from business done within this state."

Section 5477 G. C. provides:

"On the first Monday of October, the commission shall ascertain and determine the gross earnings as herein provided, of each railroad company whose line is wholly or partially within this state, for the year ending on the thirtieth day of June next preceding, excluding therefrom all earnings derived wholly from interstate business or business done for the federal government. The amount so ascertained by the commission shall be the gross earnings of such railroad company for such year."

Section 5482 G. C. provides:

"On the first Monday of November the commission shall certify to the auditor of state the amount of the gross earnings so determined of each street, suburban and interurban railroad and railroad company for the year ending on the thirtieth day of June next preceding."

Section 5486 G. C. provides:

"In the month of November the auditor of state shall charge for collection, from each railroad company, a sum in the nature of an excise tax, for the privilege of carrying on its intra-state business, to be computed on the amount so fixed and reported to him by the commission, as the gross earnings of such company on its intra-state business for the year as covered by its annual report to the commission, as required in this act, by taking four per cent. of all such gross earnings, which tax shall not be less than ten dollars in any case."

In view of the foregoing provisions of the statutes it seems reasonably clear that the tax charged by the auditor of state in November of any year under the authority of section 5486 G. C., supra, and computed on the amount of the gross earnings for the year ending on the 30th day of June next preceding, is a tax on the privilege of continuing to do business as a public utility. My predecessor, Hon. Timothy S. Hogan, in an opinion to your commission under date of December 31, 1914, (Annual Report of the Attorney General for the Year 1914, vol. II, page 1697) so held and this conclusion is supported by the holding of the court in the case of Express Co. v. State 55 O. S. 69. The court in its opinion at page 81 said:

"The tax is not laid on the gross receipts for the year 1894, but those receipts are taken as the standard by which to determine the amount of the excise tax to be paid for the privilege of doing business in the state for the year 1895 (which was the year succeeding the making of the report.)"

It may be observed, however, that no provision of the statutes determines on what day the year for the privilege of conducting the public utility business during which the tax in question is exacted, commences. Nor has said day been fixed by any decision of the courts.

In this connection I quote the following from Mr. Hogan's opinion above referred to:

> "I do not find it necessary to determine whether, if the company had done business for a few days after June 30th, but had gone out of business on the date on which the report was required to be filed, viz., the first of August, it would have been liable for the tax. I incline, however, to the view, without officially stating it as such, that the division point is the thirtieth day of June; so that if a company continues in business after the thirtieth day of June it is exercising the privilege and is liable for the tax. In such a case the mere fact that after a few days have elapsed the company may go out of business does not change the result if the company had the privilege of doing business for a year or indefinitely in the future, and asserted that privilege by doing some business after the division date; so that if of its own volition it abandoned the exercise of the privilege before the year elapsed, this would not detract from the value of the privilege."

I do not find it necessary, however, to decide the question as to whether the first day of July or the first day of September, the last day on which the report provided for in section 5470 G. C., supra, is required to be filed, marks the beginning of the year for which the tax is assessed. It is sufficient to observe, as has already been stated, that the receiver of the railroad in question was operating said railroad in respect to all classes of traffic on the first day of September, 1916, the later of these two possible dates, and that on that date it did not clearly appear that the business of said public utility would be terminated at any particular time.

In view of the foregoing it is evident that the situation presented by the question decided by Mr. Hogan in his opinion hereinbefore referred to and the one now under consideration may be stated as follows: The year within which some business must be done in order to make a railroad company liable for the excise tax must begin not earlier than the first of July and not later than the first of September. In the case considered by Mr. Hogan, the utility, an express company, the dates with respect to which are the same, had ceased doing business on the first of July; and in the case now under consideratoin the utility was still doing business on the first day of September. Therefore, neither case requires an answer to the possible question as to which of the two dates suggested is the proper one.

I find no provision of the statutes authorizing a refunder of a part of the tax in case the privilege of doing business is renounced and the business discontinued after the commencement of the year for which the tax is assessed, and in view of the holding of my predecessor above set forth I would be warranted in advising you that as a matter of law the tax in question as applied to public utilities in general is collectible in its entirety even though the business is discontinued shortly after the commencement of the year for which the tax is asssesed.

In view of the peculiar facts and circumstances of the case under consideration, however, I think an equitable deduction from the claim for the tax for the entire year should be allowed. I understand that Mr. Torpy, as receiver for said company, is authorized and has offered to pay the tax for four months, or one-third of the current year, and I, therefore, recommend that this fractional amount, properly computed in the manner prescribed by section 5486 G. C., supra, and at the per cent therein named, be accepted.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2114.

APPROVAL, LEASES OF CERTAIN CANAL AND RESERVOIR LANDS TO THE NORTHWESTERN OHIO LIGHT COMPANY AND HOWARD G. GOODWIN.

COLUMBUS, OHIO, December 16, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication of December 13, 1916, transmitting to me for examination a lease to the Northwestern Ohio Light Company of certain canal lands at Delphos, and also a lease to Howard G. Goodwin of certain reservoir land in Summit county.

I find these leases to be in regular form and am, therefore, returning the same with my approval endorsed upon the triplicate copies thereof.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2115.

PROSECUTING ATTORNEY—WHEN SAID OFFICER MAY ACCEPT EMPLOYMENT FROM COUNCIL OF VILLAGE—LIMITATIONS OF STATUTES AS TO SUCH EMPLOYMENT DISCUSSED—VILLAGE COUNSEL.

The prosecuting attorney of a county may not accept employment from the council of a village in such county, acting under authority of sections 4220 *G. C., to represent such village in any matter in which the interest of the village is adverse to that of the county, township, school district or other taxing district in said county, or to that of either of the boards mentioned in section* 2917-1 *G. C., or in any matter involving the taxing authority of the council of said village and coming before the county budget commission, but said prosecuting attorney may accept employment from the council of said village in matters involving the rights of the village which are outside and independent of the relations above referred to, where the rendering of service by said prosecuting attorney in his personal capacity as an attorney at law to such village will not conflict directly or indirectly with the full performance of his official duties as prosecuting attorney of the county. It would be proper to place in such a contract of employment a provision to the effect that the employment by the village council shall not extend to any matter which may directly or indirectly conflict with the performance of the official duties of such prosecuting attorney.*

COLUMBUS, OHIO, December 16, 1916.

HON. DEAN E. STANLEY, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—Your letter of December 8 is as follows:

"Is it lawful for a prosecuting attorney of a county in this state to accept employment, under section 4220 of the General Code, as legal coun-

sel for a village and the officers thereof, for a stated period of time, when such village is located within his county? And would such employment be incompatible with his holding the office of prosecuting attorney? Would it be proper to place in the contract of employment a provision to the effect that the employment by the village council should not extend to any matter which might directly or indirectly, conflict with the duties of such prosecuting attorney?"

Section 4220 G. C. provides:

"When it deems it necessary, the village council may provide legal counsel for the village, or any department or official thereof, for a period not to exceed two years, and provide compensation therefor."

By provision of section 2917 G. C. the prosecuting attorney of the county is made the legal adviser of the county commissioners and all other county officers and county boards and any of them may require of him written opinions or instructions in matters connected with their official duties. He is required to prosecute and defend all suits and actions which any such officer or board may direct or to which it is a party, and no county officer may employ other counsel or attorney at the expense of the county except as provided in section 2412 G. C. By the further provision of said section 2917 G. C. the prosecuting attorney is made the legal adviser for all township officers, and no such officer may employ other counsel or attorney except on the order of the township trustees duly entered upon their journal, in which the compensation to be paid for such legal services shall be fixed.

Section 2917-1 G. C. (106 O. L. 452) makes the prosecuting attorney the legal adviser of the board of deputy state supervisors of elections, or the board of deputy state supervisors and inspectors of elections, as the case may be, of his county and requires him to prosecute and defend all suits, actions or proceedings which said board may direct or to which it is a party.

By provision of section 4761 G. C. the prosecuting attorney of the county is the legal adviser of all boards of education of the county which he is serving, except boards of education in city school districts, and said provision of said section makes the prosecuting attorney the legal counsel of such boards or the officers thereof in all civil actions brought by or against them and he is required to conduct such actions in his official capacity, except in the case when such civil action is between two or more boards of education in the same county, in which case the prosecuting attorney shall not be required to act for either of said boards. The authority of a board of education in such case to employ an attorney other than the prosecuting attorney is recognized in section 2918 G. C., the first part of which provides that:

"Nothing in the preceding two sections shall prevent a school board from employing counsel to represent it, but such counsel, when so employed, shall be paid by such school board from the school fund."

The prosecuting attorney is *ex officio* a member of the county budget commission under provision of section 5649-3h G. C. (106 O. L. 180.)

In view of the foregoing provisions of the statutes it is evident that the prosecuting attorney of a county, in the performance of his duties therein prescribed, could not consistently represent a village in such county in any matter in which the interest of the village would be adverse to the county, township,

school district or other taxing district above referred to, or in any matter involving the taxing authority of the council of said village and coming before the county budget commission of which, as has already been noted, the prosecuting attorney is *ex officio* a member. I am of the opinion that as to all such matters the prosecuting attorney of the county could not consistently represent the village and could not, therefore, accept employment from the council of said village acting under authority of section 4220 G. C., supra.

However, in matters involving the rights of such village which are outside and independent of the relations above referred to, as, for instance, where the interest of the village is adverse to that of an individual or where the proper performance of a contract between said village and an individual, firm or corporation is in dispute, it is evident that the rendering of service by the prosecuting attorney in his personal capacity as an attorney at law to such a village would not necessarily conflict with the performance of his official duties, and if it should appear that his employment by the council of a village in the county under authority of section 4220 G. C. in connection with these matters last above referred to does not conflict directly or indirectly with the performance of his official duties as prosecuting attorney of the county and that the rendering of service according to the terms of such employment will not interfere in any way with the full performance of said official duties, I can see no objection to such employment and I am of the opinion that as to said latter matters and subject to the limitations above set forth the prosecuting attorney of the county may accept employment from the council of a village, within such county, acting under authority of said section 4220 G. C.

Answering your question specifically, I am of the opinion that the prosecuting attorney of the county may not accept employment from the council of a village in such county, acting under authority of section 4220 G. C. supra, to represent such village in any matter in which the interest of the village is adverse to that of the county, township, school district or other taxing district in said county, or to that of either of the boards mentioned in section 2917-1 G. C. supra, or in any matter involving the taxing authority of the council of said village and coming before the county budget commission, but that said prosecuting attorney may accept employment from the council of said village in matters involving the rights of the village which are outside and independent of the relations above referred to, where the rendering of service by said prosecuting attorney in his personal capacity as an attorney at law to such village will not conflict directly or indirectly with the full performance of his official duties as prosecuting attorney of the county. I am of the further opinion that it would be proper to place in the contract of employment a provision to the effect that the employment by the village council shall not extend to any matter which may directly or indirectly conflict with the performance of the official duties of such prosecuting attorney.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2116.

APPROVAL, SUPPLEMENTAL CONTRACT FOR CONSTRUCTION AND COMPLETION OF COTTAGE NO. 4 AT MASSILLON STATE HOSPITAL.

COLUMBUS, OHIO, December 16, 1916.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I have gone over the supplemental contract entered into on the 16th day of September, 1916, by the Ohio Board of Administration and the Cullen & Vaughn Company, relative to the construction and completion of cottage No. 4 at the Massillon state hospital, and have this day approved the same and am returning the said contract with my approval duly endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2117.

DITCH MAPS—COUNTY COMMISSIONERS ARE NOT AUTHORIZED TO CONTRACT WITH COUNTY SURVEYOR FOR MAKING SAME.

Under the facts as submitted, the county commissioners of Hardin county were not authorized to contract with the county surveyor for the making of ditch maps, and payments to such county surveyor on acccount of said contract were unauthorized. The transaction does not, however, fall within the purview of section 12910 *G. C.*

COLUMBUS, OHIO, December 18, 1916.

HON. DONALD F. MELHORN, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR:—Your request for an opinion, under date of November 29, 1916, reads as follows:

> "Mr. Edwin E. Hall, state examiner, on page 82 of his 1916 report of examination of Hardin county offices, makes a finding against ex-Surveyor L. R. Anspach, for the recovery of $375.00, paid said Anspach for ditch maps made by him while acting as surveyor of Hardin county. Said finding sets forth the whole transaction between the county commissioners and Mr. Anspach, and is in words and figures following:
>
> "'DITCH MAPS.
>
> "On the commissioners' journal under date of December 28, 1914, appears the following:
>
> "In the matter of contract with L. R. Anspach, December 28, 1914.
>
> "This day the commissioners contracted with L. R. Anspach to construct maps of each of the fifteen (15) townships of Hardin county, to scale of four inches to the mile, showing the exact location and watershed of all county ditches to date, same to be indicated by the name and number of the ditch and the volume and page of the ditch record in which said ditch is recorded. Said maps to show the farm lines and owners'

names as near to date of construction as possible. Also that two copies of Van Dyke black lines prints be made on canvas, one copy to be placed in the county commissioners' office and one in Hardin county surveyor's office. The sum of the contract not to exceed the expenditure of the sum of $375.00.

"(Signed) L. R. ANSPACH.

"(Auditor's certificate attached.)

"Under and by virtue of the foregoing contract, County Surveyor L. R. Anspach made the maps designated and was paid the following amounts:

"Date.	Warrant.	To Whom.	Purpose	Amount
"1915.				
"Jan. 9	27919	L. R. Anspach	Partial estimate ditch maps	$ 75.00
"Apr. 10	29145	L. R. Anspach	Final estimate ditch maps	300.00
"Total				$375.00

"Your examiner knows of no law authorizing the making of such a contract. The only ditch maps that we know of are those provided by sections 6454 and 6456 G. C., and the provision for maps in section 6565-9, a special act concerning joint ditches. None of these sections provide for maps such as were made and paid for.

"Finding:

"In consideration of the facts it is held that the sum of $375.00 was appropriated without any authority in law and that the same should be paid into the county treasury by ex-Surveyor L. R. Anspach.

"Before submitting my questions I would supplement the information contained in the above quoted excerpt by saying, first, that the ditch maps in question are of great utility in the surveyor's office; secondly, the price paid is reasonable, in view of the labor involved in their preparation; thirdly, the contract was let in good faith on the part both of the county commissioners and Mr. L. R. Anspach.

"I desire to know, first, whether the county commissioners had the legal right to enter into a contract for the purchase of said ditch maps; and, secondly, whether said contract comes within the purview of Code Section 12910."

Sections 6454 and 6456 G. C., referred to by Mr. Hall, are a part of the law relating to single county ditches and authorize the county commissioners, in case they find for any specific improvement petitioned for, to direct the county surveyor to make, among other things, a profile and plat of the proposed improvement, the plat to be drawn upon a scale sufficiently large to represent the meanderings of the proposed improvement and to distinctly show boundary lines, names of owners and other similar information.

In referring to section 6565-9 G. C., Mr. Hall evidently intended to refer to section 6563-9 G. C., which section is a part of the law relating to joint county ditches, and authorizes the making of a map showing all the lands benefited by any specific projected improvement, together with a description thereof, including the acreage and names of owners. None of these sections could be so construed as to authorize a contract of the character referred to in your communication. I know of no other section of the General Code authorizing the making of such a

contract, and it is my opinion, in answer to your first question, that the commissioners were without legal right or authority to enter into the contract in question.

This conclusion is strengthened by the fact that during the period of time beginning December 28, 1914, the date of the contract between the county commissioners and Mr. Anspach, and ending April 10, 1915, the date of final payment on account of the completion of said contract, Mr. Anspach was allowed and paid a fee of $5.00 for each working day, the work being done on bridges, roads and ditches, and the allowance made under section 2822 G. C. During the same period Mr. Anspach was also compensated at the rate of $25.00 per month as tax map draughtsman, under authority of sections 5551 and 5552 G. C. These facts are set forth by you in a communication dated December 8, 1916, replying to my request for additional information. Even if the county commissioners were authorized to employ the county surveyor to make ditch maps, the county surveyor would not be authorized to do the work while supposedly employed continuously with other official duties and while being compensated for the same upon a basis requiring all his time.

Section 12910 G. C., referred to by you in your communication, reads as follows:

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

A reference to the terms of the agreement between the county commissioners of Hardin county and L. R. Anspach indicates that the contract cannot be regarded as one for the purchase of property or supplies or fire insurance and for this reason it is my opinion, in answer to your second question, that the contract referred to by you does not come within the purview of section 12910 G. C. The contract is to be regarded merely as one for the services of Mr. Anspach in the making or constructing of certain maps. The thing for which the commissioners agreed to pay was the time and services of Mr. Anspach, and section 12910 G. C. could not be regarded as applicable for the reason that under the contract in question the county did not acquire "property" or "supplies" in the sense in which those terms are used in the section in question

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2118.

JOINT COUNTY ROAD IMPROVEMENT—PROPORTIONS OF EXPENSES PAYABLE BY EACH COUNTY MUST BE RAISED BY SAME METHOD IN EACH COUNTY—JOINT BOARD NOT LIMITED IN ITS POWER TO CONTRACT WITH VARIOUS BOARDS OF TOWNSHIP TRUSTEES—MAY OR MAY NOT CONTRACT WITH BOARDS INTERESTED.

Where a joint board of county commissioners, either upon a petition or by unanimous vote and without the presentation of a petition, determines to make a road improvement and specially assess any part of the cost thereof, adopting for that purpose any one of the methods provided in section 6919 G. C., the respective proportions of the compensation, damages, costs and expenses payable by each county must be raised by the same method in each county.

Where a joint board of county commissioners, proceeding without a petition and by a unanimous vote, determines to construct a road improvement, which improvement will necessarily extend into at least two townships, and further determines that the entire cost of the improvement shall be paid by general taxation and without any special assessments, the joint board is not limited in its power to contract with township trustees to the making of a contract with each board of trustees and involving the payment by it of the same proportion of the cost and expense assumed by the other interested board or boards of township trustees, but may make contracts with the several interested boards of township trustees, calling for the payment of varying proportions of the cost, or may make a contract with one interested board of trustees without making any contract whatever with the other interested board or boards.

COLUMBUS, OHIO, December 21, 1916.

HON. EARL K. SOLETHER, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—I acknowledge the receipt of your inquiry of December 4, 1916, which is as follows:

> "Proceedings for a joint county road improvement are being contemplated by the Wood and Seneca county boards of county commissioners. The proposed road improvement being on the county line between Wood and Seneca counties for a distance of six miles, and lying between Jackson township in Seneca county and Perry township in Wood county.
>
> "Heretofore, all roads improved in Jackson township, Seneca county, have been built by a general levy over Jackson township. The roads in Perry township heretofore have been constructed by a levy of two-fifths against the land owners within one mile of the improvement and three-fifths against the township. This improvement is to be constructed by the joint board by resolution and not upon petition. Further, the commissioners of Seneca county have agreed with the trustees of Jackson township, that they will pay ten per cent, of Jackson township's share of constructing this improvement, the balance of Jackson township's share to be assessed against Jackson township.
>
> "I have before me your opinion No. 1441, dated March 30, 1916, which states that you are of opinion that 'the respective portions of the costs and expenses payable by each county must be raised by the same method in each county, which method is to be set forth in the petition when the board is acting upon a petition and is to be determined by the board when acting without a petition.'

"The joint board has asked my opinion concerning this matter as they wish to proceed under a resolution and pay the damages, costs, etc., as outlined by me in my first statement. As this question is one which is of general interest over the state, I, therefore, respectfully solicit your opinion thereon.

"The question is then, whether the joint board, after granting the improvement under a resolution, is at liberty to allow each county to choose its own method of assessment.

"In connection with this, I wish to call your attention to section 6921 G. C., section 100 of the Cass road law, section 6927 G. C., section 106 Cass road law, 6928 G. C., section 108 Cass road law.

"In your opinion No. 1441 you do not mention either of the foregoing sections. It would seem from reading sections 6921, 6927 and 6928 G. C., that the legislature has enacted a law which is applicable to just such a case as we have here.

"The intention of the joint board in this case is to enter into an agreement with the trustees of the respective townships to pay for the improvement as hereinbefore set forth."

Opinion No. 1441, referred to by you and rendered by this department on March 30, 1916, to Hon. Franklin J. Stalter, prosecuting attorney of Wyandot county, and Hon. Donald F. Melhorn, prosecuting attorney of Hardin county, dealt with the situation presented where it is proposed by a joint board of county commissioners, either upon a petition or by unanimous vote without a petition, to pay the compensation, damages, costs and expenses of an improvement in some one of the several methods provided by section 6919 G. C. The opinion is not specifically so limited, but was intended to apply only where one of the methods of payment provided by section 6919 G. C. was adopted and some part of the compensation, damages, costs and expenses specially assessed, and the references in the opinion to special assessments indicate its limitations. I still adhere to the view expressed in the opinion in question and for the reasons fully set forth therein advise you that where a joint board of county commissioners, either upon a petition or by unanimous vote and without the presentation of a petition, determines to make an improvement and specially assess any part of the cost thereof, adopting for that purpose any one of the methods provided in section 6919 G. C., the respective proportions of the compensation, damages, costs and expenses payable by each county must be raised by the same method in each county.

Section 6921 G. C., referred to by you, was not considered in opinion No. 1441 G. C., supra, for the reason that such section is intended to apply where a board of county commissioners, or joint board, proceeds by unanimous vote and without a petition and determines that all the compensation, damages, costs and expenses shall be paid by general taxation. The language of the section in question, to the effect that the county commissioners, or joint board thereof, may enter into an agreement with the trustees of the township or townships in which said improvement is in whole or in part situated, whereby said county and township, *or one or more of them,* may pay such proportion or amount of the damages, costs and expenses as may be agreed upon between them, is sufficiently broad to warrant the conclusion that where a joint board of county commissioners is constructing an improvement of the character referred to by you, that is to say, a road upon a county line, and where it has been determined that the entire cost shall be paid by general taxation, then the joint board may make agreements of a different character with the two or more interested townships, and looking toward the assumption by such townships of varying proportions of the total

cost; or the joint board may make an agreement of this character with one interested board of township trustees and refrain from making a similar agreement with the other interested board or boards of trustees.

I, therefore, advise you that where a joint board of county commissioners, proceeding without a petition and by a unanimous vote, determines to construct an improvement, which improvement will necessarily extend into at least two townships, and further determines that the entire cost of the improvement shall be paid by general taxation and without any special assessments, the joint board is not limited in its power to contract with township trustees to the making of a contract with each board of trustees and involving the payment by it of the same proportion of the cost and expense assumed by the other interested board or boards of township trustees, but may make contracts with the several interested boards of township trustees, calling for the payment of varying proportions of the cost, or may make a contract with one interested board of trustees without making any contract whatever with the other interested board or boards. As above set forth, however, this conclusion does not apply where any one of the several methods of payment set forth in section 6919 G. C. is adopted and where some portion of the compensation, damages, costs and expenses is therefore to be specially assessed.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2119.

APPROVAL, RESOLUTION FOR IMPROVEMENT OF BARBERTON-GREENWICH ROAD IN HURON COUNTY.

COLUMBUS, OHIO, December 21, 1916.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of December 18, 1916, transmitting to me for examination final resolution relating to the improvement of section "B" of the Barberton-Greenwich road, Petition No. 2520, I. C. H. No. 97, Huron county.

I find this resolution to be in regular form and am, therefore, returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2120.

APPROVAL, LEASES OF CERTAIN RESERVOIR AND CANAL LANDS TO ALVA B. JONES AND T. V. TAYLOR, RESPECTIVELY.

COLUMBUS, OHIO, December 21, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication of December

12, 1916, transmitting to me for examination a lease to Alva B. Jones of certain reservoir lands at Indian Lake, valued at $3,000.00, and also a lease to T. V. Taylor of certain canal lands at Troy, valued at $200.00.

I find these leases to be in regular form and am, therefore, returning the same with my approval endorsed upon the triplicate copies thereof.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2121.

LAND REGISTRATION—RULES TO BE FOLLOWED WHICH GOVERN DISPENSING WITH COMPLETE RECORD IN PROBATE COURT OF SUCH PROCEEDINGS.

The following rules govern the dispensing with a complete record of land registration proceedings in the probate court:

1. *When an independent application for registration is dismissed without prejudice no complete record of the proceedings may be made except upon the order of the party and payment of the official fee.*

2. *When a "separate cause of action" for registration set up in a petition for partition or to sell land to pay debts is dismissed without prejudice, and the main case proceeds to judgment or is dismissed otherwise than without prejudice, the complete record of the main case need not include any of the proceedings for registration excepting so much of the petition as relates thereto, and the entry of dismissal of the application for registration; when the main case is subsequently or contemporaneously dismissed without prejudice no complete record should be made at all.*

3. *In no case has the probate court discretionary power to dispense with the making of a complete record in registration proceedings, but discretionary power does exist in such court to dispense with complete recordation of copies of voluminous papers, etc., attached to pleadings.*

4. *In no other case is there authority to dispense with the making of a complete record in registration proceedings in the probate court.*

COLUMBUS, OHIO, December 21, 1916.

HON. ROGER D. HAY, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—I have your letter of recent date submitting the following inquiry:

> "Since the Torrens law was enacted several suits have been brought in the probate court of Defiance county, Ohio, to have real estate owned by decedents registered and for authority to sell such real estate for purpose of obtaining money with which to pay debts and costs of administration.
>
> "Shortly after the enactment of the Torrens law the late Humphrey Jones of Washington C. H., caused to be issued and circulated a pamphlet in the nature of a short treatise on the Ohio title registration law; in this pamphlet Mr. Jones lays down the doctrine that in proceedings to register title and sell real estate to pay debts of a decedent estate that the probate court may dispense with the making of a complete record.

"If the probate court can dispense with the making of a complete record in a proceeding therein to register title and obtain an order to sell real estate to pay debts of decedent estate, the revenue of the county derived from court costs will be considerably reduced.

"While I have found authority for the court of common pleas to dispense with the making of a complete record in certain cases, I have been unable to find any authority other than the opinion of Mr. Jones for the probate court to dispense with a complete record.

. "If you will render an opinion on the question of the right of probate courts to dispense with the complete records in the Torrens law proceedings, the favor will be much appreciated."

The general power of a probate court to dispense with the making of a complete record in any case within its jurisdiction must be determined by a consideration of the following sections:

"Section 1594: The following books shall be kept by the probate court: * * *

"A final record, which shall contain a complete record in each cause or matter of the petitions, answers, demurrers, motions, returns, reports, verdicts, awards, orders and judgments, which shall be made and completed within ninety days after the final order or judgment has been made in such cause or matter. * * *

"Section 11212 G. C. The provisions of law governing civil proceedings in the court of common pleas, so far as applicable, shall govern like proceedings in the probate court, when there is no provision on the subject in this title.

"Section 11605 G. C. (Applicable primarily to the common pleas court): Except as hereinafter provided, the clerk shall make a complete record of every cause as soon as it is finally determined, unless such record, or some part thereof, be waived.

"Section 11607 G. C. The record shall be made up from the petition, the process, return, pleadings subsequent thereto, reports, verdicts, orders, judgments and all material acts and proceedings of the court. If items of an account, or copies of papers attached to pleadings, are voluminous, the court may order the record to be made by abbreviating them or inserting a pertinent description thereof, or by omitting them entirely.

"Section 11611 G. C. A complete record shall not be made:

"1. When action has been dismissed without prejudice to a future action;

"2. In actions in which, in open court, at the term at which the final order or judgment is made, both parties declare their agreement that no record shall be made.

"Section 11612 G. C. When an action has been dismissed without prejudice to a future action, the clerk shall make a complete record of the proceedings, upon being paid therefor by the party requesting it."

It is apparent, I think, at a glance that the probate court can have at most no greater power to dispense with the making of a complete record of any case than that possessed by the court of common pleas. I am of opinion that the combined effect of the sections above cited is such that the power of the probate court at least in the exercise of its general jurisdiction is the same as that of the common pleas court. Therefore, so far as these sections are concerned the probate court may dispense with the making of a complete record only when an action

has been dismissed without prejudice to a future action or when in open court and within term time "both parties declare their agreement that no record shall be made." However, if the exhibits, etc., are voluminous the probate court as well as the common pleas court may order them abbreviated in the complete record or omit them therefrom entirely.

It remains, however, to be determined whether or not the special proceeding to which your inquiry relates is of such a character as that the general powers of the probate court as above described may be exercised therein.

At the outset it may be remarked that the powers of the probate court as such in the particular inquired about by you are as extensive as those of the common pleas court. This is made apparent by the provisions of section 1 of the so-called Torrens law, being section 8572-1 G. C. as amended 104 O. L. 146. That section provides as follows:

> "Concurrent jurisdiction, except as otherwise provided, is hereby conferred upon the common pleas and probate courts in all matters arising under this act. The probate court, for the purpose of this act and as to the jurisdiction hereby conferred, shall have all the powers, both at law and in equity, of a court of general jurisdiction."

Because the jurisdiction to be exercised under the Torrens law is concurrent in the two courts therein mentioned and because the powers of the probate court when exercising such jurisdiction are to be those of a court of general jurisdiction (and the only court of general jurisdiction under the constitution and laws of Ohio is the common pleas court) it is made very clear that no distinction can be drawn between the power of a probate court and the power of a common pleas court when acting under the Torrens law. The question submitted by you, therefore, is to be answered by determining whether any court in which a proceeding for the registration of title may be brought has authority to dispense in whole or in part with the making of a complete record thereof.

I find it unnecessary for the present purpose to describe in detail the theory and practical operation of the so-called Torrens land law originally enacted in 103 O. L. 914. It is sufficient to observe that the jurisdiction and proceedings therein provided for culminate in a decree of registration a certified copy of which, required to be filed immediately upon the entry thereof in the office of the county recorder, seems to constitute the "registration" at which the whole proceeding is aimed. (See section 23 of the act, section 8572-23 G. C., 103 O. L. 936.)

The provisions of the related sections make is absolutely clear that a final record of the proceeding for registration or of the cause in which registration may be prayed for as incidental or ancillary relief is not a prerequisite to registration as such. Section 22 of the act, section 8572-22 G. C. as amended 104 O. L. 146, provides in very explicit terms for the making of the jurisdictional act that underlies registration. In part it is as follows:

> "If the court after a hearing finds that the applicant has title in whole or in part * * * and proper for registration, then to the extent of the title so found a *decree* of confirmation and registration shall be *entered,* which shall have the effect of a decree in rem and, subject only to (certain) exceptions * * * shall bind the land and all interests, rights, and estates therein and liens and charges thereon and * * * shall be absolutely conclusive upon and against all persons * * * whether mentioned * * * or included in the general description, 'all other persons if any, having any right or interest in or lien upon the lands or any part thereof,' and whether * * * unknown or unascertained * * * "

"Every decree of registration shall bear date * * * and shall be signed by the clerk. * * * The decree shall be stated in a form convenient for transcription upon or binding in the register of certificates of title hereinafter mentioned, and in a form suitable to constitute it a certificate of title * * * ."

The next succeeding section already referred to provides that:

"Immediately upon the entry of the decree of registration, the clerk shall send a certified copy thereof * * * to the recorder of deeds for the county in which the land or any part thereof lies, and the recorder shall transcribe or bind the decree in a book to be called register of titles, in which a leaf or leaves in consecutive order shall be devoted exclusively to each title * * * . The entry made by the recorder in this book in each case shall be the original certificate of title, and shall be signed by him * * * ."

From these sections it is clear that the Torrens act does not of itself require the making of a complete record as a condition of registration.

On the other hand it is equally clear to me that there is nothing in the nature of the registration proceedings provided for by the Torrens act nor in the provisions of the act itself which would enable any court exercising such jurisdiction to dispense with the making of a complete record under any circumstances other than those under which it is authorized to do so generally; that is to say, the power of the court to take such action is no greater in registration cases than in other cases. The general principle then which must govern the answer to your question becomes established in the statement that the probate court, when exercising in any way the jurisdiction vested in it by the so-called Torrens land act, may dispense with the making of a complete record under precisely the same circumstances under which it might do so when exercising any other jurisdiction committed to it. A complete record is a final memorial of the proceedings in a cause evidential in character and particular in form. It is not the primary record of the court's action and in the most exact sense is not the record at all. Were it not for the statutes which require a complete record to be made up save in certain cases there would be no necessity for making such record.

Bearing in mind, then, that a complete record must be made up in all cases except where the cause is dismissed without prejudice and where both parties in open court and in term time enter their agreement that such a record may be dispensed with, we may proceed to an examination of the registration act with the inquiry as to whether or not under that act either of these circumstances may arise.

Section 8572-20 G. C., being section 20 of the Torrens law, 103 O. L. 914, provides in part as follows:

"If the court finds that the applicant has not title proper for registration, a decree shall be entered dismissing the application, and such decree may be ordered to be without prejudice, in whole or in part; but unless it is so ordered it shall bind the parties, their privies and the land in respect of any issue of fact or law which has been tried and determined. * * * ."

In my opinion a complete record may and should be dispensed with in all cases in which the application or petition for registration is wholly dismissed without prejudice as authorized in this section. Such action comes squarely

within the first provision of section 11611 G. C., and under that provision and section 11612 G. C. the dispensing with a complete record is not discretionary with the court and the clerk, but it is the duty of the latter officer not to proceed to make up a final record except upon demand of one of the parties and payment of the fees therefor. But if the application for registration is dismissed without prejudice in part only, such a dismissal would not be a dismissal of the "action" without prejudice within the meaning of section 11611 G. C. and in such case a complete record should be made.

It is to be observed in this connection that according to section 8572-7 G. C. section 7 of the Torrens law, the application to register is to be made "by petition as in the commencement of a civil action."

Another question which it is necessary to answer here is as to whether or not the probate court has authority to dismiss wholly without prejudice an application for registration made in the course of a proceeding to sell real estate to pay debts, or for partition, and whether or not such dismissal would be a dismissal of the action without prejudice within the meaning of section 11611 G. C.; for what I have previously said relates only to cases in which the application for registration constitutes the only proceeding in the cause.

Your inquiry involves a consideration of section 8572-64 G. C., being section 64 of the original Torrens law as amended 106 O. L. 24. The section in its present form provides as follows:

> "In all suits to sell an estate in fee in the whole of unregistered land brought by an assignee or trustee for the benefit of creditors, commissioners of insolvents, receiver, master commissioner, administrator, executor or other person appointed by a court and in all suits to partition unregistered land held in fee, proper allegations and parties necessary to a decree for original registration of the title to said estate may be made in the petition, the said allegations to be included in a separate cause of action, and said title, before any order of sale or partition is made or entered in the case may, with the approval of the court in which such action is pending, be registered as provided in this act, in the name of the person, whether living or dead, whose title is sought to be sold, or in the names of the tenants in common, as the case may be, except that, if the legal title is in any such assignee, trustee, receiver or other person appointed by a court, the same may be so registered and the purposes for which said legal title is held stated in the decree and certificate of title. * * * In any such suit where registration of title to land is prayed for all parties shall for all purposes of the case be brought before the court in the manner provided for original registration in other cases. The court may, for good cause shown, in any case provided for in this section, enter an order dispensing with registration or permit the withdrawal of the application to register."

While this section has the effect of making the application for registration in the suits of which it speaks merely a separate cause of action in a conventional sense, yet it is apparent, I think, upon consideration that in a very real sense it is more than a mere separate cause of action and is in point of fact a separate and distinct proceeding authorized to be joined merely for the sake of convenience. This is true because it appears not only that the service of summons in the main proceeding to sell or to partition will not be efficacious to bring the natural parties to such proceedings before the court for the purpose of registration; but in addition to such service of summons it is expressly required by the section as above quoted that such parties shall also be brought before the court

"in the manner provided for original registration in other cases," i. e., by publication as provided by section 8572-14 G. C. and by registered letter as provided by section 8572-15 G. C. Moreover, other parties may be brought into the case for the purpose of registration, and indeed must be, though not proper parties to the proceeding to sell or to partition. It is clear, therefore, that while the two proceedings may go on concurrently and be initiated by the same petition with separate causes of action they do not constitute a single civil action for the purpose of the code of civil procedure, but for that purpose must be regarded as separate and distinct actions.

Section 8572-64 G. C. expressly authorizes the court to dispense with registration in causes to which it relates and to permit the dismissal of the application to register, and in my opinion this authority, together with the general authority already referred to, is sufficient to empower the court exercising such jurisdiction to permit the dismissal of the application for registration without prejudice. When that is done the complete record of the proceeding to sell or the suit in partition may, and in my opinion must, be made up without recording any of the proceedings therein relative to registration excepting the petition, which I do not think should be split up for this purpose. That is to say, where the "separate cause of action" for registration is stated in the petition to sell real estate or for partition and then the proceedings in registration are dismissed without prejudice, while the main proceeding goes on to a conclusion. The complete record of the main proceeding should contain the petition in full, but need not contain any of the other proceedings therein relative to registration, except the entry of dismissal.

The third question remains to be considered, namely, as to whether or not a complete record may be dispensed with in any registration proceedings under the second subdivision of section 11611 G. C.

In my opinion this cannot be done. That provision requires the agreement in open court of "both parties" to dispense with the complete record. This language is appropriate only to ordinary adversary proceedings, and can have no reference to proceedings under the Torrens law which are purely in rem. At the very most the defendants in a registration proceeding are all those persons who may claim or have any interest in the premises desired to be registered ad verse to that of the applicant. It is obvious, therefore, that the language, "both parties," cannot apply to such a case.

From what I have said it will be apparent that I cannot agree with Mr. Humphrey Jones in his broad statement that in any registration proceeding the court may dispense with the making of a complete record, but on the other hand I am convinced that under certain circumstances such a complete record may be dispensed with.

To recapitulate, those circumstances are as follows:

1. Where there is an independent application for registration under the Torrens law and the same is dismissed without prejudice as it may be, the probate judge, acting as clerk of his court or the clerk of the common pleas court, is not authorized to make a complete record of the proceedings thus dismissed except upon the order of a party and payment of his fees.

2. Where, in a proceeding to sell real estate to pay debts or a suit for partition, a "separate cause of action" is set up in the petition applying for registration and such "separate cause of action" is subsequently dismissed without prejudice, and the main case proceeds to judgment or is dismissed otherwise than without prejudice, the complete record which must then be made need not include any of the proceedings for registration, excepting so much of the petition as relates

thereto, and the entry of dismissal; of course, when the main case is itself subsequently or contemporaneously dismissed without prejudice no complete record should be made at all.

3. In no case has the probate court or any other court discretionary power to dispense with the making of a complete record. Such a record is either to be dispensed with under the circumstances above stated or must be made. The court has no control over the matter.

4. The probate court has, however, the authority in common with the common pleas court to permit the abbreviation of a complete record in registration proceedings as in other proceedings, by the omission therefrom of the contents of voluminous exhibits, etc., attached to pleadings, as provided by section 11607 G. C. This authority, as the section cited shows, does not extend to the omission of any process or pleading, but merely to the abbreviation or omission of items or an account (which of course does not apply in registration proceedings) or copies of papers attached to pleadings.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2122.

APPROVAL, LEASE FOR PORTION OF ABANDONED OHIO CANAL TO THE SCIOTO VALLEY TRACTION COMPANY.

COLUMBUS, OHIO, December 21, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication of December 19, 1916, transmitting to me for examination a lease to The Scioto Valley Traction Co., of a portion of the abandoned Ohio canal.

I find this lease to be in regular form and am, therefore, returning the same with my approval endorsed upon the triplicate copies thereof.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2123.

JUDGE OF COMMON PLEAS CCURT—VOTES CAST FOR CONGRESSMAN WHO HOLDS COMMON PLEAS JUDGESHIP—CONSTITUTIONAL LIMITATION NOT APPLICABLE TO SUCH OFFICE—CERTIFICATE OF ELECTION.

The governor is not authorized to withhold a certificate of election to the office of representative to congress by reason of the fact that the person so elected is at the time a judge of a court of common pleas under authority of the laws of Ohio.

COLUMBUS, OHIO, December 22, 1916.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Yours under date of December 16, 1916, is as follows:

"At the recent election held November 7, John S. Snook was elected to congress in the Fifth district of Ohio. It happens that he is and was at that time and had for some time preceding this election been judge of the common pleas court of Paulding county, Ohio.

"Will you please advise me officially whether or not Mr. Snook is entitled to his certificate in view of the fact that article 4, section 17 of the constitution, and section 4826 of the General Code provides that 'all votes for any judge for an elective office, except a judicial office, under the authority of this state, given by the general assembly, or by the people shall be void.'"

Section 14 of article IV of the constitution of Ohio provides as follows:

"The judges of the supreme court, and of the court of common pleas, shall at stated times, receive, for their services, such compensation as may be provided by law; which shall not be diminished or increased, during their term of office; but they shall receive no fees or perquisites, nor hold any other office of profit or trust, under the authority of this state, or of the United States. All votes for either of them for any elective office, except a judicial office, under the authority of this state, given by the general assembly, or the people, shall be void."

Section 4826 G. C., 103 O. L., 23, provides:

"All general elections for elective state and county offices and for the office of judge of the court of appeals shall be held on the first Tuesday after the first Monday of November in the even numbered years. All votes for any judge for an elective office except a judicial office, under the authority of this state, given by the general assembly, or by the people, shall be void."

The only change effected by the amendment in 103 O. L., 23, of the last sentence of section 4826 G. C., supra, was the omission of the comma after the word "office" first appearing therein. This omission may have arisen from a mere inadvertence. Assuming, however, that such omission was intentional, it tends to indicate a legislative construction or a purpose to clarify this provision. If any effect may be given to this omission, I think it must be, at least so far as the statutory provision is concerned, to more clearly limit its application to elective offices under the authority of this state. It could, perhaps, not be argued, however, that this change in the statutory provision would throw any light upon the proper interpretation to be given to the language of the constitution.

Upon the question submitted my predecessor, Hon. Timothy S. Hogan, rendered an opinion addressed to Hon. Warren Gard, judge of the common pleas court, Butler county, Ohio, under date of October 11, 1912, found at page 2031 of the Report of the Attorney-General for that year, in which it was held, in reference to article IV, section 14 of the constitution of Ohio, that:

"Said provision also makes void all votes cast in behalf of such judicial officers for any elective office under authority of this state, but does not invalidate votes cast for an officer of the Federal government."

It seems clear that the phrase "under the authority of this state "modifies the phrase "elective office" rather than the phrase "judicial office" in the same sentence, by reason whereof the latter provision of said section 14 of article IV

is limited by its terms in its application to offices "under the authority of this state" and therefore has no application to offices under authority of the federal government. I, therefore, concur in the opinion of my predecessor, above referred to.

In 1902 Hon. D. C. Badger, then judge of the common pleas court of Franklin county, Ohio, was elected representative to congress, a case parallel to that submitted by you, which was considered by Hon. R. W. Taylor, then chairman of elections, committee No. 1, of the national house of representatives, who was later judge of the district court of the United States, northern district of Ohio, and it was by him held that the fact of Mr. Badger being at the time of his election a judge of the common pleas court, under authority of the laws of Ohio, was not ground for a contest of his election.

In view of the opinion of my predecessor, and the precedent above cited, together with others of a similar character which might be mentioned, I respectfully advise, in answer to your inquiry, that a certificate of election should issue to Hon. John S. Snook, therein referred to.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2124.

COMMON PLEAS JUDGE—ASSIGNED BY CHIEF JUSTICE OF SUPREME COURT—NOT ENTITLED TO COMPENSATION FOR DAY ON WHICH JUDGMENT IS ENTERED IN CAUSE PREVIOUSLY HEARD, UNLESS HE *ACTUALLY* HOLDS SUCH COURT ON SUCH DAY.

A common pleas judge assigned by the chief justice of the supreme court under section 1469 *G. C. to aid in disposing of business in some county other than that in which he resides, is entitled to the special compensation of* $10.00 *per day, under section* 2253 *G. C., for such days only as he is actually present in such other county, holding court therein under such assignment, or ready to do so, if his inability to hold court is due to the failure of the parties or their counsel to attend or to any other cause beyond his control. Such compensation is not payable for a day on which a judgment is entered in a cause previously heard by him, unless he actually holds such court on such day.*

COLUMBUS, OHIO, December 22, 1916.

HON. WILLIAM P. HENDERSON, *Common Pleas Judge, Kenton, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of December 9, in which you request my opinion as follows:

> "A judge of the court of common pleas is assigned by the chief justice, under section 1469, to aid in disposing of business in some county other than that in which he resides; while there, cases are submitted to him and held for consideration; afterwards, when his opinions and entries are prepared, instead of returning, he sends the papers back to the clerk to be entered on the journal.

"In such case is he entitled to receive his per diem of $10.00 under section 2253 for the day upon which such cases so submitted are disposed of and his decision entered on the journal under such assignment, although he was not then actually present in such county, but sent the entries and other papers to the clerk as above stated?"

Section 2253 of the General Code as amended, 104 O. L., 250, provides in part as follows:

"Sec. 2253. * * * :each judge of the court of common pleas who is assigned by the chief justice by virtue of section 1469, to aid in disposing of business of some county other than that in which he resides, shall receive ten dollars per day for each day of such assignment, and his actual and necessary expenses incurred in holding court under such assignment, to be paid from the treasury of the county to which he is so assigned upon the warrant of the auditor of such county, and the amount allowed herein for actual and necessary expenses shall not exceed three hundred dollars in any one year."

Section 1469, to which reference is made in this section and in your letter, merely authorizes the chief justice of the supreme court under certain circumstances to "assign a judge or judges from another county in the state to aid in disposing of such business."

The language requiring interpretation is the phrase "each day of such assignment."

At first blush it would seem apparent that the statutes contemplate that the chief justice will designate a specific number of days in his assignment. This, however, can scarcely be the case. The service required of the judge is to aid in disposing of business. Everything done by him in disposing of such business is work done under the assignment.

On the other hand, it would not be practicable to take account of time spent by the judge so assigned after his return to his own county, in the consideration of cases submitted.

These considerations induce me to adopt the following as a working definition of the phrase "such assignment" as used in section 2253 G. C., viz.:

The time spent on the assignment referred to in section 2253 G. C. is to be measured by the time during which the judge actually holds court in the county to which he is assigned.

The main and essential service required of the judge in "disposing of business" is holding court. The record of the court would ordinarily show the days on which the judge held court, and I presume that you have these considerations in mind in inquiring whether the day of the journal entry, which is the day on which the record shows that such judge holds court in the county—although as a matter of fact he is not there—should be included.

On careful consideration I am of the opinion that your question must be answered in the negative. I do not think that the records of the court are to be conclusive evidence of the number of days spent on the assignment. On the contrary, I think the county auditor, drawing a warrant, should require the common pleas judge to make a statement as to the number of days during which he actually sat on the bench of the common pleas court of the foreign county and conducted the business of that court at the place appointed therefor. Such number of days constitute "days of such assignment," within the meaning of section 2253 G. C.

This general statement, however, requires in my opinion amplification in one particular. It might conceivably happen that a judge, acting under such an assign-

ment, might proceed to a county to which he had been assigned for the purpose of holding court, and be ready to hold court, but that through the failure of parties or their counsel to attend as expected, he would be prevented from so doing; so that the judge might remain in the foreign county for one or more days in readiness to hold court, and be prevented from so doing because of such circumstances. In such cases I believe he would be entitled to draw his compensation for each day so spent.

The true principle would seem to be, then, that the judge would be entitled to his special compensation for such days only as he is actually present in the other county, holding court therein under such assignment, or ready to do so, if his inability to hold court is due to the failure of the parties or their counsel to attend or to any cause beyond his control.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2125.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY VILLAGE OF EATON, OHIO.

COLUMBUS, OHIO, December 26, 1916.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE: Bonds of the village of Eaton, Ohio, for the property owners' share of improving West Main street, being ten bonds of three hundred and fifty dollars each.

I have examined the transcript submitted to me relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of the village of Eaton.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2126.

APPROVAL, SALE OF CANAL LANDS IN CITY OF MASSILLON TO THE HESS-SNYDER CO.—ALSO SALE OF CANAL LANDS IN LICKING COUNTY, OHIO, TO EMMA E. MEARS.

COLUMBUS, OHIO, December 27, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your communications of December 22, 1916, transmitting to me for examination resolutions providing for the sale of

certain canal lands in the city of Massillon, to the Hess-Snyder Co., and the sale of a tract of abandoned Ohio canal land in Licking county, Ohio, to Emma E. Mears.

I find these resolutions to be properly drawn and to contain a recital of the necessary jurisdictional facts and I am, therefore, returning the same with my signature attached to the duplicate copies thereof.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2127.

APPROVAL, PUBLIC SALE OF CANAL PROPERTY IN CITY OF CHILLICOTHE, OHIO, TO THE SEARS AND NICHOLS CANNING COMPANY.

COLUMBUS, OHIO, December 27, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—Under date of December 26, 1916, you submitted to me a statement of your proceedings relative to the public sale of The Sears & Nichols Canning Company of Chillicothe, Ohio, of a portion of the abandoned Ohio canal property, the sale being made under authority of section 3 of an act of the general assembly passed May 31, 1911, 102 O. L., 293, the act providing for the abandonment of certain portions of the Ohio canal and the selling and leasing of the lands connected therewith, and also under authority of section 13971 of the Appendix to the General Code. You have also submitted to me copies of the advertisement made in the Daily Scioto Gazette and the Chillicothe News-Advertiser.

I find that the sale of the land in question is authorized by the statutes, that advertisement of the same was duly made and that your proceedings in this matter are regular. I am, therefore, returning your communication with my signature attached to the duplicate form of approval.

I am retaining for the files of this department the copies of the advertisement submitted by you.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2128.

BOARD OF ADMINISTRATION—GIRLS' INDUSTRIAL SCHOOL—NO APPROPRIATION TO PAY MATERNITY EXPENSES OF SUCH INMATES WHO ARE OUT ON PROBATION.

The board of administration has no available appropriation from which to pay maternity expenses of inmates of the girls' industrial school out on probation or under contract of employment.

COLUMBUS, OHIO, December 28, 1916.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—Referring to your enquiry concerning the payment of medical expenses incurred for the care of girls who are inmates of the Girls' Industrial

School released from that institution on probation or under contract of employment, permit me to advise that this matter has been receiving attention for some time, and in view of the condition of the law which provides for the employment of a physician at the Girls' Industrial School and the further provision of the contract of employment:

> "That in case said girl becomes ill he will furnish her with proper medical care and attention and immediately notify the chief matron,"

it must be said that while the authority exists for the payment of the medical expenses at the home there is no appropriation available for the payment of extraordinary medical expenses incurred while the girl is under contract of employment and not in the home, and consequently it would require the action of the general assembly before bills for such medical services could be paid.

I am of the opinion that your board is in better position, perhaps, than any one else to determine whether or not conditions are such that an effort should be made to have appropriate legislation drafted to meet the conditions.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2129.

CANAL LANDS—PROPOSED LEASE TO CITY OF DOVER—WHEN LEASE SHOULD BE EXECUTED IN NAME OF CITY BY DIRECTOR OF PUBLIC SERVICE OR DIRECTOR OF PUBLIC SAFETY—COUNCIL SHOULD FIRST AUTHORIZE SAME.

A proposed lease of canal lands to the city of Dover should be executed in the name of the city director of public service, if the same relates to the water works department, and by the director of public safety, if the same relates to the fire department. The execution of the lease should be first authorized and directed by ordinance of council.

COLUMBUS, OHIO, December 28, 1916.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of December 12, 1916, transmitting to me for examination a lease to the city of Dover, granting to that city the right to lay and maintain a single line cast iron water main under the Ohio canal at any point within the corporate limits of said city where the same will not interfere with any lock, bridge or railway crossing. The lease is signed "T. P. Peter, Mayor."

Section 4211 G. C. provides that all contracts requiring for their execution the authority of the council of a city shall be entered into by the board or officers having charge of the matters to which they relate.

Section 3956 G. C. provides that the director of public service shall manage, conduct and control the water works.

Section 4328 G. C. authorizes the director of public service to make any contract for any work under the supervision of that department, not involving more than five hundred dollars, and provides that when an expenditure within the depart-

ment other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council.

Section 4368 G. C. provides that the director of public safety shall be the executive head of the fire department and section 4369 G. C. provides that the director of public safety shall make all contracts in the name of the city with reference to the management of such department.

Section 4371 G. C. requires that before the director of public safety creates an obligation involving an expenditure of more than five hundred dollars, he shall be authorized and directed so to do by ordinance of council.

Referring to the lease submitted by you, it may be observed that while the total amount of rental that will be paid during the life of the lease amounts to only $180.00, yet the lease involves the assumption by the city of responsibility for damages and certain other obligations and the only safe course to follow is to require the council of the city to pass an ordinance authorizing either the director of public service or the director of public safety to execute the lease in question. If the water main to be constructed is a part of the water works system of the city, the director of public service should be authorized and directed to execute the lease and if the water main is a part of the fire protection system of the city the director of public safety should be authorized and directed by council to execute the lease. The lease should then be executed in the name of the city by the director of public service or the director of public safety, as the case may be. If the lease is executed by the director of public service it should be signed as follows:

"The City of Dover,
"State of Ohio.
"By----------
"Director of Public Service."

The modification in the note of execution in case the lease is executed by the director of public safety, of course, suggests itself. There is no authority for the execution of the lease by the mayor or, indeed, in any manner other than that pointed out above, and for this reason I am returning the lease without my approval.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2130.

COUNTY COMMISSIONERS—FEES FOR COUNTY DITCHES—ONLY LIMITATION $300.00—SEE OPINION NO. 1743, JUNE 29, 1916.

The county commissioners are entitled, under the provisions of section 6523 *G. C. to three dollars per day for the time necessary to the performance of all the duties prescribed by chapter I, of title III, of part second, of the General Code, subject only to the limitation of three hundred dollars in any one year, provided by section* 3001 *G. C.*

COLUMBUS, OHIO, December 28, 1916.

HON. R. W. CAHILL, *Prosecuting Attorney, Napoleon, Ohio.*

DEAR SIR:—Yours under date of December 8, 1916, is as follows:

"I should be pleased to have your opinion as to the fees, (per diem) under the provisions of section 6523 G. C. as to the number of days they may be authorized to charge the per diem fee in the location and construction of a *single county ditch,* to wit: whether or not they may not be entitled to charge $3.00 each for the following days:

"1. For one day for the view under the provisions of section 4651 G. C.

"2. For one day for the hearing on the apportionment under favor of section 6457 G. C.

"3. For one day for fixing the date of sale of the work of construction under favor of section 6481 G. C.

"4. For one day for approving the contracts and examining the bonds of contractor and approving or disapproving the same, under the provisions of section 6486 G. C.

"5. For one day for meeting to determine at what time and in what number of assessments they will require them to be paid; and the ordering of the assessments to be placed on the duplicate under favor of section 6489 G. C."

Section 6523 G. C., to which reference is made, provides as follows:

"For services actually rendered under the provisions of this chapter, the county commissioners, each, shall receive three dollars per day. All other officers and persons shall receive compensation for such services as provided in this subdivision of this chapter."

I think your first question has reference to section 6451 G. C., which provides as follows:

"The county commissioners shall meet at the place of beginning of the ditch, as described in the petition, on the day fixed, as provided in this chapter, and hear the proof offered by any of the parties affected by said improvement, and other persons competent to testify. They shall go over and along the line of the improvement, and by actual view of the ditch and the premises along and adjacent thereto which are to be drained or benefited thereby, determine the necessity thereof, and may adjourn from time to time and to such place as the necessity of the work may require. If the commissioners find for the improvement, they shall fix a day for the hearing of applications for appropriations of land taken therefor and damages that persons, affected by said improvement, may sustain thereby, and for the approval of the report of the county surveyor as hereinbefore provided for."

It is required by the provisions of this section that the commissioners shall meet at the place of beginning of the ditch on the day fixed therefor. No specific time is prescribed in which the commissioners are required to perform the duties therein imposed. It is manifestly contemplated that the performance of the duties so imposed may require more than one day from the provision which authorizes the commissioners to adjourn from time to time and to such place as the necessity of the work may require. No rule can be stated by which the number of days necessary to the performance of the duties prescribed by this section may be determined in a particular case. The commissioners are entitled to the compensa-

tion provided by section 6523 G. C., supra, for the number of days employed in the proper performance of the duties prescribed in section 6451 G. C., supra, subject only to the provisions of section 3001 G. C., hereafter to be noted.

"Section 6451 G. C. provides in part as follows:

"* * * If the commissioners find for the improvement, they shall fix a day for the hearing of applications for appropriations of land taken therefor and damages that persons, affected by said improvement, may sustain thereby, and for the approval of the report of the county surveyor as hereinafter provided for."

By section 6454 G. C. it is provided that if the commissioners find for the improvement, they shall cause to be entered on their journal an order directing the county surveyor to make a survey of the improvement, and section 6455 G. C. provides as follows:

"The county commissioners, by such order, shall direct the county surveyor or engineer to make and return a schedule of the lots and lands, and public or corporate roads or railroads that will be benefited, with an apportionment of the cost of location, and the labor of constructing the improvement, in money, according to the benefits which will result to each. In apportioning the costs of such improvement, the benefits to any lots or lands by diking them, in whole or in part, shall be considered with other benefits, and a specification of the manner in which the improvement shall be made and completed, the number of flood-gates, waterways, farm crossings and bridges necessary, including kinds and dimensions thereof, and all county and township lines and railway crossings."

At the hearing, the time for which is required to be fixed by section 6451 G. C., supra, the commissioners are required to perform the duties prescribed by section 6457 G. C., as follows:

"If the county commissioners find that the apportionment, reported by the county surveyor, is unfair and unjust, and should not be confirmed, they shall so amend it as to make it fair and just, in proportion to benefits. If necessary, in their opinion, they may adjourn the further hearing not exceeding twenty days, unless for good cause, further time is necessary, to a day to be fixed by them and go upon the premises, view them and apportion the entire cost of location and construction, or any part thereof, as may seem just and proper. If persons, not included in the county surveyor's apportionment, are found to be benefited, and are assessed by the commissioners, such persons shall be notified as provided in this chapter for the giving of notice, by the county auditor, of the filing of a petition, and the commissioners, on the day fixed in said notice, shall again meet at the auditor's office and determine the apportionment."

As in the former case no rule can be stated as to the number of days necessary for the performance of this duty in any particular case. The commissioners are entitled to the compensation prescribed by section 6523 G. C. for the number of days necessary for the performance of the duties above prescribed, subject to the limitations of section 3001 G. C., as above referred to. Further duties which are subject to the same rule are prescribed by section 6459 G. C., as follows:

"After the apportionment by the county auditor, as provided in the

next preceding section, a person interested therein may apply for a reapportionment thereof at a regular, special or called session of the county commissioners. They shall notify all persons interested of the time and place at which they will meet and determine such apportionment, at least ten days before such meeting, and apportion it as they deem just and proper."

In like manner the commissioners are entitled to the compensation above referred to for the performance of the services required by sections 6461 and 6468, as follows:

"(6461) The county commissioners, upon actual view of the premises shall fix and allow such compensation for lands appropriated as they deem just and equitable, and assess such damages as, in their judgment, will accrue from the construction of the improvement, to each person or corporation making application therefor as provided in the next preceding section and without such application, to each idiot, insane person, or minor owning lands taken or affected by the improvement. Such compensation shall be computed without deduction for benefits to any property of such person, or corporation. On the day set for hearing, and at the time of such view of the premises, they may take into consideration the application for the change or alterations as provided in the next preceding section, and, if they find that the change or alterations will be equally beneficial, they may order the county surveyor to go upon the line of the improvement and survey the change or alteration."

"(Sec. 6468) A party to the proceeding may file exceptions to the finding by the county commissioners that the improvement is necessary, or will be conducive to the public health, convenience or welfare, and that the line described is the best route, or to the apportionment, or to any claim for compensation or damages, at any time before the time set for the final hearing of the report and apportionment. The commissioners may hear testimony and examine witnesses upon all the questions raised by the exceptions, and may compel the attendance of the witnesses by subpoena therefor. The auditor, on demand, shall issue such subpoenas. The decision of the commissioners on the exceptions shall be entered upon the journal, and if they sustain the exceptions, the cost of the hearing thereon shall be paid out of the county treasury, and if they overrule them, such cost shall be taxed against the person or corporation filing the exceptions."

The county commissioners are also required by section 6477 to meet to determine matters growing out of an appeal and verdict thereon for which service they are entitled to the compensation referred to, subject to the limitations thereon above mentioned. The same may be said of the duties imposed by sections 6478, 6481, 6486 and 6489 G. C.

Without further specific reference to particular sections thereof, it may be generally observed that by force of section 6523 G. C., supra, county commissioners are entitled to $3.00 for every day necessarily employed in the performance of the duties imposed by the provisions of chapter I, title III of part second of the General Code, and there is no statutory provision specifically limiting the time within which any of the duties so prescribed shall be performed.

The total compensation which may be received by a county commissioner for

all ditch work in any one year is limited by the provisions of section 3001 G. C. as follows:

> "* * * In counties where ditch work is carried on by the commissioners, in addition to the salary herein provided, each commissioner shall receive three dollars for each day of time he is actually employed in ditch work; the total amount so received for such ditch work not to exceed three hundred dollars in any one year, * * *"

as held in opinion 1743, addressed to Hon. B. A. Meyers, Celina, Ohio, under date of June 29, 1916, a copy of which is enclosed herewith.

Your inquiry is not susceptible of a more definite answer than that above stated.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2131.

DOMESTIC INSURANCE COMPANY—NOT "DOING BUSINESS" WITHIN MEANING OF SECTION 9590 G. C.—NOT EXEMPT FROM MAKING REPORTS AS DOMESTIC CORPORATION FOR PROFIT UNDER SECTION 5495 ET SEQ. G. C.—GLOBE INSURANCE COMPANY.

Where a domestic insurance company is not "doing business" within the meaning of section 9590 G. C. and is not therefore "required by law to file reports with the superintendent of insurance" as provided for in said section, said company is not exempted by the provisions of section 5518 G. C. from making reports to the state tax commission as a domestic corporation for profit under the provisions of section 5495 et seq. of the General Code.

COLUMBUS, OHIO, December 29, 1916.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your request for an opinion as follows:

> "The Globe Insurance Company, a domestic corporation for profit, prior to 1893 transacted business in the state of Ohio as an insurance company, and on April 28, 1893, it re-insured all of its outstanding business and has not been in business since that date. The company has not filed reports with either the superintendent of insurance or with the tax commission. Is this company exempted by section 5518 G. C. from making reports as a domestic corporation for profit under the Willis law, and is the commission authorized to issue the certificate provided by section 5521 G. C. without reports and fees as a domestic corporation for profit?"

Section 5518 G. C. provides:

> "An incorporated company, whether foreign or domestic, owning or operating a public utility in this state, and as such required by law to file reports with the tax commission and to pay an excise tax upon its gross receipts or gross earnings as provided in this act, *and insurance,*

fraternal beneficial, building and loan, bond investment and other corporations, required by law to file annual reports with the superintendent of insurance, shall not be subject to the provisions of sections one hundred and six to one hundred and fifteen, inclusive, of this act."

Section 5520 G. C. provides:

"The mere retirement from business or voluntary dissolution of a domestic or foreign corporation, without filing the certificate, provided for in sections eleven thousand nine hundred and seventy-four, eleven thousand nine hundred and seventy-five and eleven thousand nine hundred and seventy-six of the General Code, shall not exempt it from the requirements to make reports and pay fees or taxes in accordance with the provisions of this act."

Section 5521 G. C. provides:

"In case of dissolution or revocation of its charter, on the part of a domestic corporation, or of the retirement from business in this state, on the part of a foreign corporation, the secretary of state shall not permit a certificate of such action to be filed with him unless the commission shall certify that all reports, required to be made to it, have been filed in pursuance of law, and that all taxes or fees and penalties thereon due from said corporation have been paid."

From your statement of facts it appears that since April 28, 1893, the insurance company referred to in your inquiry has not been engaged in the business for which said company was incorporated under the laws of this state and has not filed annual reports with either the superintendent of insurance or with your commission. I am further informed by you that prior to said date said insurance company complied with the provisions of section 3654 R. S., then in force, which provisions were substantially the same as those of section 9590 G. C., now in force, and that said company secured the consent of the insurance department to the re-issuance of its outstanding business.

Section 9590 G. C. provides in part:

"The president or vice president and secretary of each insurance company organized under the laws of this or any other state, *and doing business in this state,* annually, on the first day of January, or within thirty days thereafter,shall prepare, under oath, and deposit in the office of the superintendent of insurance a statement of the condition of such company on the thirty-first day of December then next preceding. * * *"

I understand from you that the only business transacted by the Globe Insurance Company since the above mentioned date was the taking care of certain real estate which it owned and held pending the sale thereof and the sale of such securities as it had on hand at that time for the purpose of paying its obligations and distributing the balance to its stockholders. It cannot be said, however, that the sale of said property and the distribution of the proceeds of said sale was the doing of business within the meaning of section 9590 G. C., supra., and inasmuch as said company has not been "doing business in this state" within the meaning of said statute, since said date of April 28, 1893, it has not been required

to file the annual report with the superintendent of insurance therein prescribed and I think it follows that said company has not been exempted by the above provision of section 5518 G. C. from making the annual report to your commission as a domestic corporation for profit as required by section 5495 et seq. of the General Code, the material provisions of which were originally enacted in 95 O. L., 124, being an act of the general assembly passed on April 11, 1902, and entitled "an act to require corporations to file annual reports with the secretary of state and to pay annual fees therefor," it being understood that the insurance company in question is a domestic corporation for profit.

In this connection I call your attention to an opinion of my predecessor, Hon. Timothy S. Hogan, rendered to your commission in 1912 (Annual Report of the Attorney-General for 1912, vol. I, page 633) in which it was held that the exceptions provided for in section 5518 G. C., supra, cannot be construed to include an insurance company organized for profit, which has not yet disposed of all its shares of capital stock, as required by law, and has not yet been licensed to do business by the superintendent of insurance, and therefore, is not required to file reports with that official.

I quote from said opinion as follows:

> "It is obvious, I think, that the legislature, in excluding 'insurance * * * and other corporations required by law to file annual reports with the superintendent of insurance' from the operation of the franchise tax, must have had in mind that without this express exclusion such companies would have been within the meaning of the term 'domestic corporation for profit,' if, in point of fact, they were corporations for profit. (Some forms of insurance companies, organized under the laws of Ohio, are clearly corporations not for profit, but I do not understand that this is the case with regard to the corporations concerning which you specifically inquire. That is to say, section 5518, which contains subject matter that has always been in the Willis law, since its original enactment in 1902, could not have been inserted through an abundance of caution, but must be referred to an intention to make an exception that otherwise could not exist. Therefore, I am of the opinion that a stock insurance company is a 'corporation for profit' within the meaning of section 5495, above quoted.)
>
> "The other sections which I have quoted make it apparent that an insurance corporation cannot 'do business' until it receives its license from the superintendent of insurance, and that such a corporation does not become liable to make annual reports to the superintendent of insurance until it is engaged in business; that is, until it has reached the point where it requires a license.
>
> "Applying to these facts the express language of section 5518, supra, which is not at all ambiguous, it seems clear to me that an insurance company which has not yet become 'required by law to file annual reports with the superintendent of insurance' is not exempted from the 'Willis law' provisions of the tax commission act. *That is to say, it is not the mere fact that a corporation is organized for purpose of doing an insurance business which makes it exempt; the company must be actually engaged in such business.*
>
> "If any further discussion is needed it might be well to consider the fact that the franchise tax, as construed in Southern Gum Company v. Laylin, 66 O. S., 578, is a tax upon the privilege of being a corporation—the privilege originally conferred by the issuance of articles of incorpora-

tion. It is not upon the privilege of *doing* the business for which the corporation is organized, but upon the privilege which exists at the instant of the issuance of the articles of incorporation, and by virtue of which the incorporators proceed to dispose of the capital stock of the corporation before engaging in any business whatever."

I concur in this opinion of my predecessor and I think the reasoning advanced by him in support of the conclusion above expressed is applicable to the case under consideration. In other words, inasmuch as the Globe Insurance Company has not been "doing business" within the meaning of section 9590 G. C., supra, since April 28, 1893, I am of the opinion that said company has not been "required by law to file reports with the superintendent of insurance" since said date and has not been, therefore, exempted from the provisions of section 5518 G. C., supra, since the time said provisions of said latter section became effective in 1902.

I am of the opinion, therefore, in answer to your question that said company has not been exempted, since said date of April 28, 1893, by said section 5518, G. C. from making reports to your commission as a domestic corporation for profit under the provisions of section 5495 et seq., of the General Code, and that your commission is not authorized to issue the certificate provided for in section 5521 G. C., supra, until the annual reports for the years 1902 to 1916, inclusive, "have been filed in pursuance of law" and until "all taxes or fees and penalties thereon due from such corporation have been paid."

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2132.

SECRETARY OF STATE—BILL FOR TELEGRAPH TOLLS INSTRUCTING ELECTION BOARDS TO PRESERVE BALLOTS OF THE NOVEMBER ELECTION, 1916—LEGAL CHARGE—QUESTION OF VALIDITY OF ORDER IMMATERIAL.

A charge for telegraph tolls incurred by the secretary of state in communicating with the several boards of deputy state supervisors and inspectors of elections and deputy state supervisors of elections is, under the facts as submitted, a legal charge against funds appropriated for the use of the secretary of state for communication purposes, the validity or invalidity of the order contained in said communication being immaterial.

COLUMBUS, OHIO, December 29, 1916.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication of December 27, 1916, in which communication you inquire as follows:

"The secretary of state, Hon. Charles Q. Hildebrant, has presented the enclosed bill to this office requesting the payment of $122.83 to the Western Union Telegraph Company. I have been advised that this service was rendered to him for advising the boards of election not to destroy the ballots until ordered by the secretary of state.

"I returned this voucher to Mr. Hildebrant and suggested that he

get the attorney-general's approval of the same. The voucher was returned to this department with the following notation on the same: 'Above request refused. C. Q. Hildebrant, Secretary of State.'

"I desire to be advised as to whether or not this is a legal charge against the funds appropriated to the secretary of state, and whether or not the statutes governing the election machinery of the state authorizes a payment of this nature."

Section 4787 G. C. reads as follows:

"By virtue of his office the secretary of state shall be the state supervisor and inspector of elections and the state supervisor of elections, and, in addition to the duties now imposed upon him by law, he shall perform the duties of such offices as prescribed in this title."

While I find no express statutory provision covering the exact situation revealed by your letter, yet it is apparent from an examination of the current appropriation measure that the legislature, in the passage of the same, had in mind the fact that the secretary of state would at times find it proper and even necessary to communicate with the several boards of deputy state supervisors and inspectors of elections and deputy state supervisors of elections, and other persons performing duties under his supervision or having official relations with his office.

Section 3 of house bill No. 701, 106 O. L., 666, being an act to make general appropriations, and said section being especially intended to cover expenditures during the year ending June 30, 1917, contains the following appropriations for the secretary of state:

"Maintenance * * * F7 communication, $400.00. * * *"

In view of the general supervisory character of the duties of the secretary of state with reference to elections, as indicated by his title and by the several statutes relating to the subject of elections, to which statutes it is unnecessary to refer in this connection, it is my view that the secretary of state is authorized to expend all or any part of the appropriation referred to above for telegraph tolls in communicating with the several boards of deputy state supervisors and inspectors of elections and deputy state supervisors of elections upon any matter pertaining to the operation of the election machinery of the state, which in his judgment it is proper to bring to their attention, and that he has such a measure of discretion as to the matters proper to be so communicated that his actions are not subject to review. The question or whether or not the order contained in the telegrams was a valid one is immaterial in the present inquiry and I do not in any manner pass upon the validity of the order.

It is, therefore, my opinion that the item referred to by you is a legal charge against the funds appropriated to the secretary of state, and referred to above, and that the payment in question is authorized under the statutes and the current appropriations measure.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2133.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY VILLAGE OF LEETONIA.

COLUMBUS, OHIO, December 29, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

> "RE: Bonds of the village of Leetonia, Columbiana county, Ohio, in the amount of $28,000.00 for the purpose of constructing a sewage disposal plant and connections leading thereto, being 28 bonds of one thousand dollars each."

I have examined the transcript of the proceedings of council and other officers of the village of Leetonia relative to the above bond issue; also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will constitute valid and binding obligations of said village.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2134.

APPROVAL, AGREEMENT OF CONSOLIDATION OF CERTAIN RAILROADS KNOWN AS THE PENNSYLVANIA LINES.

COLUMBUS, OHIO, December 30, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of December 29 requesting my opinion as follows:

> "We are referring to your department agreement of consolidation of the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company; Vandalia Railroad Company; Pittsburgh, Wheeling and Kentucky Railroad Company; the Anderson Belt Railway Company; Chicago, Indiana and Eastern Railway Company, dated September 28, 1916, forming the Pittsburgh, Cincinnati, Chicago and St. Louis Railroad Company, and kindly request your advice as to whether the same is in conformity with the laws of Ohio and should be accepted and filed by the secretary of state upon presentation of a filing fee of $100,000."

I have examined the agreement of consolidation referred to in your letter and advise you that the certified recitals and statements therein show that the procedure required by the provisions of sections 9027 et seq. of the General Code, authorizing the consolidation of such railroad companies, have been complied with, and that it is your duty to accept and file the same.

In so advising you I have not considered, nor do I pass upon, the power of the several companies to consolidate under the laws of Ohio, or upon the legal effect of the agreement of consolidation. Respectfully,

EDWARD C. TURNER,
Attorney-General.

2135.

MUNICIPAL CORPORATION—SEWERS—HOW COST OF MAIN SEWER MAY BE ASSESSED—HOW COST OF MAIN SEWER AND SEWAGE DISPOSAL PLANT OUTSIDE OF MUNICIPAL CORPORATION MAY BE ASSESSED.

The cost and expense of the construction of a main sewer not in excess of the benefits derived therefrom may be assessed upon the lots and lands in a sewer district benefited by such improvement.

The cost and expense of constructing necessary main sewers and a sewage disposal plant outside of a municipal corporation may be assessed by the council upon the specially benefited lots or lands in the corporation or a sewer district therein, in proportion to the benefits which will result from such improvement, subject only to the limitations upon such assessments for the improvements constructed wholly within the corporate limits.

COLUMBUS, OHIO, January 2, 1917.

The State Board of Health, Columbus, Ohio.

GENTLEMEN:—Yours under date of December 4, 1916, is as follows:

"In a municipality which has been ordered by the state board of health to install a sewerage system, it is deemed advisable from an engineering standpoint to divide the municipality into two sewer districts from each of which a main sewer would be laid to a disposal plant located outside of and at some distance from the corporate limits. On account of tax rate limitations the municipality will be compelled to limit as much as possible the amount of the expense to be raised by general taxes. It should be stated also that the main sewer above mentioned within the corporate limits will have to be of larger size than would be necessary for mere service sewers to the immediate abutting properties. Such main sewer will not intersect until the disposal plant is reached.

"Quaere:

"1. Can the cost of constructing such main sewer *within the municipality*, over what it would cost to construct service sewers only along the same course, be assessed wholly or in part, according to benefits, against all property in the sewer districts which are served by each of such main sewers respectively?

"2. Can the entire cost, or any part thereof, of constructing such main sewers from the corporate limits of the municipality to the disposal plant be assessed, according to benefits, against all property in the sewer districts which are served by each of such main sewers respcetively?

"3. Can the cost of constructing a sewerage disposal plant outside the corporate limits of a municipality be *assessed*, wholly or in part, according to benefits, on all property within two sewer districts into which the municipality will be divided?"

General authority to levy and collect special assessments is conferred upon council of a municipal corporation by the provisions of section 3812 G. C., as follows:

"Each municipal corporation shall have special power to levy and collect special assessments, to be exercised in the manner provided by law. The council of any municipal corporation may assess upon the abutting, adjacent and contiguous or other specially benefited lots or lands in the corporation, any part of the entire cost of any street, alley, dock, wharf, pier, public road, or place by grading, draining, curbing, paving, repaving, repairing, constructing sidewalks, piers, wharves, docks, retaining walls, sewers, drains, watercourses, water mains or laying of water pipe and any part of the cost of lighting, sprinkling, sweeping, cleaning or planting shade trees thereupon, and any part of the cost and expense connected with or made for changing the channel of, or narrowing, widening, dredging, deepening or improving any stream or watercourse, and for constructing or improving any levee or levees, or boulevards thereon, or along or about the same, together with any retaining wall, or riprap protection, bulkheads, culverts, approaches, flood gates or water ways or drains incidental thereto, which the council may declare conducive to the public health, convenience or welfare, by any of the following methods:

"First. By a percentage of the tax value of the property assessed.

"Second. In proportion to the benefits which may result from the improvement, or

"Third. By the foot front of the property bounding and abutting upon the improvement."

By section 3871 G. C. it is provided that:

"In addition to the powers herein conferred to construct sewers and levy assessments therefor, council of a municipal corporation may provide a system of sewerage for such municipal corporation or any part thereof. * * *"

Section 3872 G. C. provides as follows:

"The plan so devised shall be formed with a view of the division of the corporation into as many sewer districts as may be deemed necessary for securing efficient sewerage. Each of the districts shall be designated by a name and number, and shall consist of one or more main sewers, with the necessary branch or connecting sewers, the main sewers having their outlet in a river, or other proper place. The districts shall be so arranged as to be independent of each other, so far as practicable."

Assessments for the cost and expense of the construction of a sewerage system or systems, according to such a plan as is referred to in section 3871 G. C. supra, are provided for by section 3879 G. C. as follows:

"After the publication of such notice, the council shall determine whether it shall proceed with the proposed improvement or not, and if it decides to proceed therewith, an ordinance for the purpose shall be passed. Such ordinance shall contain a statement of the district or districts or parts thereof proposed to be constructed, the character of the

material to be used, a reference to the plans and specifications, the mode of payment therefor, and shall provide for assessing the cost and expenses of the improvement upon the lots and lands in each district as other assessments are levied, and the lots and lands in each district shall be assessed by districts, except that the cost of the construction of any main sewer which serves as a common outlet for two or more districts shall be apportioned between the districts, and the cost assessed on the lots and lands in the respective districts in proportion to the benefits accruing thereto."

It must be observed that by the terms of this section it is required that the ordinance shall contain a statement as to the improvement, of the "mode of payment therefor" and that such ordinance "shall provide for assessing the cost and expense of the improvement upon the lots and lands in each district *as other assessments are levied*, thus clearly referring to the modes of assessment defined in section 3812 G. C., supra, and to the limitations thereon found in sections 3819 G. C.

Special assessments may not, however, be levied and collected in excess of the benefits derived from the improvement by the property assessed.

"Schroder v. Overman, 61 O. S., 1.
"Walsh v. Barron, 61 O. S., 15.
"Walsh v. Sims, 65 O. S., 212.
"Dayton v. Bauman, 66 O. S., 379."

Thus the assessment of the cost and expenses of the construction of a main sewer against the lots and lands in the sewer district specially benefited thereby, in an amount not in excess of such benefits ,is clearly authorized.

Your second and third questions may be considered together. To be of practical utility, any sewer or drain must have an outlet or there must be provided therefor a proper place of discharge. That a sanitary sewer may be discharged within a municipal corporation is, at least in most cases, impracticable. Not only must there be such proper place of discharge, but it is also necessary, in many cases, to provide artificial means of disposing of the discharge of such sewer, viz., a sewage disposal plant. It is seldom, if ever, practicable to construct such disposal plant within the corporation. Section 3891 G. C. confers upon municipal corporations authority to purchase and hold land for this purpose, as follows:

"A municipal corporation may purchase and hold land outside of the corporate limits, to be used as a sewerage farm, for the proper dispositions of the sewage of such corporation, under such rules and regulations as shall be prescribed by council and approved by the state board of health."

Such extensions of main sewers and disposal plant, as are referred to in your inquiry, are no less a part of the improvement by reason of their location outside of the corporate limits. In short, an extension of the main sewer and disposal plant is a part of the street improvement, although not located upon any street served thereby. Certainly the expense of the sewer extensions and the construction of the disposal plant are expenses and costs directly "connected with" the street improvement, or a part of the sewerage system of a sewer district. It will be noted that it is provided by section 3812 G. C., supra, that the council of a municipal corporation may assess any part of the entire cost and expense *connected with* the improvement of any street, etc.

In the case of King v. the City of Dayton, 10 C. C., n. s., 522, it was held:

"It is not necessary that the property be improved so as to make sewer connections immediately available. If the sewer is adequate and so located that it may be utilized in the future, the lands are specially benefited. The presumption is that the present plan will be perfected so as to include convenient laterals as the city grows. The assessment for the main sewer can be but once and must be now in order to provide prompt payment for its construction.

* * * * * * * *

"There was no excess in the amount assessed for the main sewer. The pumping station was a necessary part of the equipment."

I think it must be conceded that the extension of a main sewer beyond the corporate limits and the construction of a sewage disposal plant are in many cases a necessary part of the equipment or improvement.

I am, therefore, of opinion, in answer to your second and third questions, that the cost and expense of constructing the necessary main sewers and a sewage disposal plant outside of a municipal corporation may be assessed by the council upon the specially benefited lots or lands in the corporation or sewer district therein, in proportion to the benefits which results from such improvement, subject only to the limits upon such assessment for improvement constructed wholly within the corporate limits.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2136.

APPROVAL, RESOLUTION FOR IMPROVEMENT OF CERTAIN ROADS IN BROWN, BUTLER, CLINTON, FAYETTE, HAMILTON, HARRISON, JEFFERSON AND SCIOTO COUNTIES.

COLUMBUS, OHIO, January 2, 1917.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication of December 29, 1916, transmitting to me for examination final resolutions relating to the improvement of the following roads:

"Brown County—Sec. 'A,' Ripley-Hillsboro road, Pet. No. 2112-T, I. C. H. No. 177.

"Butler County—Sec. 'B,' Hamilton-Scioto road, Pet. No. ——, I. C. H. No. 467.

"Clinton County—Sec. 'B,' Wilmington-Xenia road, Pet. No. 1571, I. C. H. No. 248.

"Clinton County—Sec. 'F,' Cincinnati-Chillicothe road, Pet. No. 2189-T, I. C. H. No. 8.

"Fayette County—Sec. 'A,' Dayton-Chillicothe road, Pet. No. 2331, I. C. H. No. 29.

"Hamilton County—Sec. 'A,' Cincinnati-Hamilton road, Pet. No. 2405, I. C. H. No. 39.

"Hamilton County—Sec. 'A,' Cincinnati-Hamilton road, Pet. No. 2405, I. C. H. No. 39.

"Hamilton County—Sec. 'A,' Carthage-Hamilton road, Pet. No. 2415, I. C. H. No. 43.

"Hamilton County—Sec. 'A,' Carthage-Hamilton road, Pet. No. 2415, I. C. H. No. 43. (Also duplicate.)

"Harrison County—Sec. 'J,' Bridgeport-Cadiz road, Pet. No. 2456, I. C. H. No. 100.

"Jefferson County—Sec. 'L,' Steubenville-Cambridge road, I. C. H. No. 26, Pet. No. 2538.

"Scioto County—Sec. 'L,' Ohio River road, Pet. No. 2903, I. C. H. No. 7."

I find these resolutions to be in regular form and am, therefore, returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2137.

CIVIL SERVICE—POLITICAL SPEECHES BY PERSONS IN CLASSIFIED SERVICE—CONSTRUCTION OF CIVIL SERVICE LAW AS APPLIED TO CLASSIFIED CIVIL SERVICE EMPLOYES.

The making of political speeches by persons in the classified civil service of the state, counties, cities or city school districts constitutes a violation of section 486-23 *G. C.,* 106 *O. L.,* 416.

A person in the classified civil service of the state, counties, cities or city school districts, who has been guilty of a violation of the provisions of the civil service law may not thereafter be said to be employed in pursuance of that law within the meaning of section 486-21, *G. C.,* 106 *O. L.,* 415.

If the state civil service commission finds upon proper investigation that, as a matter of fact, any officer or employe in the classified civil service of the state has been guilty of a violation of any of the provisions of the civil service law, the commission may refuse to certify to the pay roll, estimate or account of the compensation of such officer or employe, as provided by section 486-21 *G. C., supra.*

COLUMBUS, OHIO, January 3, 1917.

The State Civil Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Yours of recent date is as follows:

"The attention of the state civil service commission has been called to political activity on the part of persons whose names appear on our pay roll as classified employes.

"We have called the attention of all such employes to section 486-23 of the civil service law, and have held consistently that political activity on the part of classified employes, whether on the state pay roll or on temporary leave of absence, are prohibited by law from active participation in politics.

"We interpret the law to mean that any person whose name appears

on our pay roll as a classified employe may not engage in political activity of any kind, even though he has been granted a leave of absence by his appointing officer.

"Will you give us at the earliest possible moment your interpretation of the civil service law as applied to cases of this kind?"

Upon request for further statement of facts as to the activities which constituted the "political activity" referred to in the above inquiry, you submit the following:

"This is to supplement our letter of October 25th, asking for an opinion on political activity by persons in the classified service.

"The specific case which gave rise to this request for an opinion was that of Peter Albeitz, an employe in the classified service in the department of auditor of state. On the morning of October 25th the newspapers contained a report of a political speech made by Mr. Albeitz. We immediately wrote Mr. Donahey, stating the commission could no longer approve the pay of Mr. Albeitz as a classified employe, and recommended his discharge from the classified service.

"We understand from newspaper reports that Mr. Donahey's contention will be that Mr. Albeitz was first given leave of absence to perform this political service and that the right to make political speeches is a constitutional privilege and, therefore, not in violation of section 486-23."

Section 486-23 G. C., 106 O. L., 416, to which reference is made, provides as follows:

"*Political Assessments.*—No officer, employe or subordinate in the classified service of the state, the several counties, cities and city school districts thereof, shall directly or indirectly, orally or by letter, solicit or receive, or be in any manner concerned in soliciting or receiving any assessment, subscription or contribution for any political party or for any candidate for public office; nor shall any person solicit directly or indirectly, orally or by letter, or be in any manner concerned in soliciting any such assessment, contribution or payment from any officer, employe or subordinate in the classified service of the state, the several counties, cities or city school districts thereof; nor shall any officer or employe in the classified service of the state, the several counties, cities and city school districts thereof be an officer in any political organization or take part in politics other than to vote as he pleases and to express freely his political opinions."

The latter provision of this section is a specific inhibition against any officer or employe in the classified service of the state, counties, cities or city school districts taking part in politics, subject only to the exception and qualification therein expressed.

The making of a political speech, which is understood to mean the making of a public address during a political campaign, for political purposes and with a view to inducing electors to vote for or against a political party candidate, or some proposition to be determined by the election, is taking part in politics within the meaning of this latter provision of section 486-23 G. C., supra, and, therefore, brings any officer or employe in the classified service of the state, counties, cities or city school district, who makes such political speech, within the inhibition

against any such officer or employe taking part in politics, unless making a political speech comes within the exception to or limitation of such inhibition, which permits such officer or employe to "express freely his political opinions."

In construing this phrase with a view to determining whether making a political speech is within its meaning, consideration must be given to the fundamental principle of statutory construction that the words of a statute, if in common use, are to be taken in their plain, obvious and ordinary signification. It is not believed that to say one may freely express his political opinions would ordinarily be taken to mean that one may engage in making public addresses with a view to inducing persons to vote for or against certain candidates, political parties or propositions. To merely express one's political opinions, as that phrase is used by people generally in the course of everyday life, certainly does not comprehend the public advocacy of partisan claims to the suffrage of the electorate. To freely express one's political opinions, as that phrase is ordinarily understood, means only that interchange of ideas on political questions and candidates for public office, common to people generally in their associations in the ordinary course of everyday life, as distinguished from the public advocacy of specific candidates, parties or policies, which constitutes, according to the common understanding, being active in politics or political activity.

In giving interpretation to section 486-23 G. C., consideration must be given to the purpose of the civil service law in which it was enacted. Aside from the elimination of the dominance of partisan influence in the selection or appointment of public officers and employes, the primary purpose of the civil service law is to effect a higher standard of efficiency in the public service and of public officers and employes, and whether the restrictions put upon the personal liberties of individuals in the employ of the public are necessary to the proper and efficient public service is for the legislature to determine.

It will not be questioned that it is within the power of the legislature to prescribe qualifications of public officers and employes and it is equally within the power of the legislature to provide disqualifications for officers and employes in offices and positions created by legislative authority. This rule is stated in 29 Cyc. 1380, as follows:

> "The legislature has, in the absence of constitutional inhibition, the same right to provide disqualifications as it has to provide qualifications for office."

Section 6 of the act of congress of August 15, 1876, prohibited all executive employes of the United States, not appointed by the president, from requesting, giving or receiving from any other officer or employe of the government money, or property, or other thing of value, for political purposes, and prescribed a penalty for violation thereof.

In the case of ex parte Curtis, 106 U. S., 371, 27 L. Ed., 232, the above statute was under consideration and the court, after reference to a number of similar acts of congress, observed:

> "The evident purpose of congress in all this class of enactments has been to promote efficiency, and integrity in the discharge of official duties and to maintain proper discipline in the public service."

This, it is conceived, is a clear, concise and authoritative statement or definition of the purpose of civil service laws, of equal applicability to the statutes of this state relative to that subject as to those then under the immediate consideration of the court.

In connection with section 486-23 G. C., supra, must be considered the provision of section 486-28 G. C., 106 O. L., 417, as follows:

> "*Violations.* Whoever, after a rule has been duly established and published by any civil service commission according to the provisions of this act, makes an appointment to office or selects a person for employment contrary to the provisions of such rule, or wilfully refuses or neglects otherwise to comply with or to conform to the provisions of this act, or wilfully violates any of such provisions, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment in the county jail, for a term not to exceed six months, or by both such fine and imprisonment, in the discretion of the court. If any person so convicted shall hold any public office or place of public employment such office or position shall by virtue of such conviction be rendered vacant."

Section 486-30 G. C., 106 O. L., 418, provides in part as follows:

> "*Prosecutions.* Prosecutions for the violation of the provisions of this act, or the rules and regulations of the state commission established in conformity thereto, shall be instituted by the attorney-general or by the state commission acting through special counsel, or by the county prosecutor for the county in which the offense is alleged to have been committed; * * *"

It will thus be seen that the violation of any of the provisions of the civil service law constitutes a criminal offense, therefore, rendering its provision subject to the familiar rule of construction in favor of the accused, applicable to all criminal statutes, subject, however, to the further well established rule stated in the first branch of the syllabus in the case of Conrad v. State, 75 O. S., 52, as follows:

> "The rule as to strict construction of penal statutes does not require the courts to go to the extent of defeating the purpose of the statute by a severely technical application of the rule."

It is suggested that it is not within the power of the legislature to restrict the right of public officers and employes, as individuals, to engage in making political speeches of the character herein referred to.

As in contravention of the constitutional right of free speech, the first amendment to the constitution of the United States provides as follows:

> "Congress shall make no law * * * abridging the freedom of speech or of the press. * * *"

This constitutional provision operates in no way as a restriction upon the power of states in respect to liberty of speech.

Section 11 of article 1 of the constitution of Ohio provides in part as follows:

> "Every citizen may freely speak, write, and publish his sentiment on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. * * *"

This constitutional provision guarantees to citizens and individuals, as such, the protection of their liberty of speech. That is to say, it may be said that it is a constitutional right of a citizen to make political speeches, but that does not argue at all that he has any right to hold public office or employment while so engaged. In other words, it must be here borne in mind that there is a marked distinction between the constitutional rights of citizens, as such, and the rights of individuals to hold public office or employment, and it is with the latter alone that we are here dealing. The right to hold office or to be in the public employ is in no sense a constitutional right of citizens or individuals.

In the case of McAuliffe v. New Bedford, 155 Mass., 216, 220, the court, in discussing the validity of a rule prohibiting the solicitation of money or any aid on any pretense, for any political purpose whatever, said:

> "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding office within its control."

In the case of Duffy v. Cooke, 239 Pa. St., 427, where the constitutionality of an act prohibiting certain political activities of officers and employes of certain cities was attacked, the court, at page 431 of the opinion, observed:

> "While the constitution forbids ineligibility for office as a wrong against sound principles in a free state, it no where confers a right to obtain an office. That, in the last analysis, depends upon the favor of the people or rather appointing power, as we have seen to be coupled with reasonable conditions for the public good. If these conditions are too stringent or too disagreeable, the option to refuse the office or to resign it remains."

The court in holding the statute to be constitutional, referred with approval to the opinion of Magill, J., in the case of Commonwealth v. Hasskarl, 21 Pa., D. R., 119, in which the constitutionality of the same statute was in question. In this latter case an employe of the city of Philadelphia was charged in the petition with having taken an active part in the political management of the Republican party in a certain ward of said city and with having been present at the polls on an election day, in violation of section 2 of an act of the legislature of the state, and a writ of mandamus was sought compelling the appointing authority to discharge such employe for the violation of the provisions of the statute as charged therein. Section 2 of the act of the legislature, for violation of which this action was brought, provides as follows:

> "No officer, clerk or employe of any city of the first class * * * shall be a member of or a delegate or alternate to, any political convention * * *, shall serve as a member of, or attend the meetings of, any committee of any political party, or take an active part in political management or political campaign * * * shall in any way or manner interfere with the conduct of any election or the preparation therefor at the polling place, or with the election officers while counting the vote or returning the ballot boxes, etc. * * * save only for the purpose of marking and

depositing his ballot * * * or be within any polling place, or within fifty feet thereof, except for purposes of ordinary travel or residence. * * *"

For a violation of the above section the act provided as a penalty the immediate dismissal from employment by the city. The question then before the court was stated in the opinion as follows:

"Has the legislature the power to forbid this defendant from doing the things complained of, except during the hours of his employment?"

In the consideration of this question the court, in the opinion, observed:

"This is an act which is intended to prevent political activity or taking an active, managing part in political affairs by employes of the municipality.. It relates to personal activity, and does not in any way conflict with the constitutional provision in relation to 'the free communication of thoughts and opinions,' or the right of the citizen to 'freely speak, write and print on any subject.'

"An employer, whether an individual or a municipality, is entitled to have the best service of which an employe is capable. And if, in the judgment of the legislature, political activity on the part of clerks or employes of a city is likely to interfere with efficient public service, there would appear to be no legal reason why such activity should not be restrained or prohibited, so long as the individual elects to continue in the public service. If such restriction is distasteful to him, he has the alternative of seeking other employment. He is not, by the act, prohibited from engaging in free speech, or otherwise communicating or expressing his personal views upon political subjects, urging these views upon others in an effort to influence them to vote for the candidates of his choice, nor is his right to the free exercise of the elective franchise in any manner restricted.

"By the act, the employee is merely prohibited, while in the employ of the city, from doing certain specific things which are designated as being opposed to the best interests of the municipal service. There can be no doubt that the legislature would have the power to enact that no person, while acting as a clerk or employe of a city of the first class, should engage in other business or employment, nor hold public office, even though the duties of such employment or office might not be performed during the actual hours of his employment by the city, as, for instance, that he should not accept employment as a night watchman, which would deprive him of the rest requisite for proper and efficient service during the working hours of his city employment. The act does not impose any restrictions upon the actions, political or otherwise, of the individual as such, but simply upon the *employee* of the *municipality* while holding office or employment thereunder. It is simply a *condition of his employment.* If he does not like or is not willing to submit to the restriction upon his personal liberty, he need not accept nor continue in the employment of the city. If he does accept or continue in such employment, he waives his right to that freedom of action which he enjoys when otherwise employed. 'It belongs to the state, as the guardian and trustee of its people and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf or on behalf of its municipilities.

No employe is entitled of absolute right, and as a part of his liberty, to perform labor for the state.' Atkin v. Kansas, 191 U. S., 207; Com. v. Casey, 43 Pa. Superior Ct. 494.

"If it be urged, as it was at argument, that the act in question imposes a hardship or unjust restriction of the freedom of action of an employe of the municipality, the answer is found in the opinion of Mr. Justice Brown in Pittsburgh's Petition, 217 Pa. 227, wherein he says: 'Restraints on the legislative power of control must be found in the constitution of the state, or they must rest alone in the legislative discretion. If the legislative action operates injuriously to the municipalities or to individuals, the remedy is not with the courts. The courts have no power to interfere, and the people must be looked to, to right, through the ballot box, all these wrongs * * *. The fact that the action of the state toward its municipal agents may be unwise, unjust, oppressive or violative of the natural or political rights of their citizens, is not one which can be made the basis of action by the judiciary.'"

This case holds in effect that it is within the power of the legislature to determine to what extent restrictions of the political activities of public employes or officers are necessary to efficient public service and places such restrictions upon the plane of a condition of employment rather than that of an abridgment of the constitutional liberties of citizens and recognizes in the authority by which an office or employment is created a power to impose upon the tenure of such office, or the continuance of such employment, all those conditions which the constituting authority deems necessary to bring about that efficiency of service analogous to that of a private employer to impose conditions upon the continuance of the services of his employe. No restrictions upon the activities of public officers or employes can be said, in any true sense, to abridge the constitutional rights or liberty of citizens, as such, so long as there is no duty imposed upon such officer or employe to continue in the public service, subject to such condition. That is to say, so long as the public service remains purely voluntary, his acceptance and continuance in the same operates as a surrender of those guaranteed rights required by law as a condition of tenure or employment, or an agreement to the imposition of such conditions or restrictions upon what would otherwise be his constitutional rights as an individual.

It is suggested that the employe in question may have been away from the performance of the regular duties of his employment on leave of absence granted by the appointing officer. A leave of absence, which was, no doubt, temporary, it is not believed would have the effect of taking a person to whom granted out of the employ of the state or out of the classified service of the state. By such leave of absence an employe forfeits no right under the civil service law, as such, and it cannot be urged with consistency that all the rights conferred upon the employe continue during such leave of absence and yet the employe is relieved from the obligations imposed by the same law under which he may assert that his rights are so protected. If a person may be properly said to be an employe in the classified service of the state for the purpose of protecting his rights under the civil service law, he must as conclusively continue to be an employe in the classified service of the state for the purpose of the application of those provisions of the civil service law imposing upon him duties, obligations and restrictions of what would otherwise be his privilege. In other words, a person in the classified civil service of the state is not separated from such service by a mere leave of absence and while his actual service and compensation are alike suspended during the continuance of the leave of absence, by reason thereof, he is for every other purpose and in all other respects subject to the statutory provisions applicable to

such employe when in actual service. By the terms of section 486-23 G. C., a person is subject to its provisions so long as he continues to be an officer or employe in the classified service of the state, counties, cities or city school districts thereof. A leave of absence from duty will not therefore operate to relieve a person in the classified service referred to from limitations imposed by said section.

I am, therefore, of opinion that it is within the power of the legislature to provide, as a condition of tenure of office or continuance of employment, that no officer or employe in the classified civil service of the state, or any county, city or city school district, shall, during his tenure of office or time of employment, engage in making a political speech or speeches. I am further of opinion that the making of a political speech by an officer or employe in the classified civil service of the state, or any county, city or city school district, is within the inhibition of section 486-23 G. C., 106 O. L., 616, against any such officer or employe taking part in politics other than to vote as he pleases and to express freely his political opinions, and is, therefore, a violation of said section.

Any different conclusion would be subversive of the purpose of the constitutional and statutory provisions applicable to the civil service of the state, counties, cities and city school districts.

In this connection attention is called to the provisions of section 486-21 G. C., 106 O. L., 415, as follows:

> "*Pay Rolls.* After the taking effect of this act it shall be unlawful for the auditor of state, or for any fiscal officer of any county, city or city school district thereof, to draw, sign or issue or authorize the drawing, signing or issuing of any warrant on the treasurer or other disbursing officer of the state, or of any county, city or city school district thereof, to pay any salary or compensation to any officer, clerk, employe, or other person in the classified service unless an estimate, payroll or account for such salary or compensation containing the name of each person to be paid, shall bear the certificate of the state civil service commission, or, in case of the service of a city, the certificate of the municipal service commission of such city, that the persons named in such estimate, payroll or account have been appointed, promoted, reduced, suspended, or laid off or are being employed in pursuance of this act and the rules adopted thereunder.
>
> "Any sum paid contrary to the provisions of this section may be recovered from any officer or officers making such payment in contravention of the provisions of law and of the rules made in pursuance of law; or from any officer signing or countersigning or authorizing the signing or countersigning of any warrant for the payment of the same, or from the sureties on his official bond, in an action in the courts of the state, maintained by a citizen resident therein. All moneys received in any action brought under the provisions of this section must, when collected, be paid into the treasury of the state or appropriate civil division thereof, except that the plaintiff in any action shall be entitled to recover his own taxable costs of such action."

By the provisions of this section it becomes the duty of the state civil service commission, in the case of all state officers and employes in the classified civil service of the state, to examine the estimate, payroll and account of the compensation proposed to be paid to such officers and employes and in the first instance to determine whether the persons whose names appear thereon have been appointed, promoted, reduced, suspended or laid off, or are being employed in pursuance of the civil service law, and the rules adopted thereunder. If the state

civil service commission determines, as a matter of fact, that the persons whose names appear upon such estimate, payroll or account have been appointed, promoted, reduced, suspended or laid off, or are being employed in pursuance of the civil service law, and the rules adopted thereunder, it becomes the duty of the state civil service commission to certify such findings upon such payroll, estimate or account, of compensation to be paid. If, on the contrary, any person whose name appears upon such payroll, estimate or account, as a matter of fact, has not been appointed, promoted, reduced, suspended or laid off, or is not being employed in pursuance of the civil service law, and the rules adopted thereunder, it would be a violation of the duty of the state civil service commission to certify such payroll, estimate or account, contrary to the fact. It should be here observed that the determination of such matter of fact as the violation of the civil service law by an officer or employe should be based upon substantial proof and that mere newspaper reports could not be taken as substantiating such matter of fact.

This raises the question whether an employe, who has been guilty of a violation of section 486-23 G. C., supra, is thereafter being employed pursuant to the civil service law and the rules adopted thereunder. I believe it cannot be maintained that a person who is guilty of an open violation of the plain provisions of the civil service law, during the tenure of his office or the continuance of his employment in the classified civil service of the state may thereafter be said to be employed pursuant to its provisions and that, therefore, if the state civil service commission finds, as a matter of fact, upon proper investigation, that an officer or employe in the classified civil service of the state has wilfully violated the provisions of section 486-23 G. C., supra, the commission may properly refuse to certify the payroll of such officer or employe, as provided by section 486-21 G. C., supra.

It is deemed unnecessary to call attention to the power to make investigations concerning all matters touching the enforcement and effect of the provisions of the civil service law and the rules prescribed thereunder, conferred upon said state civil service commission and prescribed by section 486-7 G. C., 106 O. L., 403.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

2138.

SCHOOLS—COMPENSATION OF DISTRICT SUPERINTENDENT—ERRONEOUS CERTIFICATION BY COUNTY BOARD OF EDUCATION —HOW ERROR CORRECTED—ERRONEOUS APPORTIONMENT BY COUNTY AUDITOR—HOW SAME MAY BE CORRECTED—UPON PROPER CERTIFICATION BEING MADE.

This opinion deals with the payment of the compensation of a district superintendent under the particular state of facts therein set forth.

If an erroneous certification has been made to the county auditor by the county board of education pursuant to the provisions of section 4744-2 G. C., 104 O. L., 133, such error may be corrected to make the certification speak the truth as of the time at which the compensation of a district superintendent is finally determined according to law.

If the county auditor has made his semi-annual apportionment of school funds upon the basis of an erroneous certification, prior to the correction thereof, the erroneous apportionment necessarily resulting therefrom may be adjusted at the next semi-annual settlement upon the correction of the certification.

COLUMBUS, OHIO, January 3, 1917.

HON. C. ELLIS MOORE, *Prosecuting Attorney, Cambridge, Ohio.*

DEAR SIR:—Yours under date of December 28, 1916, is as follows:

"I am addressing this communication to you upon the following state of facts and after a conversation with our county auditor, Dr .T. C. White: Some time prior to the first day of September, 1916, the board of education of the village school district of Byesville, employed Prof. J. S. Talbott, as district school superintendent, at a salary of $1,562.50 per annum. The said J. S. Talbott did not agree to accept that salary and on the first day of September, 1916, his salary was reconsidered by said board of education, and the same increased to $1,900.00 per annum, beginning September first, 1916. This is according to a certificate on file in the auditor's office and signed by E. S. Blake, clerk of the board of education, Byesville, Ohio. Under date of August 1, 1916, the president of the county board of education, and the county superintendent, certified to Auditor White that the salary of the district superintendent, J. S. Talbott, should be $1,562.50 for the school year beginning in September, 1916. Later, on November 24, 1916, the county superintendent certified to the county auditor that the annual salary of the district superintendent, J. S. Talbott, should be $1,900.00 instead of $1,562.50.

"Under date of November 28, 1916, you rendered an opinion concerning this matter to the auditor of state which opinion was prompted by a letter written by Auditor White to the auditor of state, and submitted to you. This opinion was number 2069. Prof. Talbott insists that this opinion does not affect his case, since he never accepted the salary of $1,562.50, but on the contrary refused to accept such employment until it was raised to $1,900.00.

"Under the above state of facts we would like to submit to you, for your opinion, the following propositions since you have already given the opinion above referred to:

"(1) Is it legal for the auditor of Guernsey county, Ohio, to pay

such increase of salary when allowed by the county board of education under the above state of facts?

"(2) If the above question should be answered in the affirmative, that it would be legal for the county auditor to pay such increase, kindly state how he is to make his settlement and the method he is to follow, since he has made one settlement on the basis of the salary of $1,562.50, which settlement was made on the first of September, 1916.

"Mr. Talbott is respectfully calling attention to opinion 1190 under date of October 8, 1914, as a basis that might be followed in making settlement."

Under the facts stated in your inquiry no employment of Prof. Talbott was effected until the acceptance of his salary fixed by the board of education. The fact that the board of education in effect proposed or offered to employ Mr. Talbott at a salary of $1,562.50 per annum cannot be material so long as there was no acceptance of such offer. As I understand the facts stated, there was no obligation on either Prof. Talbott or the board of education until his acceptance of employment at a salary of $1,900.00 per annum. There is no question of increase of salary during a term of employment under the facts stated. In contemplation of law there was but one salary fixed, viz., that of $1,900.00 per annum. From this it follows that the certification of the president of the county board of education and the county superintendent, under date of August 1, 1916, to the fact that the salary of the district superintendent of the Byesville village school district was $1,562.50 was erroneous in fact for the reason, as above pointed out, that such compensation had not at that time been determined.

Section 4742 G. C., 104 O. L., 141, provides as follows:

"Not less than sixty days before the expiration of the term of any district superintendent, the president of the boards of education within such supervision district or in supervision districts which contain three or less village or rural districts, the boards of education of such districts shall meet and elect his successor. The president of the board in the village or rural district having the largest number of teachers shall issue the call giving at least ten days' notice of the time and place of meeting. He shall also act as chairman and certify the results of such meeting to the county board of education."

Section 4744-2 G. C., 104 O. L., 133, provides as follows:

"On or before the first day of August of each year the county board of education shall certify to the county auditor the number of teachers to be employed for the ensuing year in the various rural and village school districts within the county school district, and also the number of district superintendents employed and their compensation and the compensation of the county superintendent; and such board of education shall also certify to the county auditor the amounts to be apportioned to each district for the payment of its share of the salaries of the county and district superintendents."

Section 4744-3 G. C., 106 O. L., 396, provides as follows:

"The county auditor when making his semi-annual apportionment of the school funds of the various village and rural school districts shall retain the amounts necessary to pay such portion of the salaries of the

county and district superintendents as may be certified by the county board. Such amount shall be placed in a separate fund to be known as the 'county board of education fund.' The county board of education shall certify under oath to the state auditor the amount due from the state as its share of the salaries of the county and district superintendents of such county school district for the next six months. Upon receipt by the state auditor of such certificate, he shall draw his warrant upon the state treasurer in favor of the county treasurer for the required amount, which shall be placed by the county auditor in the county board of education fund."

While it was manifestly required and contemplated by the legislature in the enactment of sections 4742 and 4744-2 G. C., supra, that the number of district superintendents employed and their compensation should be determined prior to the first day of August in each year, the provisions of these sections certainly cannot be held to be of such mandatory character that no district superintendent may be lawfully employed subsequent to sixty days prior to September 1st in any year.

Until the district superintendents are employed and their compensation fixed —and such employment comprehends an acceptance by the superintendent so employed—it is not practicable to make the certification required by section 4744-2 G. C., supra, to state the facts in every case. It is, therefore, the duty of the county board of education to ascertain if the district superintendents have been employed, and their compensation finally determined, before making the certification required by section 4744-2 G. C., supra, that the same may state facts.

Although it was held in opinion No. 2069, addressed to Hon. A. V. Donahey, auditor of state, under date of November 28, 1916, that a second certification of increased compensation over that which was once finally determined may not be made within the year under the provisions of section 4744-2 G. C., it was not intended to hold that an error of fact in such certification may not be corrected to make the same speak the truth as of the time the compensation of district superintendents was actually first fixed and finally determined. On the contrary, I am of the opinion that the county board of education, under the facts stated, should correct their certification in respect to the compensation of Prof. Talbott to make it correctly state the facts as of the time of his acceptance of employment. The error which resulted of necessity in the August distribution by the county auditor from the incorrect certification of August 1, 1916, may then be adjusted at the next semi-annual settlement and sufficient funds then retained to pay the full compensation of the district superintendent, as determined by the board of education and by him accepted.

I am, therefore, of opinion, in answer to your first question, that the county auditor may lawfully pay the compensation of the district superintendent in question, as fixed by the board of education at $1,900.00 per annum, upon the correction of the certificate to show such salary to be that determined by the board of education.

In answer to your second question I am of the opinion that the county auditor should, at the next semi-annual settlement, retain a sufficient amount of funds to pay the full compensation of the superintendent in question.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2139.

MUNICIPAL COURT, COLUMBUS, OHIO—SECTION 3056 G. C. CONSTRUED—SAID SECTION APPLICABLE TO FINES ASSESSED AND COLLECTED BY ABOVE COURT.

The provisions of section 3056 G. C. are applicable to fines assessed and collected by the municipal court of Columbus, Ohio.

COLUMBUS, OHIO, January 3, 1917.

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

GENTLEMEN:—You have asked my opinion on the following questions:

> "Are the provisions of section 3056, General Code, relating to the payment of fines, assessed by a police court, to the law library, applicable to the municipal court of Columbus, Ohio?"

Section 1558-79 of the General Code, 106 O. L., 375, defining the powers and duties of the clerk of the municipal court of the city of Columbus, provides in part as follows:

> "* * * He shall pay over to the proper parties all moneys received by him as clerk; he shall receive and collect all costs, fees, fines and penalties, and shall pay the same monthly into the treasury of the city of Columbus, and take a receipt therefor, except as otherwise provided by law; * * *"

It will be noted that the foregoing provision specifically recognizes that not all fines collected by the clerk of the municipal court are to be paid into the treasury of the city of Columbus, but any of such fines, the disposition of which is otherwise provided by law, are excepted from said provision.

Said section 1558-79 G. C. further provides with reference to the duties of the clerk of the municipal court of the city of Columbus:

> "He shall succeed to and have all the powers and perform all the duties of police clerks."

One of the duties of police clerks is found in section 3056 G. C. which provides in part as follows:

> "All fines and penalties assessed and collected by the police court for offenses and misdemeanors prosecuted in the name of the state, except a portion thereof equal to the compensation allowed by the county commissioners to the judges, clerk and prosecuting attorney of such court in state cases shall be retained by the clerk and be paid by him quarterly to the trustees of such law library association, but the sum so retained and paid by the clerk of said police court to the trutsees of such law library association shall in no quarter be less than 15% of the fines and penalties collected in that quarter without deducting the amount of the allowance of the county commissioners to said judges, clerk and prosecutor."

I am, therefore, of the opinion that section 3056 G. C. does apply to fines

collected by a clerk of the municipal court of the city of Columbus for offenses and misdemeanors prosecuted in the name of the state.

It is true that the portion of the compensation of the judges and the clerk of the municipal court, which is to be paid by the county, is now fixed by statute and not by allowance by the county commissioners. However, I do not believe this change in the law renders entirely inoperative section 3056 G. C., supra, but the same is still in effect, at least to the extent of requiring the payment to the association of the minimum of fifteen per cent.

I am, therefore, of the opinion that the provisions of section 3056 G. C. do apply to fines assessed by the municipal court of Columbus, and that while some legislation is undoubtedly needed to clear up the inconsistency between said section and the provisions of the Columbus municipal court act, it is the duty of the clerk of the municipal court to pay over to the law library association the fines collected, up to the fifteen per cent. minimum fixed by the statute.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2140.

TAXES AND TAXATION—PHILIPPINE GOVERNMENT REGISTERED BONDS—NOT TAXABLE IN OHIO.

COLUMBUS, OHIO, January 3, 1917.

HON. WILLIAM H. LUEDERS, *Probate Judge, Cincinnati, Ohio.*

DEAR SIR:—In your letter of November 16th you enclose a letter addressed to you by Sidney Spitzer & Co., asking for opinion as to whether or not Philippine government registered bonds are taxable in the state of Ohio.

You state that this matter comes up because executors and guardians desire to buy these bonds as trust securities and you request my opinion on the above stated question.

Section 1 of the act of congress, passed February 6, 1905 (U. S. Stat. at Large, Public Laws, Vol. 33, Part 1, page 689), provides as follows:

> "Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that all bonds issued by the government of the Philippine Islands, or by its authority, shall be exempt from taxation by the government of the United States, or by the government of the Philippine Islands, or by any political or municipal subdivision thereof, or by any state or by any county, municipality, or other municipal subdivision of any state or territory of the United States, or by the District of Columbia."

The above provision of the statute by its terms exempts the bonds in question from taxation by any state, or by any county, municipality or other municipal subdivision of any state or territory of the United States. I am of the opinion, therefore, in answer to your question that said bonds are not taxable in the state of Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2141.

ACADEMIC DEPARTMENT OF COLLEGE OR UNIVERSITY SUPPORTED BY STATE IN WHICH TEACHERS' TRAINING SCHOOL IS MAINTAINED—PERSON HOLDING DIPLOMA FROM FIRST GRADE HIGH SCHOOL ENTITLED TO ADMISSION TO SUCH DEPARTMENT WITHOUT CONDITION.

A person holding a diploma from a first grade high school is entitled to admission without condition to the academic department of any college or university supported in whole or in part by the state in which institution is maintained a teacher's training or normal school.

COLUMBUS, OHIO, January 3, 1917.

HON. H. C. MINNICH, *Dean of Teachers' College, Miami University, Oxford, O.*

DEAR SIR:—Yours under date of December 6, 1916, is as follows:

> "Must a state teachers' training school in Ohio under section 7658, section 7807-3, 4 and 5, give unconditioned entrance to graduates from high schools operating under a first grade charter?"

Section 7658 G. C., 103 O. L., 125, to which you refer, provides as follows:

> "A holder of a diploma from a high school of the first grade may be admitted without examination to any college of law, medicine, dentistry, or pharmacy in this state, when the holder thereof has completed such courses in science and language as are prescribed by the legally constituted authorities regulating the entrance requirements of such college; except such institutions privately endowed which may require a higher standard for entrance examinations than herein is provided. After September 1, 1915, the holder of a diploma from a first grade high school shall be entitled to admission without examination to the academic department of any college or university which is supported wholly or in part by the state."

It is the latter provision of this section which has particular application to your inquiry. It will be noted that this provision is limited by its terms to the academic department of colleges or universities which are supported wholly or in part by the state.

Sections 7807-3 and 7807-4 G. C., 104 O. L., 100, relate to the granting of elementary provisional high school and provisional special certificates without further examination to graduates from a normal school, teachers' college, college or university, who have completed a full two years' academic and professional course, or a full four years' academic and professional course, in such institutions which have been approved by the superintendent of public instruction, who hold a diploma or certificate of graduation from a first grade high school or the equivalent thereof.

Reading section 7658 G. C., supra, in connection with the two last mentioned sections, it seems conclusive that the phrase "academic department" as used in section 7658 G. C., supra, comprehends and includes the courses of study preliminary to the work of the professional course, as referred to in sections 7807-3 and 7807-4 G. C., supra, as offered, generally speaking, in colleges of arts.

So that the force of the latter provision of section 7658 G. C., supra, is to admit to the "academic" courses, as above defined, of any college or university, which is supported in whole or in part by the state, without examination, all persons who hold a diploma from a first grade high school.

You ask if a state teachers' training school must give "unconditioned entrance" to graduates of first grade high schools. It will be observed that section 7658 G. C. provides that the holder of a diploma from a first grade high school shall be entitled to admission without examination to the academic department of any college or university supported wholly or in part by the state. I am inclined to the view that when it was provided that graduates of first grade high schools should be entitled to admission without examination that the term "examination" was intended to comprehend all conditions of admission and that the diploma should satisfy all such conditions whatsoever of admission to the departments of such colleges or universities above referred to.

I am, therefore, of opinion, in answer to your inquiry, that a person holding a diploma from a first grade high school must be admitted without condition to the academic department of any college or university supported in whole or in part by the state, which institution maintains a normal or teachers' training school.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2142.

APPROVAL, LEASE OF COLUMBUS FEEDER TO SCIOTO VALLEY TRACTION COMPANY.

COLUMBUS, OHIO, January 3, 1917.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication of December 29, 1916, transmitting to me for examination a lease of the Columbus feeder to The Scioto Valley Traction Company for twenty-five years, at a valuation of $100,000.00.

I find this lease to be in regular form and am, therefore, returning the same with my approval endorsed upon the triplicate copies thereof.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2143.

APPROVAL, LEASE OF PORTION OF CANAL LANDS AT AKRON TO THE CANAL BELT RAILROAD COMPANY.

COLUMBUS, OHIO, January 3, 1917.

HON. FRANK R. FAUVER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I acknowledge the receipt of your communication of November 24, 1916, transmitting to me for examination a lease to the Canal Belt Railroad Company of a portion of the canal lands at Akron, valued at $6,500.00.

I find this lease to be in regular form and am, therefore, returning the same with my approval endorsed upon the triplicate copies thereof.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2144.

PROBATE COURT—APPLICATION TO COMPLETE LAND CONTRACTS MADE UNDER SECTION 11922 G. C.—WHAT FEE CHARGEABLE BY COURT WHERE APPLICATION RELATES TO MORE THAN ONE CONTRACT.

Where an application to complete land contracts is made under section 11922 *G. C. to the probate court, the probate judge is entitled to charge and collect only the fee of five dollars, fixed by section* 1601 *G. C., even in cases where the application relates to more than one contract.*

COLUMBUS, OHIO, January 4, 1917.

HON. O. E. LYTLE, *Probate Judge, Akron, Ohio.*

DEAR SIR:—I acknowledge the receipt of your request for an opinion under date of December 27, 1916, which request reads as follows:

> "About the middle of section 1601 of the General Code of the state of Ohio we find the following:
> "'petition to lease and improve real estate, application and settlement of claim by wrongful death, application and order to complete contract, application to lease for oil, gas, clay or mineral, application to invest in productive real estate, application to borrow money and mortgage real estate, each five dollars.'
> "A petition or application was filed in this court to complete a number of land contracts. Would the probate court be entitled to simply charge five dollars for the one application, which asks to complete a number of land contracts, or would it be entitled to five dollars for each contract?
> "We have one petition filed in our court which asks to complete fifty-seven different land contracts."

An examination of the language of section 1601 G. C. quoted by you, and

especially the language "application and order to complete contract," makes it reasonably clear that the fee of five dollars relates to the application and order and not to the contract. In other words, the probate judge is entitled to a fee of five dollars for each application and order of this character and the fee does not relate to the contract authorized to be completed. The statute does not provide that the probate judge shall receive a fee of five dollars for each contract completed upon application to and order by him. It remains to consider, therefore, only the question of whether an application may cover more than one contract which an executor or administrator desires to complete.

Section 11922 G. C. reads as follows:

> "When a person who has entered into a written contract for the sale and conveyance of an interest in land dies before its completion, and his executor, administrator, or other legal representative, desires to complete it, he may file a petition therefor in the common pleas or probate court of the county in which the land, or any part thereof, is situated. If the petition be filed in the probate court, service may be made therein as in civil actions. The heirs at law, devisees, or other legal representatives of the deceased vendor, when not plaintiffs, must be made defendants."

So far as this section is concerned, its object is to grant to an executor or administrator the power to make a conveyance and the section is not intended to provide a method by which an unwilling purchaser may be compelled to complete his contract. The section is designed to meet the situation existing where the purchaser is willing to complete his contract and there is no requirement that the purchaser be made a party to the proceeding, it being provided only that the heirs at law, devises, or other legal representatives of the deceased vendor, when not plaintiffs, must be made defendants. I know of no reason, therefore, why one application of this character might not relate to two or more separate contracts of the deceased. A contract is in each instance the basis of the application. The parties will, in each instance, be the same and the relief prayed for will be identical.

It is my view that one application may relate to two or more contracts and that therefore where an application relates to more than one contract, the probate judge is entitled to charge and collect only the fee of five dollars fixed by the statute.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2145.

SHERIFF—COMPENSATION FOR FEEDING PRISONERS EMPLOYED UPON HIGHWAY WORK—CLAIM SUBMITTED, DISAPPROVED.

Under the facts as submitted, the sheriff of Belmont county cannot collect, and may not lawfully be paid, certain extra compensation claimed by him for feeding prisoners employed upon highway work.

COLUMBUS, OHIO, January 4, 1917.

HON. GEORGE THORNBURG, *Prosecuting Attorney, St. Clairsville, Ohio.*

DEAR SIR:—I acknowledge the receipt of your request for an opinion under date of December 13, 1916, which request reads as follows:

"I am in receipt of the attached letter and bill from the county commissioners of Belmont county. The letter sets out the facts and the question asked is whether or not the commissioners can legally allow this bill. I would like to have your opinion upon the matter.

"Section 2850 G. C. provides that:

"'The commissioners shall allow the sheriff not less than forty-five nor more than seventy-five cents per day for keeping and feeding prisoners in jail.'

"While the commissioners are under contract to pay fifty-eight cents per day for boarding prisoners in jail, that contract was entered into a long time prior to the time any prisoners were worked on the public highways. The Cass highway law provides that the commissioners shall arrange with the sheriff for the maintenance and discipline of the prisoners while upon the public highways. While no contract was entered into for extra compensation and since this amount asked brings the compensation up to the maximum, I cannot see any reason why the commissioners should not pay the bill, if in their judgment they believe it just. They have the right at any time a showing is made to raise the compensation, and if the showing is made that it was worth more to board prisoners who are working every day upon the public highways, cannot they pay the amount if they think it proper?

"I think, on the other hand, that the sheriff has been negligent in not presenting this bill and asking for this extra compensation when the first month was due, and the commissioners might assume from the presentation of his bills, without any charge for extra compensation, that he was not going to ask for any extra compensation, and it is my opinion it is doubtful whether he could recover, yet I believe if the commissioners see fit to pay this bill that they will have a legal right to do so."

The letter addressed to you by the county commissioners of your county reads as follows:

"The commissioners of Belmont county are under contract with Clyde C. Bulger, sheriff of Belmont county, to board all prisoners confined in the Belmont county jail, at the rate of 58c per day. In September, 1915, after the Cass highway law went into effect, the commissioners requested that the sheriff work all available prisoners upon the county highways under the direction of the county commissioners. At the time this ar-

rangement was made no contract or agreement was entered into whereby the sheriff was to receive more than the usual sum of 58c per day for boarding such prisoners.

"The sheriff, however, did furnish to the prisoners working upon the public highways extra food and gave them a greater quantity of food than those prisoners confined in the jail all the time.

"Each month since September, 1915, the sheriff has submitted to the commissioners an itemized bill for boarding all the prisoners confined in the jail at the rate of 58c per day, and no claim was made for any extra compensation for boarding prisoners on the road in any of said monthly statements. All of said monthly statements have been paid, and the sheriff has received the money.

"On December 6th, 1916, the sheriff has submitted a bill for extra amount claimed for feeding the prisoners that worked upon the public highways; a copy of said bill for extra compensation is hereto attached, marked A. Can this bill be legally paid?"

The bill presented by the sheriff covers the period beginning with September, 1915, and ending with October, 1916. The bill bears the following notation:

"This bill is for extra food and work in packing buckets and feeding the men working on public works and roads; said extra expense being incurred in feeding said prisoners extra meats, eggs, pies and cakes to pack said buckets, and at the breakfast and supper meals."

The amount of the bill is $971.04, being for 5,712 days at 17c per day, said 17c being the difference between the rate ordinarily allowed the sheriff for feeding prisoners in the jail and the maximum amount allowable under the statutes.

Section 2850 G. C. reads as follows:

"The sheriff shall be allowed by the county commissioners not less than forty-five nor more than seventy-five cents per day for keeping and feeding prisoners in jail, but in any county in which there is no infirmary, the county commissioners, if they think it just and necessary, may allow any sum not to exceed seventy-five cents each day for keeping and feeding any idiot or lunatic. The sheriff shall furnish at the expense of the county, to all prisoners confined in jail, except those confined for debt only, fuel, soap, disinfectants, bed, clothing, washing and nursing when required, and other necessaries as the court in its rules shall designate."

Section 2997 G. C. provides that in addition to the sheriff's compensation and salary the county commissioners shall make allowances quarterly to each sheriff for keeping and feeding prisoners, as provided by law. The rate to be paid the sheriff by the county commissioners for keeping and feeding prisoners in jail is not, strictly speaking, a matter of contract even within the limitations provided by section 2850 G. C., although the matter is ordinarily treated by the commissioners and sheriff as though it were a matter of contract. When the commissioners have fixed the rate within the limits provided by section 2850 G. C., the sheriff is required to perform the duty of keeping and feeding prisoners for the rate so fixed and cannot decline so to do.

The use of prison labor on roads is regulated by chapter II of the Cass highway law, 106 O. L., 574, 655. Under section 7496 G. C., whenever the state

highway commissioner makes requisition upon the warden or superintendent of the state penitentiary or reformatory for prisoners to work upon the state highway, or in the preparation of road building material for use thereon, it becomes the duty of the warden or superintendent, and the state highway commissioner, to provide by agreement for the cost of transportation and maintenance of said prisoners and the discipline and government thereof. Under section 7497 G. C. it is also the duty of the warden or superintendent and the state highway commissioner to agree as to the amount to be paid the prison authorities, if anything, for the use of said prisoners, in addition to the entire cost of transportation, maintenance and discipline. Under section 7498 G. C. county commissoiners are authorized to make similar requisition upon the warden or superintendent of the state penitentiary or reformatory and are authorized to agree with the authorities controlling the prison in the same manner and as to the same matters as the state highway commissioner. Under section 7500 G. C. county commissioners are also authorized to make requisition upon any jailer for any number of prisoners sentenced to a jail, desired for use upon the highways of the county or in the manufacture of road materials. The section expressly provides that an agreement shall first be entered into between the county commissioners and the authorities in charge of said jail, prescribing the amount which shall be paid for the labor of such prisoners, in addition to the cost of transportation, maintenance and discipline.

From the above it will be observed that the maintenance of prisoners employed upon the highways is made by statute a matter of contract between the authorities using the prisoners and the authorities having charge of the jail or prison in which such prisoners are confined. Under the facts as submitted by you it does not appear that any agreement was ever entered into between the sheriff and the county commissioners providing for the payment of any compensation to the sheriff on account of maintaining prisoners while employed upon the highway.

Even if such a contract had been made, it does not appear that there was any compliance with section 5660 G. C., which section reads as follows:

> "The commissioners of a county, the trustees of a township and the board of education of a school district, shall not enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of money, unless the auditor or clerk thereof, respectively, first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate and in process of collection and not appropriated for any other purpose; money to be derived from lawfully authorized bonds sold and in process of delivery shall, for the purpose of this section, be deemed in the treasury and in the appropriate fund. Such certificate shall be filed and forthwith recorded, and the sums so certified shall not thereafter be considered unappropriated until the county, township or board of education, is fully discharged from the contract, agreement or obligation, or as long as the order or resolution is in force."

In view of the fact that no contract covering the maintenance of prisoners while employed upon the highways was made, as provided by law, and no certificate made in compliance with section 5660 G. C. and the further fact that, during all the time covered by the account now presented, the sheriff charged and collected for the prisoners employed on highway work the full amount fixed by the commissioners under authority of section 2850 G. C., it is my opinion that the law will

leave the parties to this transaction where it finds them, and that the sheriff cannot collect and may not lawfully be paid the additional compensation claimed by him.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2146.

LINE FENCES—SECTION 5913 G. C. AND RELATED SECTIONS HELD CONSTITUTIONAL.

Section 5913 and related sections of the General Code are constitutional and valid. They may not be so construed and administered, however, as to charge an owner of lands, which are, and are to remain, unenclosed, with any part of the expense of constructing and maintaining a line fence for the sole benefit of an adjoining proprietor.

COLUMBUS, OHIO, January 5, 1917.

HON. DEAN S. STANLEY, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—Your request for an opinion under date of December 27, 1916, reads as follows:

> "I write to inquire concerning the constitutionality of section 4243 and the subsequent sections of the General Code dealing with the building and maintenance of line fences. I am in some doubt upon this matter by reason of certain decisions, to wit: The Alma Coal Co. v. Cozad, treasurer, 79 O. S., 348; John P. Beach v. Bert Roth, et al., as trustee of Sharon township and Simon Dressler, reported in the 18th C. C., N. S., at page 579, which I understand was affirmed without opinion in Roth et al. v. Beach, 80th O. S., 746; and the case of McDorman v. Ballard et al., trustees, et al., which was decided by the supreme court April 25, 1916, and will appear in the 94th O. S.
>
> "I find it difficult to reconcile these decisions and do not know whether it was the purpose of the court in the last mentioned case to distinguish from other cases or to overrule the case reported in 80th O. S."

When you refer to section 4243 of the General Code I assume that you intend to refer to section 5913 of the General Code, which was a part of section 4243 R. S. Section 5913 of the General Code reads as follows:

> "If either person fails to build the portion of fence assigned to him, the township trustees, upon the application of the aggrieved person, shall sell the contract to the lowest responsible bidder agreeing to furnish the labor and material and build such fence according to the specifications proposed by the trustees, after advertising them for ten days by posting notices thereof in three public places in the township."

This section and the related sections, commencing with section 5908 G. C., have been considered by the courts in a number of cases referred to by you, but I am unable to say that there is any conflict in the authorities or that there is any doubt as to the constitutionality of these sections.

In the case of the Alma Coal Company v. Cozad, treasurer, the court did not hold that the sections in question were unconstitutional. The court merely held that the sections could not be so construed and administered as to charge an owner of lands, which are, and are to remain, unenclosed, with any part of the expense of constructing and maintaining a line fence for the sole benefit of the adjoining proprietor. The court further held that to give these sections any other and broader meaning and to so construe them as to charge an owner of lands, which are, and are to remain, unenclosed, with any part of the expense of constructing and maintaining a line fence, would amount to the laying of an imposition upon such lands for the sole benefit of another, which course of action is inhibited by constitutional provisions.

The syllabus in the case of Beach v. Roth, et al., trustees, 18 O. C. C., N. S., 579, is misleading, the broad statement of the syllabus being that section 4243 R. S. is unconstitutional. It sufficiently appears, however, from the opinion of the court, that the court had in mind a situation where the lands on which it was sought to lay the imposition were unenclosed and were intended by the owner so to remain and that the owner had no occasion for a line fence for the purpose of controlling his own domestic animals or for any other purpose except it might be to protect his lands from the domestic animals of his neighbor, who was seeking to compel him to share in the expense of constructing a line fence. This case was affirmed without report in 80 O. S., 746, on the authority of the Alma Coal Company v. Cozad, treasurer, supra.

In the recent case of McDorman v. Ballard, et al, trustees, reported in the Ohio Law Reporter of November 20, 1916, volume XIV, No. 34, and which case will appear in 94 O. S., 183, the constitutionality of these sections was again before the supreme court and the sections were held to be constitutional and valid, but after citing the case of Alma Coal Co. v. Cozad, treasurer, the supreme court affirmed the ruling in that case and held that the statutes in question could not be so applied and construed as to compel the owners of lands, which are, and are to remain, unenclosed, to bear any part of the expense of constructing and maintaining line fences for the sole benefit of adjoining proprietors.

In view of the holdings in the above cited cases, there can be no doubt as to the constitutionality of the sections about which you inquire. Such sections are constitutional and valid and may not be so construed and administered as to charge an owner of lands, which are, and are to remain, unenclosed, with any part of the expense of constructing and maintaining a line fence for the sole benefit of an adjoining proprietor.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2147.

BOARD OF STATE CHARITIES—COSTS IN MAYOR'S COURT IN ARREST OF DELINQUENT WARD OF ABOVE NAMED BOARD WHO IS OUT ON PAROLE AND HAS ESCAPED FROM PRIVATE HOME.

Cost in a mayor's court incurred in the arrest of a delinquent ward of the board of state charities, for offense committed by said ward, who has escaped from a private home in which he had been placed by the board should follow the case into the juvenile court which assumed jurisdiction of the prisoner, and be paid the funds of that court, notwithstanding the ward was subsequently surrendered to the board for disposition.

COLUMBUS, OHIO, January 5, 1917.

Board of State Charities, Columbus, Ohio.

GENTLEMEN:—Your request for an opinion is as follows:

> "Enclosed you will find a letter from Judge Hoke, of Tiffin.
>
> "George Van Scoter at one time was an inmate of the Boys' Industrial School. He was paroled to return to Columbus. Soon thereafter he was implicated in some offenses and the judge of the Franklin county juvenile court imposed another sentence to Lancaster. The execution of this sentence was suspended and the boy was released on probation to the children's welfare department of this board. He was boarded in a foster home in Fairfield county. On or about December 1, he ran away from this home, after he had stolen some money, and was finally apprehended in Seneca county, as will be noted in the letter of Judge Hoke. Through a newspaper clipping we recognized the boy under arrest as one in whom we were interested and we sent one of our visitors, Mr. Wright, to return the boy if the authorities of Seneca county were not disposed to take any further action.
>
> "When Mr. Wright informed Judge Hoke that the boy was under suspended sentence of the juvenile court of Franklin county, Judge Hoke ordered the release of the boy to Mr. Wright with the understanding that he was to be returned to Franklin county. This was done and the by is now an inmate of the Boys' Industrial School, his probation having been recalled and the former sentence ordered executed.
>
> "We desire your advice as to whether the charges mentioned in the letter are ones for this department to pay or is it properly chargeable to some other agency or person?"

By virtue of the authority contained in section 1352-5 General Code, (103 O. L., 867) the Board of State Charities is empowered to receive as its wards delinquent children committed to it by a juvenile court.

It is further provided in the section referred to that such children are to be placed in homes in accordance with the provisions of section 1352-3 of the General Code.

Section 1352-4, General Code, provides that the actual and necessary expenses of the placing of such children shall be paid from funds appropriated to the board.

Under the provisions of section 1352-3, General Code, referred to above, the Board of State Charities becomes vested with the sole and exclusive guardianship of such children and as such is charged with their care and control.

In the case of George Van Scoter, referred to in your letter as having been apprehended by the authorities of Seneca county for the commission of an offense after he had run away from the home in Fairfield county where he had been placed by your board, although the action of the authorities in apprehending and holding the boy is stated to have been in behalf of your board, the action taken was in reality the same as would have been taken in the case of any person accused of crime. The fact that the boy arrested was found to be subject to the jurisdiction of the juvenile court resulted in his being turned over to that court and under and by virtue of the provisions of section 1682 of the General Code the costs and expenses incurred in the mayor's court would follow the matter into the juvenile court of Seneca county and it is my opinion they should be paid from the juvenile court fund of the county.

Your attention is invited to opinion No. 502 addressed to the Bureau of Inspection and Supervision of Public Offices under date of June 14, 1915, to be found in Vol. II, of the Opinions of the Attorney-General for 1915, at page 1022.

Respectfully,
EDWARD C. TURNER,
Attorney-General.

2148.

COUNTY JAILS—DISCHARGE OF PRISONERS WHEN COMMITTED TO JAIL IN DEFAULT OF PAYMENT OF FINE AND COSTS.

Prisoners committed to jail in default of payment of fine and costs may be released either by serving out time at the rate of sixty cents, seventy-five cents or one dollar per day, as the case may be, by payment of fine and costs to sheriff by action of the county auditor, county commissioners, under insolvency law, or by action of the courts in a proper proceeding.

COLUMBUS, OHIO, January 6, 1917.

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

GENTLEMEN:—Your request for an opinion is as follows:

"Kindly let us have your written opinion on the following proposition at an early date:

"Kindly enumerate the methods by which a prisoner committed to the county jail by a justice of the peace, mayor, or police judge, in default of payment of fine and costs, may secure his liberty.

"Following is an extract from one of the reports on file in this office which we have been holding to be the law on this subject and we are desirous of knowing whether we are correct:

"'Discharge of prisoners when committed to jail in default of payment of fine and costs.'

"'This subject has been touched upon at several places in this report, but in order that there may be no misunderstanding of the matter, the several legal methods are herewith specifically set up, as follows:

"'1st. By serving out time at the rate of 60 cents a day as provided in section 13717 G. C.

"'By payment of fine and costs to the sheriff.

"'3d. By action of the county auditor under the provisions of section 2576 G. C.

"'4th. By action of the county commissioners under the provisions of sections 12382 and 12383 G. C.

"'5th. By action of the commissioner of insolvents under the provisions of sections 11146 and 11180 G. C.

"'6th. By action of a court of competent jurisdiction reviewing the case.

"'7th. By habeas corpus proceedings. (See sections 12161 et seq.)

"'NOTE—If the sentence of the court is for a *specific number of days* in addition to the commitment in default of payment of fine and costs, said days must be served first, and only the last two methods above cited can operate to relieve a prisoner from serving such specific sentence.'"

In your letter you refer, among other things, to section 12383 of the General Code as being one of the means through which prisoners committed to jail may be released. In reading that section you will find that it is not a provision for the release of a prisoner but rather for the re-arrest of a prisoner who has been released under the provisions of section 12382 of the General Code and who has violated the conditions of his parole under that section.

Section 3666 of the General Code is as follows:

"The council may provide that any person who refuses or neglects to pay the fine imposed on conviction of any such offense, and the costs of prosecution, shall be imprisoned and kept at hard labor until, at the rate of seventy-five cents for each day's labor, exclusive of Sundays, he shall have earned an amount equal to such fine and costs."

Section 1405 of the General Code, as amended (106 O. L., 170), which is a part of the fish and game laws, provides that persons convicted of violations of that law shall be committed to the jail or workhouse of the county and there confined one day for each dollar of the fine and costs adjudged against them and that they shall not be discharged therefrom by any board or officer except upon the payment of the fines and costs remaining unsatisfied or upon the order of the board of agriculture.

Subject to the reference to section 12383 of the General Code referred to above, and the provisions of sections 3666 and 1405 of the General Code, as amended, it is my opinion that the instructions contained in your circular and quoted in your letter as an abstract from the reports on file in your office are correct as showing the procedure by which one committed to jail in default of payment of the fine and costs may be released therefrom.

Respectfully,

EDWARD C. TURNER,

Attorney-General.

2149.

DISTRICT SUPERINTENDENT—FREQUENCY OF FILING REPORTS UNDER SECTION 4740 G. C., 106 O. L., 439, LEFT TO DISCRETION OF COUNTY SUPERINTENDENT—DUTY OF BOARD OF EDUCATION TO WITHHOLD PAY OF SUPERINTENDENT WHO FAILS TO FILE REQUIRED REPORTS.

Under the provisions of section 7706 G. C., 104 O. L., 133, the frequency of the reports of district superintendents, including superintendents under section 4740, G. C., 106 O. L., 439, is left to the discretion of the county superintendent, subject only to the specific requirement that a report shall be made annually.

The county superintendent may require the punctual filing of such reports monthly.

It is the duty of the board of education to withhold the pay of any superintendent employed under section 4740 G. C., supra, who fails to file reports properly required by the county superintendent.

COLUMBUS, OHIO, January 6, 1917.

HON. IRVING CARPENTER, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—Yours under date of December 15, 1916, is as follows:

"Several questions have been raised by the county superintendent of schools, upon which I desire your advice. They are with reference to his powers under the following sections:

"Section 4740 provides that the superintendent of such separate district 'shall perform all the duties prescribed by law for a district superintendent.'

"Section 7706 defining the duties of the district superintendent provides 'he shall report to your county superintendent annually, and oftener if required, as to all matters under his supervision.'

"1st. Under the latter section what authority is given the county superintendent to specify the frequency, nature and items of the report, which is to be made to him annually or oftener as required?

"2nd. Is he vested with authority to require the punctual and certain filing in his office of these reports?

"3rd. Under the two sections referred to are the duties of the superintendent of a separate district, provided for in section 4740, with reference to such reports, the same as those prescribed for district superintendents in 7706, especially is it mandatory for him to furnish monthly reports to the county superintendent, if so required by the county superintendent?

"4th. In the event of a district superintendent or superintendent of such separate district failing or refusing to make such reports, what remedy has the county superintendent by which to compel such reports to be made? Does section 7784 apply to such case, and if so how could it be applied when a board of education refuses to withhold the pay of such superintendent?"

Section 4740 G. C., 106 O. L., 439, to which reference is made, provides as follows:

"Any village or rural school district or union of school districts for

high school purposes which maintains a first grade high school and which employes a superintendent shall upon application to the county board of education before September 10, 1915, or before June 1st of any year thereafter, be continued as a separate district under the district supervision of the county superintendent. Such district shall continue to be under the direct supervision of the county superintendent until the board of education of such district by resolution shall petition to become a part of a supervision district of the county school district. Such superintendent shall perform all the duties prescribed by law for a district superintendent, but shall teach such part of each day as the board of education of the district or districts may direct. Such districts shall receive no state aid for the payment of the salaries of their superintendents and the salaries shall be paid by the boards employing such superintendents."

Section 7706 G. C., 104 O. L., 133, which prescribes in part the duties of district superintendents, and which is adopted by reference by the provisions of section 4740 G. C., supra, provides as follows:

"The district superintendent shall visit the schools under his charge, direct and assist teachers in the performance of their duties, classify and control the promotion of pupils, and shall spend not less than three-fourths of his working time in actual class room supervision. He shall report to the county superintendent annually, and oftener if required as to all matters under his supervision. He shall be the chief executive officer of all boards of education within his district and shall attend any and all meetings. He may take part in their deliberations, but shall not vote. Such time as is not spent in actual supervision shall be used for organization and administrative purposes and in the instruction of teachers. At the request of the county board of education he shall teach in teachers' training courses which may be organized in the county school district."

Under this latter section the frequency of the reports of district superintendents, including superintendents under section 4740 G. C., supra, is left entirely to the discretion of the county superintendent, subject only to the specific requirement that a report shall be made annually. The discretion thus vested in the county superintendent would not be reviewed by the courts except for a gross abuse thereof.

The statute itself specifically requires that such reports shall be "as to all matters under his supervision," referring to the supervision of a district superintendent, including superintendents under section 4740 G. C., supra.

It is thus rendered conclusive that the county superintendent may require such reports as in his judgment he deems necessary, not only as to any but as to all matters which are under the supervision of district superintendents, including superintendents under authority of section 4740 G. C., supra. Said reports should, of course, be in such detail as directed by the county superintendent, as is reasonably necessary to render the same of utility and to make them serve all purposes for which they are intended.

From the foregoing it follows that it is within the authority of the county superintendent to require the punctual filing of the reports referred to and which he may require to be made by district superintendents, as referred to in your second inquiry.

In answer to your third question, I am of the opinion that the language of section 4740 G. C. is sufficiently specific in that respect to render it conclusive that the duties of superintendents, under section 4740 G. C., supra, in relation to the reports referred to, are the same as those of district superintendents prescribed by section 7706 G. C., and if so required by the county superintendent it is mandatory upon a superintendent, under section 4740 G. C. to make monthly reports of matters under his supervision to the county superintendent.

Section 7784 G. C., 104 O. L., 225, to which you refer in your fourth inquiry, provides as follows:

> "Boards of education shall require all teachers and superintendents to keep the school records in such manner that they may be enabled to report annually to the county auditor and superintendent of public instruction as required by the provisions of this title and shall withhold the pay of such teachers and superintendents as fail to file the reports required of them. The records of each school, in addition to all other requirements, shall be so kept as to exhibit the names of all pupils enrolled therein, the studies pursued; also, indicate the character of the work done, the standing of each pupil, and must be as near uniform throughout the state as is practicable."

This section specifically provides that the board of education shall withhold the pay of such teachers and superintendents as fail to file the reports required of them. This latter language clearly comprehends the reports required of superintendents under the provisions of sections 7706 and 4740 G. C., and it is, therefore, the duty of boards of education to withhold the pay of a district superintendent, under authority of section 4740 G. C., who fails to file the reports required by section 7706 G. C., supra, as herein above defined.

The refusal of any member of a board of education to withhold the pay of a teacher or superintendent, as required by section 7784 G. C., supra, would render such member subject to the provisions of section 10-1 G. C., 103 O. L., 851, as follows:

> "That any person holding office in this state, or in any municipality, county or any subdivision thereof, coming within the official classification in section 38, article 2, of the constitution of the state of Ohio, who refuses or wilfully neglects to enforce the law, or to perform any official duty now or hereafter imposed upon him by law, or who is guilty of gross neglect of duty, gross immorality, drunkenness, misfeasance, malfeasance or non-feasance, shall be deemed guilty of misconduct in office; upon complaint and hearing in the manner provided for herein shall have judgment of forfeiture of said office with all its emoluments entered thereon against him, creating thereby in said office a vacancy to be filled as prescribed by law. The proceedings provided for herein are in addition to impeachment and other methods of removal now authorized by law."

This remedy is not, however, available to the county superintendent, as such, and may be enforced only in the manner prescribed in subsequent sections.

There is no statutory provision which specifically imposes upon the county superintendent the duty of enforcing the provisions of section 7784 G. C., supra, nor is any authority conferred upon the county superintendent, as such, to invoke the remedy provided in section 10-1 G. C., supra. There is, therefore, no remedy peculiar to the county superintendent, as such. I am inclined, however, to the

view that section 7784 G. C. imposes upon the board of education the mandatory duty of withholding the pay of any teacher or superintendent who shall fail to file the reports required of them and that the payment of such teacher or superintendent might be enjoined by a taxpayer.

Respectfully,
EDWARD C. TURNER,
Attorney-General.