The above case of *State ex rel Halsey, et al* vs. *Ward* was decided a number of years ago, but the statutes with reference to the incorporation of municipalities and the annexation of territory thereto have not been materially changed since the decision of that case, and I am of the opinion that the doctrine of the case still holds. It, of course, does not apply if one entire township is annexed to an adjoining municipality. In that case the township organization is abolished for all purposes except the election of justices of the peace.

I am therefore of the opinion in specific answer to your question that a township clerk has the right to contine to deputize persons to sell hunter's and trapper's licenses in that part of his township which has been annexed to a city.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4835.

MEDICAL BOARD—ACCREDITED SCHOOL OF NURSING—REGULATION, DEFINING SUCH AS ONE CONNECTED WITH A HOSPITAL REQUIRING OHIO REGISTERED NURSES, VALID.

SYLLABUS:

The regulation of the State Medical Board defining a nurses' training school in good standing as a school connected with a hospital which requires nursing to be practiced therein by Ohio registered nurses, as adopted January 5, 1932, effective July 1, 1932, is a valid rule and not violative of any constitutional rights of those who may have theretofore matriculated in schools of nursing which are not in good standing as defined by such rule.

COLUMBUS, OHIO, December 22, 1932.

The State Medical Board, Columbus, Ohio.

GENTLEMEN:—Your letter of recent date is as follows:

"Under date of January 5th, 1932 the State Medical Board adopted an additional rule or regulation governing the practice of nursing in hospitals having accrediated schools of nursing. A copy of this resolution reads as follows:

'Accredited schools of nursing whose graduates will be candidates for the Ohio R. N. will hereafter (July 1st, 1932) be located or connected with hospitals which require nursing to be practiced by Ohio registered nurses. Such hospitals shall require nurses practicing therein to be Ohio registered. Pupil nurses enrolled in the training school are exempt from this requirement.'

This requirement was deemed necessary by the Board for the reason that a number of nurses registered in other states had accepted employment in accrediated hospitals or were employed as teachers in accredited schools and were refusing to apply for registration in Ohio.

Following the promulgation of this requirement all accredited training schools sought to enforce it and at this time there remains but one individual who refuses to do so. The attached letter of Dr. Bachmeyer sets forth the problem in detail. The nurse who refuses to resign

and who, apparently, has not submitted any credentials to this office and made formal application for Ohio registration relies for exemption upon a rule of the Civil Service Commission of the city of Cincinnati, which Commission did not at the time she took her examination for a position with the Cincinnati General Hospital require that graduate nurses be registered in Ohio—although the rule did require graduate nurses to be registered.

At an earlier date you, in a formal opinion to this department, construed the regulations adopted by the State Department of Health requiring registration before employment to mean 'Ohio registered'.

The department begs to inquire whether this opinion should not be applied in the instant case.

I am informed that the Civil Service Commission of Cincinnati has amended their rule to require Ohio registration for nurses in the future, but are not inclined to construe the requirement as applying to the nurse in question. This department is of the opinion that the application of the rule of January 5th should not be considered as retroactive but that Ohio registration was in reality required at all times."

The opinion to which you refer is reported in Opinions of the Attorney General for 1929, Vol. II, p. 1072. The syllabus is as follows:

"In appointing public health nurses under the provisions of Section 1261-22, General Code, a district board of health is subject to the same limitations in making the selection as are set forth in Section 4411, General Code, relative to the appointment of public health nurses by a municipal board of health, and accordingly must employ registered nurses, unless registered nurses are not available, in which event, other suitable persons may be so appointed."

The foregoing opinion might be pertinent in interpreting the former rule of the Cincinnati Civil Service Commission. It is my view, however, that this is not a function of your board. Under the statute, you are charged with the duty of determining the standing of schools of nursing, and this is a matter which the legislature has left to the discretion of the Medical Board.

Section 1295-5, General Code, provides for the issuance of a certificate to persons desiring to practice nursing as registered nurses in this state by the nurses' examining committee. One of the requirements of this section is that the applicant be a graduate of a nurses' training school and present a diploma from such school. The statute provides that "If the committee shall find the diploma to be genuine and from a nurses' training school in good standing, as defined by the state medical board, and connected with a hospital or sanitorium, * * * the committee shall issue a certificate * * *." The statute clearly authorizes the State Medical Board to define what shall constitute a nurses' training school in good standing.

Your inquiry raises a question as to the validity of the rule set forth therein and whether it shall apply to schools connected with hospitals which have heretofore employed nurses who are not Ohio registered nurses.

It is well established that a rule such as is here under consideration must be reasonable. In *State of Ohio* vs. *Gardner,* 58 O. S. 599, the court held that "Where the pursuit concerns in a direct manner the public health and welfare, and is of such a character as to require a special course of study or training,

or experience, to qualify one to pursue such occupation with safety to the public interests, it is within the competency of the general assembly to enact reasonable regulations to protect the public against evils which may result from incapacity and ignorance."

It may well be argued that the matter of whether or not registered nurses are employed in a hospital connected with a school of nursing has perhaps no direct bearing upon the course of study which it has prescribed for graduation, but it has been held by the Supreme Court that the standing of a school to be determined by a professional board, is not dependent alone upon the course of study it has prescribed for graduation but that the reputation of the school among the members of the profession must be considered. In *State, ex rel. Medical College* vs. *Coleman, et al.,* 64 O. S. 377, the court commented upon this point at p. 388 as follows:

> "The statute does not define what shall constitute a medical institution 'in good standing.' Its language is that, 'If the board shall find the diploma to be genuine, and from a legally chartered medical institution in good standing as determined by the board,' etc., thus leaving the standing of the institution whose diploma is presented by an applicant, to be determined according to the best judgment of the board.
>
> It is unnecessary to inquire here whether there may be cases in which the courts would undertake to correct or control the judgment of the board on this question. It is clear that the standing of a medical college within the meaning of the statute, is not to be determined alone from the course of study it has prescribed for graduation. The statute imports, at least, that the institution shall be one which has established a favorable reputation among members of the medical profession; and the board should not be required to recognize one, that, from the brief period of its existence, or the novelty of its system of treatment has not yet acquired such reputation, but might, in the judgment of the board, be considered as still in an experimental state. The statute has undoubtedly left much in this respect to the sound discretion of the members of the board, who, in passing upon the various applications presented to them, it must be assumed, will act as their official position requires, fairly, impartially, and justly to all concerned."

It appears to me that the obvious purpose of the statutory requirement that a school of nursing be connected with a hospital is to enable students of nursing to acquire practical experience in the duties and responsibilties of their profession as assumed and performed by registered nurses. It would, therefore, seem that if the school were connected with a hospital in which no registered nurses were employed, the students of that school might be placed under a material handicap in pursuing their training course. It is, accordingly, my opinion that the rule in question is not unreasonable.

It is next necessary to consider whether or not this rule may be said to be retroactive in its effect in barring graduates from a school connected with a hospital which has employed nurses which are not registered in Ohio prior to the effective date of the rule.

In so far as non-registered nurses which may have been heretofore employed in such hospitals as are here under consideration are concerned, your inquiry presents no question of impairment of the obligation of contracts in violation of Section 10, Article I of the Federal Constitution, this for the reason

that the Medical Board is not seeking to dictate the type of nurses which any hospital may employ but is only concerning itself with its statutory power in determining what applicants for registration may be considered as graduates of nurses' training schools in good standing. Obviously any hospital may continue to employ non-registered nurses as long as it may see fit so to do.

Coming to the question of whether or not the rule may be said to be retroactive as to applicants for registration who have heretofore enrolled in schools of nursing connected with hospitals employing non-registered nurses, the statute contains no provision whereby the Medical Board shall determine in advance of an application being filed whether the diploma accompanying such application is from a school in good standing as defined by the board. The Coleman case, supra, is directly in point as to this matter. The language of the court on pp. 386 and 387 is as follows:

> "One of the grounds upon which this relief is sought is, that the provision of section 4403c, of the Revised Statutes, as amended February 27, 1896, (92 O. L., 44-5), which confers on the state board the power to determine whether a diploma, presented for its action, is one issued by a legally chartered medical institution 'in good standing,' and, if determined not to be so, to refuse to the holder of the diploma, a certificate to practice medicine, is in conflict with section 28 of article 2 of the constitution of this state, and of section 10 of article 1 of the federal constitution, being, it is claimed, retroactive in its operation, and in impairment of the obligation of contracts; and also in conflict with the fourteenth article of amendment to the federal constitution, in that it denies to parties due process of law. It would seem to be a sufficient answer to this ground of complaint that, if the statutory provision which confers on the state board the power to determine whether a medical institution whose diploma is presented for its action, is of good stand, is repugnant to so many constitutional inhibitions, it would be highly improper for the court to compel the board to exercise that power by recognizing the relator as a medical institution of the character required by the statute. However, it was held in *France* vs. *State,* 57 Ohio St., 1, that the statute was not obnoxious to the constitutional provisions referred to.
>
> The other ground on which the writ demanded is sought is, briefly stated, that, the refusal of the medical board to recognize the relator as an institution of the required standard, is purely arbitrary and the result of prejudice because the system taught by it is new and different from that adopted by other medical colleges. This does not appear to be a sufficient ground for granting the writ at the relator's instance. The proper scope of a proceeding in mandamus against an official board, is to command the performance of acts which the law has specifically enjoined upon it as a duty resulting from the office. Section 6741, Revised Statutes. Unless the duty is so enjoined, the remedy is inappropriate. A careful examination of the statutes fails to discover any provision authorizing an application to the board by a medical institution to obtain official recognition of its good standing, or any provision requiring of the board any official action in that behalf upon such an application. And such official action not being enjoined by statute, cannot be required by writ of mandamus. Nor, do we find any provision which makes it the duty of the board to determine in advance of an application for

a certificate to practice medicine, whether a person holds a diploma from a medical institution of the proper standing. It is only when a diploma is presented upon such application, that the action of the board can be invoked."

To the same effect is *State of Ohio* vs. *Gravett,* 65 O. S. 289 and *Williams* vs. *Scudder,* 102 O. S. 305.

In view of the foregoing, it is my opinion that the regulation of your board defining a nurses' training school in good standing as a school connected with a hospital which requires nursing to be practiced therein by Ohio registered nurses, as adopted January 5, 1932, effective July 1, 1932, is a valid rule and not violative of any constitutional rights of those who may have heretofore matriculated in schools of nursing which are not in good standing as defined by such rule.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4836.

MINIMUM WAGE—PUBLIC CONTRACTS—INAPPLICABLE TO PERSONS OR FIRMS WHO FURNISH MATERIAL TO CONTRACTOR OR SUB-CONTRACTOR.

SYLLABUS:

Where a person or firm furnishes materials to a contractor or subcontractor to be used in the construction of a public improvement and such person or firm has nothing to do with the installation or fabrication of such materials into such improvement, sections 17-4 *to* 17-6, *General Code, inclusive, do not operate to empower the public authority authorized to contract for such improvement to provide in the contract with the successful bidder a minimum rate of wages to be paid to the men employed and paid by such person or firm furnishing such materials when engaged in the delivery of such materials to the site of improvement.*

COLUMBUS, OHIO, December 23, 1932.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication which reads as follows:

"Under Section 17-3 to 17-6, the Director of Highways has authority to fix a minimum wage on highway contracts.

This minimum wage is binding on all contractors and sub-contractors. Under authority of the above sections, the Director has set a minimum wage on all contracts since last August.

The practice has grown up among contractors of having material delivered directly to the job by the material company, whereas such delivery has almost always been made by the contractor or his sub-contractor.

The Highway Department recently made a ruling that when material was hauled from railroad cars or from material plants to the