Note from the Attorney General's Office:

1903-1907 Op. Att'y Gen. No., p. 143 was overruled by 2004 Op. Att'y Gen. No. 2004-025.

OFFICIAL OPINIONS.

CONSTRUCTION OF LAW GOVERNING "ONE MILE ASSESSMENT PIKES."

COLUMBUS, OHIO, January 2, 1903.

Michael Cahill, Prosecuting Attorney, Eaton, Ohio.

DEAR SIR:—Your leter of December 30, 1902, propounding a number of questions in regard to the construction of the law governing "one mile assessment pikes," has been received.

The various inquiries and suggestions made by you would require a minute examination of all the laws governing the construction of "one mile assessment pikes," without having before us a statement of the facts in regard to each particular road referred to in your letter. The decision of Judge Fisher no doubt states the law upon the matters that were before him, and the case of Miller v. Hickson, 64 O. S., p. 39, fully sustains the decision of Judge Fisher.

Not having furnished us with the facts relative to each road in your county that may have been constructed under the provisions of the law referred to, it is out of the question to give you an opinion upon all matters that might arise, growing out of your situation there, but I would make these suggestions.

The object of the law governing "one mile assessment pikes," is to allow localities within counties upon petition, to have constructed roads and highways. For this purpose the law has provided for the selection of three suitable persons as road commissioners to supervise the construction of the pike. The petition for such road as provided in section 4774, demonstrates that the improvement, or prayer for the improvement, originates from fre-holders living in the particular district through which the contemplated road is to extend. The road commissioners above referred to, are, for the purposes of the work to be performed by them, created a body corporate. They may issue bonds to be paid for by the extra taxes levied upon the abutting free-holders, in pursuance of the petition filed by the free-holders. The road commissioners are required under section 4792, to report annually, and to settle with the county commissioners for the receipts and expenditures for the current year, and if they fail to perform such duty, they may be proceeded against, as provided by sections 4793 and 4794.

Section 4827 provides that when the road shall have been completed, the road commissioners shall make a final report to the county commissioners of the total expenditures on the road, and turn over to the county auditor, their books and papers, and that thereafter, the turnpike or road shall be kept open and repaired under the provisions of chapter 10.

Section 4796 provides that when the road commissioners have completed their road in a good substantial manner, they may make application to the board of county commisioners to receive the same; and the county commissioners shall, after making view and examination of the road, if, in their opinion, the road is in suitable condition to be received as completed, they shall receive

the same, and such road shall then be kept in repair under the provisions of chapter 10.

There is no express provision of law, which either directly or indirectly, provides for the acceptance of a road such as that contemplated, by the county commissioners, while such road is in an uncompleted condition.

On May 9, 1902 (95 O. L., p. 454), the Legislature has provided what shall be done by the board of county commisioners when the road shall not be constructed, nor the tax levied.

Under the general statement you make in your letter, as I understand it, you propose a situation like this: A petition has been duly filed, the road commissioners appointed, the extra tax levy to the full extent required by law has been made and collected, and the road remains uncompleted. We are not advised by you whether there is any outstanding indebtedness existing against the said road, whether in the shape of bonds, orders, or in other form. As long as the bonds or other indebtedness is outstanding, to the amount of the extra taxes legally levied and collected, the road commissioners must remain as first constituted, a body corporate. If there is no legal indebtedness existing against the road, and the road is uncompleted, the legal extra levies have been exhausted and applied upon the road, then under the act of May 9, 1902, just referred to, it becomes the duty of the county commissioners to act as prescribed in such law. And I can see no reason, why, if the state of facts exists as last indicated by me, that is, a complete exhaustion of the legal extra levies, and no outstanding indebtedness held on account of, or to be liquidated out of such levies, then the road commissioners duties have ceased. There is nothing further for them to do, and unless the free-holders shall petition the county commissioners for an extra levy to complete the road, then the county commissioners may appropriate such road, and keep it in repair by virtue of chapter 10 of the Revised Statutes.

This matter as presented by your letter, indicates so many different points of inquiry, that if you desire any further information from this office, it will be more satisfactory to us for you to make the points you desired passed upon, stating the facts under which they arise, your own conclusions after an investigation of the statutes and law, and any authorities you may find relevant to the subject inquired of.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

IN REGARD TO FORFEITED LEASES ENTERED INTO WITH THE BOARD OF PUBLIC WORKS.

COLUMBUS, OHIO, January 5, 1903.

Allen W. Thurman, President Special Canal Commission, Columus, Ohio.

DEAR SIR:—Your letter of January 5th received. In it you make two inquiries:

First. What right, if any, has the State of Ohio to terminate the lease made by the State of Ohio to Morehouse and Van Foseen, under date of the 8th day of May, 1878, and transferred to J. W. Chrisman and G. G. Metzger on the 12th day of August, 1878, and now held by Bassett and Company, situate at Waterville, Lucas County, Ohio, said lessee having failed to comply with the terms of the

lease, in so far as he has failed to make payment of rentals, which were due on November 1, 1902.

Second, Whether the Board of Public Works has the power to lease the water now used at Waterville at any other point that they may designate.

The first inquiry requires an examination of the terms of the lease referred to. Amongst other provisions in said lease is found the following:

> "And if at any time any installment which shall become due for rent as hereinbefore expressed, shall remain unpaid for one month from the time the same shall fall due, or if the party of the second part shall in any respect, fail to fulfill and perform all engagements of said party hereinbefore expressed, or shall do or permit to be done any act or thing hereby prohibited, or shall in any respect violate this agreement, then and in either case, all the rights and privileges derivable to said party from this agreement, shall from the time of such failure or violation, cease and determine, and any authorized agent of the State or lessee under said State shall have full right and power to enter upon and take possession of the premises, and resume all the rights and privileges hereby granted to the party of the second part."

This lease further provides that the rental shall be payable semi-annually on the first day of May and November in each and every year during the continuance of this lease, to the collector of canal tolls at Maumee City, or other agent of the State authorized to receive the same.

The facts as submitted to us are, that the lessee, Bassett, has ever since the first day of November, 1902, failed and refused to pay the rentals as he engaged to do by the terms of the lease, and consequently this lease has become forfeited by its terms, and the rights and privileges of said lessee thereunder have ceased and determined. It being provided as above, in the lease, that either an authorized agent of the State or a lessee under the State shall have full right and power to enter upon and take possession of the premises and exercise all the rights and privileges granted to the original lessee, it is apparent that the Board of Public Works has full authority at this time to lease said water power to any suitable applicant who may apply for the same. The very fact of leasing the property by the Board at this time is an authoritative declaration and notice to the former lessee that the State has taken advantage of the forfeiture of the lease as provided by its terms.

As to the second inquiry, we would say that the water power, leased by virtue of the Bassett contract, is described as of 2,100 cubic feet of water per minute. We would, therefore, say that any surplus water not heretofore leased out of the level of the Miami and Erie canal, referred to in the Bassett lease, may be leased to any suitable person, provided such grant of water power shall not infringe upon the rights of prior subsisting lessees.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

WHO SHOULD BEAR THE TRAVELING EXPENSES OF PATIENTS DISCHARGED FROM THE OHIO HOSPITAL FOR EPILEPTICS?

COLUMBUS, OHIO, January 6, 1903

A. P. Ohlmacher, Superintendent Ohio Hospital for Epileptics, Gallipolis, Ohio.

DEAR SIR:—In your letter of January 1, 1903, you make the following inquiry: Whether the hospital should pay the traveling expenses of discharged

patients who are sent back to their respective counties, or whether the expenses should be borne by the county?

Prior to April 14, 1900, such expenses were to be paid by the institution, both to and from the hispital; but on April 14, 1900 (94 O. L., p. 182), Section 8 of the original act, providing for the establishment and government of such hospital, was amended, and the following provision made:

> "The Traveling and incidental expenses of the patient and also of the officer or other person or persons in charge of such patient, to and from said institution, shall be paid by the counties, or as provided in Section 631 of the Revised Statutes."

Section 631 of the Revised Statutes provides in substance that the traveling and incidental expenses shall be paid by the patient himself, or by those having him in charge, so that as the law now is, the traveling expenses of discharged patients who are sent back to their respective counties, must either be borne by the patient himself, by those having him in charge, or by the county.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

SECTIONS 148c AND 148d R. S. ADMISSION OF AMERICAN GOLD MINING AND MILLING COMPANY INTO STATE.

COLUMBUS, OHIO, January 6, 1903.

Hon. L. C. Laylin, Secretary of State, Columbus, Ohio.

DEAR SIR:—I have yours of January 3rd, in which you ask an opinion from me as to whether the American Gold Mining and Milling Co., a foreign corporation, is required to comply with the provisions of Section 148c and 148d of the Revised Statutes of Ohio.

It appears from the facts stated in this case that this is a company organized under the laws of Utah to carry on the business of mining in that state; that none of this property is located in Ohio, and none of its business is transacted here except to the extent of soliciting persons to subscribe and pay for capital stock in this company, and an occasional meeting of some of the directors. I do not think this is an employment of the capital of the company within the State of Ohio, as is contemplated by the provisions of the Sections above referred to. When stock is subscribed for and the money paid, it is supposed to be taken out of the State and used in the development and operation of the mines in question. It is not used within the State of Ohio in the transaction of any business. Indeed, it seems to me, the only real business that is done in the State of Ohio by this company or its agents is that of soliciting subscriptions to its capital stock.

There is another reason why I think it would not be good policy to give these mining companies a certificate of authority to do busines in the state, when the only thing they desire to do is to solicit subscriptions to their capital stock. Some of these companies heretofore, to my personal knowledge, have solicited admission to the State and have obtained certificates of admission, and have immediately thereafter used these certificates with great effect in inducing dupes to subscribe for their capital stock, claiming that the company had been examined by the Secretary of State and has received his approval.

Very truly yours,
J. M. SHEETS,
Attorney General.

SECTION 3263 R. S. CHANGING COMMON STOCK INTO PREFERRED AND WHETHER CAN FILE A CERTIFICATE OF WITH SECRETARY OF STATE.

COLUMBUS, OHIO, January 6, 1903.

Hon. L. C. Laylin, Secretary of State, Columbus, Ohio.

DEAR SIR:—I am in receipt of yours of December 30th, in which you ask an opinion from me as to whether a corporation organized under the laws of Ohio can change a portion of its common stock into preferred stock under the provisions of Section 3263 of the Revised Statutes of Ohio, and pursuant to the provisions of that section file a certificate of such change with the Secretary of state.

In my opinion it cannot.

While I have little doubt but that the stockholders among themselves may agree to give a part of the common stock the characteristics of preferred stock, and that in the event of the winding up of the company that the courts would carry out that agreement, yet that is a mater with which the state has nothing to do.

Section 3263 makes provision for issuing preferred stock, and that is done by increasing the capital stock, upon the written consent of at least three-fourths of the stockholders. When preferred stock is thus provided for, a certificate showing that fact and the amount of the increase of the stock is required by the provisions of this section to be filed with the Secretary of State.

But there is no provision anywhere in the law that I am able to find, providing that a company may change a part of its common stock into preferred stock, and file a certificate of that change with the Secretary of State. Hence, I am of the opinion that the certificate of the change of a part of the common stock into preferred stock, in the case of the Mt. Gilead Water, Light, Heat and Power Co., should not be permitted to be filed with you.

Very truly yours,
J. M. SHEETS,
Attorney General.

DUTIES OF JOINT BOARDS CREATED BY THE PROVISIONS OF THE ACTS OF APRIL 28, 1902 (95 O. L., 277-283).

COLUMBUS, OHIO, January 7, 1903.

To the Ohio Canal Commission, Columbus, Ohio.

GENTLEMEN:—I am in receipt of yours of the 6th instant, in which you ask certain questions regarding the duties of the Joint Board created by the provisions of the two acts of April 28, 1902 (95 O. L., pp. 277-283), providing for the control and management of the reservoirs of the State as public parks and pleasure resorts.

I will try to answer your inquiries in their order.

First. Does the Joint Board provided for in Section 2 of Bill No. 43 have the control and management, for park and pleasure resort purposes, of the Celina Grand Reservoir?

This question should be answered in the affirmative. The two acts of April 28, already referred to, being acts *in pari materia*, must be construed together.

Section 1 of Senate Bill No. 43 (one of the acts above referred to), dedicates the Celina Grand Reservoir as one of the public parks and pleasure resorts of the State, and while the remainder of this act does not mention the Celina Grand Reservoir as one of the reservoirs over which the Joint Board has control, yet Sction 1 of Senate Bill No. 44 (being the other act above referred to), provides

> "That all lakes, reservoirs, and state lands that have heretofore or that may hereafter be dedicated or set apart for the use of the pubic, for park and pleasure resort purposes, shall be under (the) control and management of the Board of Public Works, the Chief Engineer of the public works and the Ohio Canal Commission acting jointly, as said boards now discharge their official duties when leasing State lands."

So that here is an express provision of statute for the control and management of the Celina Grand Reservoir by this Joint Board, for, as already suggested in Senate Bill No. 43, it is dedicated and set apart "for the use of the public, for park and pleasure resort purposes."

Second. Do all the provisions of that bill apply to the Celina Grand Reservoir, for park and pleasure resort purposes, the same as to Buckeye Lake, Indian Lake and Portage Lakes?

It is immaterial whether all the provisions of Senate Bill No. 43 apply to the Celina Grand Reservoir or not, for substantially the same provisions are enacted by Senate Bill No. 44, which does apply to all the reservoirs dedicated and set apart for the use of the pubic for park and pleasure resort purposes, which of course includes the Celina Grand Reservoir, as already suggested. Hence, for the purposes of your inquiries, we may drop out of view the remainder of the provisions of Senate Bill No. 43.

Third: Is is the duty of the Secretary of the Board of Public Works under Section 5 of Senate Bill No. 44 to keep a separate account of all revenues derived from leases of State lands in and adjacent to said Celina Grand Reservoir and of all funds derived from the sale of special privileges on the same?

Section 5 of Senate Bill No. 44, among other things, provides:

> "The said Secretary shall also keep a separate account of all revenues derived from leases of State lands in and adjacent to said parks or pleasure resorts, likewise of all funds derived from the sale of special privileges in connection with the same, and shall credit, in a separate account, to each park or pleasure resort, all moneys derived from the lease of lands or sale of special privileges in connection with such parks or pleasure resorts."

This provision requires the Secretary of the Joint Board to keep one account of all moneys received for leases, special privileges, etc.; and also separate accounts showing the amount received from each reservoir for such leases and special privileges. That is, he should keep all the funds derived from the sale of special privileges, leases, etc., from all the reservoirs and lands adjacent thereto, in one account, but should also show the amount derived from each reservoir.

Your fourth inquiry is covered by the answer to the third, hence I will give it no further consideration.

Fifth: Under Section 4 of Bill No. 44 how much can the Joint Board expend on each park or resort the first year and during subsequent years?

Section 2 of Senate Bill No. 44 provides that for the purpose of policing and patrolling these reservoirs, the Joint Board may expend annually a sum not to

exceed $350.00 on each reservoir. The amount, however, thus to be expended, must be obtained from the receipts for rentals, special privileges, etc. There is no other provision, however, in either act, apportioning to each reservoir the amount that can be expended thereon annually for the purpose of "maintaining and improving" them. Section 4 of Senate Bill No. 44 provides that

> "All revenues derived from the granting of special privileges connected with such parks or pleasure resorts as aforesaid, shall be set apart as a special fund, for the purpose of maintaining, improving and policing the same, and such of receipts not more than two thousand dollars during any subsequent year shall be expended under (the) direction lars during the first year, nor more than one thousand dollars during any subsequent year shall be expended under (the) direction of the Joint Board provided for in the first section of this act."

It thus appears that while the Joint Board may expend the first year, two thousand dollars in maintaining, improving and policing these reservoirs, and one thousand dollars each year thereafter, yet the statute is silent as to how this sum shall be apportioned among the several reservoirs, in "improving and maintaining" them. Hence, it is quite clear to me that the Legislature intended to leave it to the discretion of the Joint Board to determine the amount to be expended on each reservoir in improving and maintaining it. Indeed, common prudence would require that the Legislature should leave it to the Joint Board to determine how this annual allowance should be expended, for it would be impossible to determine ahead of time what ought to be expended on each reservoir. The only limitation (as already suggested) upon the discretion of the Joint Board in expending this annual allowance is found in Section 2 of Senate Bill No. 44, which is to the effect that no more than $350.00 shall be expended in any one year upon any one reservoir in policing and patrolling it. But that does not include the amount to be expended in "maintaining and improving" it, provided for in Section 4 of the act. Nor does it compel the annual expenditure of $350.00 on each reservoir in policing and patrolling it. The Joint Board may, if in its judgment any reservoir does not require it, dispense with the expenditure of $350.00 or any part of it.

Your sixth and seventh inquiries are covered by the answer to the fifth, hence need not be further considered.

Eighth: If the revenues and funds set apart and credited to a separate account in any year, as provided in Section 5 of said bill exceeds the amount that can be expended thereunder, what disposition can be made with such excess?

I am unable to find in either Senate Bill Nos. 43 or 44 any provision for the use of any surplus that may exist over the annual expenditure provided for in these acts. Hence, it should accumulate in the State Treasury until the Legislature shall hereafter make some disposition of it.

Ninth: With reference to the expenditure of the annual allowance upon these reservoirs, when does the year begin and end?

In my opinion, the year began as soon as the Joint Board was organized, and of course the new years begin at each anniversary thereafter. This Joint Board, being a special board created by the acts referred to, and having a special fund provided for by those acts, are not controlled by the general provisions of the statutes requiring the fiscal year to begin and end at any particular time. Hence, as already suggested, the year begins with the organization of the Joint Board.

Very truly,
GEORGE H. JONES,
Assistant Attorney General.

AS TO WHETHER PROSECUTING ATTORNEY IS ENTITLED TO TEN PER CENT. OF FINES COLLECTED BY MAGISTRATES IN CRIMINAL CASES. ALSO TEN PER CENT. OF FINES COLLECTEL UNDER SECTION 6968, WHEN HE DOES NOT APPEAR FOR STATE.

COLUMBUS, OHIO, January 9, 1903.

Addison C. Lewis, Esq., Prosecuting Attorney, Steubenville, Ohio.

MY DEAR SIR: Yours of January 7th at hand and contents noted. You inquire whether, in my opinion, a prosecuting attorney is entitled to ten per cent of the fines collected by Magistrates in criminal cases, and also ten per cent. of the fines collected under the provisions of Section 6968 R. S., where he does not appear and act for the State in the prosecutiou of infractions of the game law.

Section 1273, R. S., requires the Prosecuting Attorney to prosecute criminal cases in the Probate, Common Pleas and Circuit Courts; and after conviction he is required to proceed vigorously to collect fines and costs, also forfeited recognizances, but he is not required to appear before a magistrate and prosecute a criminal case or collect fines imposed in such courts. It was held in the case of The State v. Brewster, 44 O. S. 249, that the Prosecuting Attorney was not entitled to the costs in a criminal case which were paid by the State to the County, pursuant to the provisions of Sections 7336 and 7337 R. S. Judge Minshall, in speaking for the Court in that case, at page 251, says:

> "Now we think it is manifest that the mind of the Legislature was directed to the provisions of these several sections when it enacted Section 1298, and that the commission there allowed on all moneys collected on fines, forfeited recognizances and costs in criminal causes, has references to such fines, forfeited recognizances and costs in criminal causes as, by these sections, he is required to collect."

Such being the holding of the Supreme Court, it would follow that as the Prosecuting Attorney is not required to prosecute cases in Justice's Courts or to collect the fines therein imposed, he is not entitled to 10 per cent. on the fines thus imposed and collected.

I am also of the opinion (following out the spirit of the decision in the case of State ex rel. v. Brewster) that unless the prosecuting attorney acts for the State in prosecuting infractions of the Fish and Game Laws under the provisions of section 6968 R. S., he is not entitled to 10 per cent. of the fines collected. It is evidently intended that this compensation should be awarded to the prosecuting attorney for his services in such cases, but if he does not appear for the State he does not earn the compensation therein provided.

I freely state, however, that I am not so sure of the correctness of my answer to your second inquiry as I am of the first. It is questionable whether or not the prosecutor is not entitled to his 10 per cent. of the fines collected under section 6968 R. S., even though he did not appear and take part in the prosecution.

Very truly yours,

J. M. SHEETS,

Attorney General.

LEGALITY OF PROPOSED ARTICLES OF INCORPORATION OF THE W. V. SMITH COMPANY.

COLUMBUS, OHIO, January 12, 1903.

Hon. L. C. Laylin, Secretary of State, Columbus, Ohio.

DEAR SIR: I am in receipt of your communication of January 10th, in which you inclose proposed articles of incorporation of the W. V. Smith Company, and inquire whether the purposes of organization therein set forth, are such as may be lawfully combined in one corporation.

One general purpose contained in these proposed articles is that of producing, refining and smelting and selling mineral oils and metals. This business, of course, would include all things incidental thereto.

There are, however, two distinct and separate kinds of business, other than the one above referred to, which this company proposes to engage in as set forth in its proposed articles of incorporation, which in my opinion, should be eliminated before the articles should be allowed to be filed. These two provisions referred to are as follows:

> "First: Organizing companies, partnerships, associations and originating enterprises for the purpose of producing and refining oil and gas, mining, milling, smelting and dealing in metals, ores and minerals, and promoting companies or organizations for the purpose of manufacturing, mining and other enterprises."
>
> "Second: Purchasing, holding, selling, assigning, transferring, mortgaging, pledging or otherwise disposing of capital stock, bonds, debentures or securities of all kinds, of any other corporation or association."

It is against the policy of the laws of Ohio to allow a corporation to engage in more than one kind of business. Indeed, Section 3235, R. S., providing for the organization of corporations, only permits corporations to be formed "for any purpose for which individuals may lawfully associate themselves," thus permitting a corporation to be formed only for one purpose. In construing this section of the statute, Spear, J., in speaking for the court in the case of State ex rel. v. Taylor, 55 O. S., at p. 67, says:

> "It is urged, however, that the plaintiff's contention is supported by the authority given by Section 3235, Revised Statutes, which provides that 'corporations may be formed in the manner provided in this chapter for any purpose for which individuals may lawfully associate themselves,' etc. It will be noted that the word is 'purpose', not 'purposes.' Its use implies a limitation. This limitation must have been by design. It is a most wise and reasonable one. We cannot assume that the general assembly would intentionally clothe corporations with capacity to unite all classes of business under one organization, as this would tend strongly to monopoly."

Very truly,

J. M. SHEETS,

Attorney General.

DEPUTY STATE SUPERVISORS OF ELECTIONS ENTITLED TO COMPENSATION FOR SERVICES PERFORMED BY THEM WITH RESPECT TO THE ELECTION REQUIRED BY THE ACT OF MARCH 12, 1902.

COLUMBUS, OHIO, January 17, 1903.

E. L. Taylor, Prosecuting Attorney, Columbus, Ohio.

MY DEAR SIR:—I am in receipt of your communication of the 13th inst. in which you seek an opinion from me as to whether the members of the board of deputy state supervisors of elections, are entitled to receive compensation for services performed by them with respect to the election provided for by Section 3 of the act of March 12, 1902, (95 O. L., 41).

The act of March 12, 1902, provides the terms and conditions upon which any county of the state may raise the necessary funds and erect a memorial building. Section 3 of this act provides that before any bonds can be issued for this purpose, the question of issuing the bonds must be submitted to a popular vote at a regular county election; also, that

> "The deputy supervisors of election of said county shall submit said question to popular vote at the next regular county election with such forms of ballot as said deputy supervisors may prescribe, and shall certify the result of said election to the board of trustees."

The act of October 22, 1902, (96 O. L., 13), precribing the compensation which deputy state supervisors of elections shall receive, provides among other things, that

> "Each deputy state supervisor of elections and the clerks of boards of deputy state supervisors of elections shall receive for his services the sum of two ($2.00) dollars, for each election precinct in their respective counties for each election held in their said counties, the returns of which are, or may be required by law to be made to the board of deputy state supervisors of elections."

Hence, as the returns of the election provided for in the act of March 12, 1902, are "required by law to be made to the board of deputy state supervisors of elections," the members thereof are entitled to compensation for the services.

It will be observed that the services of the deputy state supervisors of elections are measured at the rate of two ($2.00) dollars a precinct for each election, "the returns of which are, or may be required by law to be made" to them. It matters not that another election is held on the same day, the returns of which are required to be made to the deputy state supervisors of elections. These elections are two separate and distinct elections.

It consequently follows, as already suggested, that they are entitled to pay for each election.

Very truly,

J. M. SHEETS,
Atorney General.

AS TO WHETHER COUNTY SHALL PAY EXPERT WITNESS FEES.

COLUMBUS, OHIO, January 20, 1903.

Robert H. Day, Esq., Prosecuting Attorney, Canton, Ohio.

MY DEAR SIR:—Yours of the 16th at hand and contents noted.

Your inquiry requires an opinion upon the question as to whether under the provisions of the act of April 28, 1902 (95 O. L., 282), the county is liable for the compensation due expert witneses examined on behalf of a person charged with crime, where an inquisition of lunacy has been instituted against him under the provisions of Section 7176 R. S.

The act of April 28, 1902, provides:

> "When in the examination or trial of any person accused of the commission of crime, or upon inquiry before the grand jury, it shall appear to the prosecuting attorney or the assistant prosecuting attorney to be necessary to the due administration of justice to procure examination by chemical or other experts, or the testimony of expert witnesses, the county commissioners may, upon the certificate of the prosecuting attorney or his assistant that such services were or will be necessary to the due administration of justice, allow and to pay such expert such compensation for his services as the court approves and as the commissioners may deem just and proper.

From these provisions it will appear that before any bill can be allowed as compensation to an expert witness, the prosecuting attorney must certify that such expert witness was necessary in the particular case to the due administration of justice. In other words, the prosecuting attorney is the sole judge as to whether any expert testimony is necessary, and as he is the judge as to whether any expert testimony is necessary, he certainly must be the judge as to how many expert witnesses are necessary. If it were not so, the moment he concluded that expert witnesses were necessary, then the county would be at the mercy of the defendant and his counsel. Expert witnesses could be obtained from any distance and in any numbers. Hence, before any witness is entitled to compensation as an expert he must have a certificate to the effect that such testimony was necessary to the due administration of justice.

Waiving that question, however, I am of the opinion that the statute in question does not provide for the payment of compensation to expert witnesses who testify on behalf of a defendant. The prosecuting attorney is not interested in convicting the accused but in finding out the truth. The state does not demand the conviction of any person and it is the prosecuting attorney's duty to investigate fairly and impartially all criminal cases to determine for himself whether the accused ought to be placed upon trial, and to aid in that investigation the legislature has placed at his disposal the means whereby he can procure expert assistance.

It will not be out of place to avert to the fact that except in so far as changed by express statutory provision, a person on trial accused of a crime, is not entitled to have either his witnesses or counsel paid out of the public treasury. Hence, the question is not whether the statute prohibits the payment, but does it allow the payment. In the United States Courts, even now, a person on trial, accused of crime, must pay the expenses of subpœnaing his own witnesses and their fees, unless he is indigent; but that fact must appear to the court, and even then he must set forth in his affidavit what he expects

the witnesses, he desires to subpœna, to testify to. Not until the act of April 28, 1902, was passed did the law make any provision for compensation to expert witnesses above that of the ordinary witness, and as, in my opinion, this act makes no provision for the payment of expert witnesses out of the public treasury, who testify on behalf of the defendant in a criminal case, it follows that the county is not liable for compensation to such witnesses.

Very truly yours,

J. M. SHEETS,
Attorney General.

SECTION 1352 REVISED STATUTES UNCONSTITUTIONAL.

COLUMBUS, OHIO, January 21, 1903.

Hon. Charles W. Stage, County Solicitor, Cleveland, Ohio.

MY DEAR SIR:—Yours of January 17th at hand and contents noted. I think you and I will both agree that the provision of Section (1352) R. S. which assumes to give the county treasurer of Cuyahoga County power to "omit to enforce the payment of penalties for non-payment of taxes within the time limited by law", is clearly unconstitutional. Penalties for non-payment of taxes within the time prescribed by law is certainly a subject of a general nature, as much so as the subject of taxation itself is one of general nature. But were it not so, in my opinion, this provision at most could have application only to the penalties which the law permits the treasurer to charge between the 20th of December and the February settlement for non-payment of taxes; and between the 20th of June and the August settlement for non-payment of taxes. When the property is returned delinquent and the penalty assessed thereon, it is no longer a question of omitting to enforce payment of penalties, it then becomes a question of remission of penalties. I feel so sure, however, of my opinion that this act is clearly unconstitutional, that I do not care to elaborate further.

Very truly yours

J. M. SHEETS,
Attorney General.

CONSTRUCTION OF SECTION 9, PROVIDING FOR EXAMINATION OF ENGINEERS.

COLUMBUS, OHIO, January 22, 1903.

Hon. George M. Collier, Chief Examiner Steam Engines, Columbus, Ohio.

DEAR SIR:—Answering your inquiry of this date with regard to the construction of Section 9 of the act providing for the examination of engineers, would say: That under said Section 9 any person dissatisfied with the action of the District Examiner in refusing or revoking a license may appeal to you, and the statute requires you to investigate the action of said District Examiner, and if, upon such examination, you find that the District Examiner was justified in refusing or revoking such license, you shall sustain said District Examiner in his action; and otherwise, you shall order such District Examiner to issue a license to the person making the appeal.

Pursuant to the power herein invested in you, you have the authority to examine the applicant yourself and from other evidence determine the fitness of the applicant for a license, and you are not concluded by the investigation of the District Examiner thereon.

Very truly yours,
J. M. SHEETS,
Attorney General.

REGISTRATION OF ELECTORS.

COLUMBUS, OHIO, January 23, 1903.

Hon. Lewis C. Laylin, Secretary of State, Columbus Ohio.

DEAR SIR:—I beg to acknowledge receipt of your communication of January 19th seeking an opinion from me upon certain questions propounded by you concerning the registration of electors under the provisions of the election laws of the state. I will endeavor to answer your inquiries in their order.

(*a*) Is a general registration of all electors of the city required by the registration laws where council acting under Section 117 of the municipal code has sub-divided such city into new wards?

All electors have a constitutional right to vote unhampered by any condition except those imposed by statute for the purpose of preserving the purity of the ballot.

Hence, to determine whether a general registration is necessary, if the council has sub-divided the city into new wards under the provisions of Section 117 of the new municipal code, resort must be had to the provisions of the statute upon the subject of registration of voters.

Section 2926a, R. S., provides:

> "In cities of the first and second class no person shall be deemed or held to have acquired a legal residence in any ward or election precinct for the purpose of voting therein at any election general or special, nor shall he be admitted to vote at any election therein unless he shall have caused himself to be registered as an elector in such ward or precinct, in the manner and at the time hereinafter required."

Section 2926h R. S., requires a general annual registration of all electors residing in cities of the first class and in cities of the first grade of the second; also requires a quadrennial registration, prior to each presidential election, of all electors residing in all other cities of the second class, to which the act applies. But the registration above referred to, is required to be had prior to the November election. I have been unable to find, however, any statutory provision requiring a general registration of electors at any other time, except prior to the November election.

Section 2926h after requiring a general registration of electors, as above set forth, provides that

> "And at all other state, April or any other public election, those electors who have been duly registered at such general registration as herein provided, and have not movd from the precincts in which they have registered at said general registration in any such city, shall not be required to register; but at such state, April or other public election, at the times hereinbefore provided for registration

> days, only those electors of any such city shall be required to register, as may be new electors, or who have moved into any precinct of any such city since any general, state or April registration, and have not been registered therein, excepting that at such April or public election other than presidental and state, such registration shall take place on Friday and Saturday in the second week before any such election."

From these considerations it becomes quite apparent, I think, that your first inquiry must be answered in the negative.

(*b*) "If a general registration is not required, in such case has the city board of elections power to declare an emergency and order a special general registration prior to such April election?"

In answer to this inquiry it is sufficient to say that a city board of elections is not the legislature of Ohio, and has no legislative power upon the subject of registration of electors. And as the legislature has not required a general registration of all electors prior to the April election, it follows that the city board has no authority to require such registration.

(*c*) "If a general registration is not required by law, and the city board is without authority to order the same, do the registration laws require the city board of elections to make new registers for such new wards and precincts and to transfer thereto the registered voters of the old wards and precincts?"

Section 2926v, paragraph 5, R. S. provides:

> "Whenever a new ward has been created, or the boundaries of any ward or precincts have been changed after the general registration, and before the April election following, it shall be the duty of the board of elections to appoint election officers, rearrange the voting precincts, provided for registration of electors not already registered, make new registers, and certify the registration of registered electors whose voting precincts have been changed, and make all necessary arrangements and regulations for holding elections in such new or altered wards or precincts; provided, that the right of any registered elector to vote shall not be prejudiced by any error in making out the certified list of registered voters."

Hence, when the municipal authorities under the provisions of the new municipal code sub-divide a city into new wards, the provisions of Section 2926v, above quoted, require that the board of elections shall "appoint election officers, rearrange the voting precincts, provide for the registration of electors not already registered, make new registers, and certify registrations of registered electors whose voting precincts have been changed, and make all necessary arrangements and requirements for holding elections in such new or altered wards and precincts." It matters not that all the wards of the city happen to be new wards. The provisions of Section 2926v., above quoted, make ample provision for such contingencies. Conditions might have arisen even without the enactment of the new municipal code, which would have required the rearranging of a city into wards, and it will hardly be claimed that under such circumstances the board of elections would not be required to proceed under the provisions of Section 2926, paragraph 5.

Very truly yours,

(Signed,) J. M. SHEETS,
Attorney General.

COLUMBUS, OHIO, January 26, 1903.

Hon. J. C. Porterfield, Chief Game Warden, Columbus, Ohio.

MY DEAR SIR:—I am in receipt of yours of January 20th and 23rd, having reference to the right and duties of game wardens, where they find the plumage of song birds exposed for sale by milliners and others. You inquire whether the wardens and their deputies may seize such plumage without process, wherever discovered by them, as is provided in Section 409a R. S., with reference to birds, fish and game when found unlawfully in the possession of any person.

In my opinion they cannot. The only authority upon which they can act with reference to seizing "birds, fish, game," etc., is found in Sections 409a and 409b, R. S. Sections 409a and 409b give ample authority for seizing birds, fish and game found in the possesion of another during the closed season; also guns, nets, traps and in fact all devices used for kiling or capturing such game, but there is no provision in either of these sections which authorizes the taking of plumage of birds in the possession of any person. As these are criminal statutes and must be strictly construed, the power to seize "birds, fish and game" does not carry with it the power to seize the plumage of song birds, even though that plumage may be in the unlawful possession of a person.

In your letter of January 23rd you inquire whether the act in question can have a retroactive effect so as to make it unlawful to continue to hold in possession the plumage of birds slaughtered prior to the enactment of the statute. It clearly cannot be retroactive. Were it so construed it would make the act unconstitutional. Hence, wherever plumage is found, which, it is claimed, was slaughtered or purchased and had in possession prior to the enactment of the statute referred to, unless you can prove to the contrary, it is useless to give the matter any attention, for the state would fail, and the wardens would be liable for civil damages, if they undertook to seize the plumage.

You inquire whether the possession of plumage alone is an offense, and whether the act would apply to those who wear the plumage, etc. Section 6960 makes it unlawful for persons to have the plumage of birds for sale, which are protected by its provisions, hence, a young lady who may have the plumage of a bird protected by the provisions of Section 6960, R. S., upon her hat, is not guilty of an infraction of this law, for the plumage is not in her possession for sale.

Very truly yours,
J. M. SHEETS,
Attorney General.

COLUMBUS, OHIO, January 26, 1903.

Hon. W. D. Guilbert, Auditor of State, Columbus, Ohio.

DEAR SIR:—I beg to acknowledgs receipt of yours of January 22nd, in which you inquire whether a person is to be regarded as a dealer in intoxicating liquors within the provisions of the Dow law, when his dealing consists in transactions of the following character:

A, a non-resident of Ohio, advertises himself as a dealer in intoxicating liquors, sometimes representing himself as having a place of business in Ohio, and sometimes not. He has an arrangement with B, a manufacturer and rectifier of intoxicating liquors in Ohio, whereby he solicits and receives orders from customers residing in Ohio and elsewhere for goods, and turns the orders over to

B, who fills such orders by shipping directly to A's customers; B charges on his books all goods shipped on such orders to A at a price agreed upon between them; he also keeps a separate set of books in which he charges the goods thus sold against A's customers and in favor of A at the price agreed upon between A and his customers; when remittances are made to B, he credits the customer with the amount paid on A's books and credits A with the amount received on his own books.

Under such a business relationship, B sells the goods to A; he is A's creditor and has a right to enforce payment from A. A in turn sells the goods to his own customers, B acting only as the agent in filling his orders, in keeping his books and in collecting claims due to him. If there is any profit in the sales to A's customers, they belong to him; if there is a loss, either by failure of a customer or otherwise, A must stand it. Hence, in my opinion, A is a wholesale dealer in intoxicating liquors in Ohio within the meaning of the Dow law. The business is carried on where B is located, and the tax should be charged and collected at that place.

Very truly yours,
J. M. SHEETS,
Attorney General.

WHETHER THE TOLEDO FIRE AND MARINE INSURANCE COMPANY IS ENTITLED TO THE CERTIFICATE PROVIDED FOR BY SECTION 284, R. S.

COLUMBUS, OHIO, January 27, 1903.

Hon. A. I. Vorys, Superintendent of Insurance, Columbus, Ohio.

DEAR SIR:—Your letter of November 28, 1902, inclosing copy of charter of the Toledo Fire and Marine Insurance Company, has been considered.

The particular inquiry you make is substantially this: whether the said Toledo Fire and Marine Insurance Company, under the state of facts presented by your letter, is entitled to a certificate as defined in Section 284 of the Revised Statutes, that the "company has in all respects complied with the laws of the state relating to insurance."

The charter of the Toledo Fire and Marine Insurance Company was granted by the legislature of this state on February 2, 1848. The purposes of or powers granted to said corporation by said act are contained in Section 7, which is as follows:

> Section 7. That the corporation herein and hereby created, shall have full power and lawful authority to insure all kinds of property against damage or loss by fire, water and inland navigation upon rivers, lakes or canals; to make all kinds of insurance upon life or lives, to cause themselves to be insured against any loss or risk they may have incurred in the course of business, and generally to do and perform all other necessary matter and things connected with and proper to promote those objects."

As you state in your letter, the fact is that the Toledo Fire and Marine Insurance Company has not filed a report since 1885. On March 26, 1885, by a unanimous vote of the stockholders of said corporation, it was resolved to wind up the business of the company. From that date until July 21, 1893, the regular meetings of the directors were held, and steps taken from time to time to dispose

of the securities and assets of said corporation, and in fact, said corporation was in a state of liquidation. On July 21, 1893, a resolution was passed by the stockholders of said company to continue business.

It appears by the minutes of said corporation that the annual meetings of the directors continued to be held, but such minutes do not disclose that the corporation continued business.

About the first of May, 1902, the stock of the company, as far as can be ascertained, came into the possession of the persons who now are proposing to operate said corporation, and the minutes of the corporation show, together with the stock books and certificates, that the present owners of the stock came into possession thereof by purchase in the regular way.

Since the present members of the corporation have come into control of said company and its stock, said company has been and is now doing a fire insurance business. We are not able to state the amount of business transacted by this corporation since May, 1902, but we are informed that there are a large number of outstanding policies that have been issued by said corporation, and that premiums have been received by said company on account of said policies and risks, approximating $22,000.

At the time of the passage of the act incorporating this company, fire insurance companies in the state of Ohio were not authorized or empowered to insure against direct damage by lightning. But since the adoption of the constitution of 1851, the legislature, by general law, has authorized fire insurance sure against direst loss or damage by lightning. The Toledo Fire and Marine companies to insure against direct loss or damage by lightning. The Toledo Fire and Marine Insurance Company therefore, under its charter, had no power to take such class of risks.

It is a fact, however, that the Toledo Fire and Marine Insurance Company has been and is now, insuring property against direct damage by lightning. The conclusion must follow that either this corporation is exercising a franchise not conferred upon it by its charter, or that such corporation has accepted the provisions of the general laws governing fire insurance companies in the State of Ohio, and has thus placed itself for all intents and purposes, under the regulation of such general laws.

6 O. C. C. R., 275.

It will be noticed that by section 7 of the charter of said company above referred to, that this corporation is empowered and authorized, amongst other things, to make all kinds of insurance upon life or lives. Such powers have never been exercised by this corporation in all the years of its existence, and no doubt it should be ousted, in so far as that portion of the franchise is concerned, for non-user.

As far as the financial condition of said Toledo Fire and Marine Insurance Company is concerned, we are not advised.

We therefore conclude:

First: That said Toledo Fire and Marine Insurance Company, by accepting the general provisions of the statutes of this state governing fire insurance companies, and having acted thereunder, has submitted itself to the provisions of the statute governing domestic fire insurance companies in this state.

Second: That it has forfeited any power it may have had to make insurance on lives, and

Third: Until said corporation shall comply with the statutes governing domestic fire insurance companies, such company is not entitled to the certificate provided for in section 284 of the Revised Statutes.

Very respectfully,

GEORGE H. JONES,

Assistant Attorney General.

COLUMBUS, OHIO, January 27, 1903

Hon. Harry Bannon, Prosecuting Attorney, Portsmouth, Ohio.

MY DEAR MR. BANNON:—Your letter addressed to the County Officers Fee Commission was handed to me for answer. I have had occasion to examine into the question a number of times, as to whether the prosecuting attorney was required to perform any services for the county or any of the county officers, in the way of litigation, without being entitled to receive extra compensation over and above his salary; and without assigning in detail the reasons for the conclusions, I will state to you my conclusions.

First. It is not made the duty of the prosecuting attorney to act for the county officers in litigation, except in certain specified cases, and in such cases provision is expressly made by statute as to whether he shall receive extra compensation for such services.

Second: In all other cases the officers are left free to employ such counsel as they see fit, and if they employ the prosecuting attorney, they do not employ him in his official capacity, hence must pay him as they would any other counsel.

Such being my conclusions, you are clearly entitled to reasonable compensation, to be allowed by the county commissioners, for defending them in the Traction Company case.

In criminal matters, however, you are obliged to prosecute in the Common Pleas Court and Circuit Court, and that you must do for your salary. R. S. Section 1273. In the Supreme Court, however, the law contemplates that the attorney general will take charge of criminal cases, yet the attorney general has not taken charge of such litigation for more than a quarter of a century. On the other hand, however, it has been the custom of the prosecuting attorney to follow the case to the Supreme Court, although there is no provision of statute by which he can receive compensation for such services. It has been the custom (and I have approved it) to allow the prosecuting attorneys their actual expenses, however, in following such cases to the Supreme Court.

Under the principles announced in the beginning of my letter, you are clearly entitled to compensation for your services in the Simmons case, in which you prosecuted the clerk's bond and recovered judgment. You are entitled to 10 per cent. of the amount recovered.

Very truly yours,
J. M. SHEETS,
Attorney General.

WATER POWER LEASED FOR ONE PURPOSE CANNOT BE USED FOR ALL PURPOSES.

COLUMBUS, OHIO, January 28th, 1903.

Hon. Allen W. Thurman, President Special Canal Commission, Columbus, Ohio.

DEAR SIR:—Your letter of January 26, 1903, at hand. You make two inquiries in your letter.

First: Whether the Detwiler lease, which calls for all the surplus water on the eighteen, four, and two mile levels of the Miami and Erie Canal between Providence and Toledo, prohibits the State from granting pipe permits to others for the use of said water on these levels?

In answer to this inquiry I would say, that by the terms of the lease of water power made originally to Robert J. Law, Trustee, on the 12th day of March, 1895, by the Board of Public Works of Ohio, and which is the lease I understand to be inquired about, the use and occupation of "all the surplus water of the Miami and Erie Canal between Providence and Toledo not needed for navigation or not now under lease," is granted or leased. Such lease, by its terms, is a grant of water for power purposes. The water under the lease is to be taken out of the level of the Miami and Erie Canal at Maumee, and the particular location is described in the land leased, a description of which is found upon the second page of the lease to Robert J. Law, Trustee, referred to.

The state may not grant the use of any of the surplus water described in this lease so long as the lessee uses such water for power purposes, or may desire to use such water for power purposes during the term of said lease. But the lessee under said lease is not authorized to use the surplus water on said level, as described in his lease, for any other purpose than that specifically granted by the terms of the lease itself, and the Board of Public Works has no power, during the term of said lease, to grant pipe permits to use any of said surplus water from said levels, which has been granted to said lessee.

Second inquiry: Does the lease to Detwiler mean that he has the use of this surplus water for power purposes only, or for all purposes?

The answer to the first inquiry submitted practically answers this inquiry. I repeat, that under the terms of the lease referred to, the lessee has no authority or right to use the surplus water described in said lease for any other purpose than for power purposes. And it may be added, that such lessee, by the very terms of the lease, has no power to sell, assign, or transfer his right or interest, or any part thereof, to any person or persons, without the assent of the authorized agent of the state first obtained therefor in writing.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

COLUMBUS, OHIO, January 28th, 1903.

Hon. J. C. Porterfield, Chief Game Warden, Columbus, Ohio.

DEAR SIR:—Your letter of January 13th at hand. You ask, first, whether a game warden can seize, without process of law, any birds, fish or game, and refer to Section 409a of the Revised Statutes?

Section 409a provides that:

> "The game warden and deputies may arrest on sight, without a warrant, any person detected by them in the act of violating any such laws. That they shall have the same right as sheriffs to require aid in executing any process or in arresting without process any person found by them in the act of violating any of said laws, and they shall have authority to seize without process any birds, fish or game then found in the possession of any *such* person, which is so in possession contrary to law," etc.

It will be observed by this section that the game wardens may arrest without warrant any person they may see violating the game laws, and if any such person so found violating the game laws, shall have in their possession birds, fish or game, such possession being contrary to law, then the wardens may without warant take into their possession such birds, fish or game.

You also inquire whether under Section 409b, it is lawful for any warden to search or examine any package, parcel, box or other receptacle, room, building, boats or other place without a search warrant; and you further say that you understand that under such circumstances, by virtue of said Section 409b, that a warden will not be liable in damages to any person on account of any arrest, or any search or examination made without a search warrant, even if it should become necessary to use force or break open any package or into any room, building, etc.

It will be observed that Section 409b provides that the warden or other public officer shall not be liable in damages on account of such acts, when such arrest, search, examination or seizure is made in the discharge of his duties, *in accordance with the provisions of this act.* You have no greater authority for search or examination, without a search warrant, than would a sheriff of a county have. If you should break into any package, parcel, box, etc., or any room, building or boat, without a search warrant, and should fail to discover the evidence of crime, as provided by the statute, you would still be liable for damages, because the citizen is protected from such search, unless evidence of guilt is found, by the constitution of the State and the provisions of the statute.

You also in your letter refer to Section 6967 R. S., as reflecting upon your right to inspect or open packages, boxes, etc., or enter into rooms or buildings without a search warrant; but Section 6967 provides specifically that it shall only be unlawful for a person to refuse upon demand to permit the examination proposed, if upon inspection, such packaeg room or other place shall be found to contain, or to have contained any birds, fish, or game, killed, taken or had in possession in violation of law. In other words, if the person upon whom the demand is made, refuses such demand, and upon an examination, it should be found that his refusal was properly based, that is to say, no birds, fish or game were found upon the premises searched, then such refusal of a person is lawful and not unlawful, under said section.

Respectfully,
GEORGE H. JONES,
Assistant Attorney General.

COLUMBUS, OHIO, January 24, 1903.

Hon. Charles W. Wilkins, Prosecuting Attorney, Warren, Ohio.

MY DEAR SIR:—Yours of January 22nd at hand and contents noted. You inquire whether under the provisions of Section 3718a R. S. a justice of the peace, mayor or police judge has exclusive jurisdiction where a person is brought before him charged with an infraction of Section 6951 R. S., providing a penalty for cruelty to animals; or whether the justice of the peace, mayor or police judge may act as an examining magistrate and bind the person over to the proper court, providing the accused waive examination and consent to be bound over.

It is quite clear to me that this may be done. While Section 3718a R. S. gives a justice of the peace, mayor or police judge jurisdiction, it does not give them exclusive jurisdiction. The Probate Court of some of the counties, and the Common Pleas Courts of all of the counties of the State have jurisdiction in all misdemeanors. That being the case the grand jury might take up the matter and indict a person for cruelty to animals in the first instance, and as the Common Pleas Court could take jurisdiction in that way it may take jurisdiction when the accused is bound over.

I am inclined to the view, however, that the accused, if he see fit, may demand a trial before the justice of the peace, mayor or police judge, before whom the charge is filed.

Very truly yours,
J. M. SHEETS,
Attorney General.

CONSTRUCTION OF SECTION 897-5.

COLUMBUS, OHIO, February 3, 1903.

E. G. McClellan, Prosecuting Attorney, Bowling Green, Ohio.

MY DEAR SIR:—Yours of February 2d at hand and contents noted. I have already had occasion to pass upon the question inquired about. You will observe that the language used in Section 897-5 (95 O. L. 501), is identical with that as contained in the original Section 897, which the court held in the case of Richardson v. State, 66 O. S. 108, not to include anything beyond his per diem and mileage allowed, and nothing for his personal expenses. The second proposition of the syllabus reads:

> "Expenses incurred for railroad fare, livery hire, charges for the use of his own conveyance, for the feed and shoeing of horses used by him, and for his board and others of a like nature, are of a personal character, for which no valid claim can be made against the county, although they are incurred while about the business of the county."

In view of the fact that the legislature used the same language which was construed in this case, in Section 897-5, it must be conclusively presumed it intended the same construction to be placed upon it. That being the case your commissioners would not be entitled to hotel bills, livery hire, horse feed, car fare, etc. The only material change in the law as it now reads and the law as it existed before the amendment, is a limitation of the amount to be expended to $200 a year, and of course that sum must be "actually paid in the discharge of some official duty," as interpreted by the Supreme Court in the case above referred to.

Yours very truly,
J. M. SHEETS,
Attorney General.

COMPENSATION OF PROSECUTING ATTORNEY IN HABEAS CORPUS CASES.

COLUMBUS, OHIO, February 3, 1903.

John Q. Waters, Prosecuting Attorney, Georgetown, Ohio.

MY DEAR SIR:—Yours of January 31st at hand and contents noted. You inquire whether in my opinion the prosecuting attorney of the county is entitled to compensation, to be paid out of the county treasury where he is employed to represent the sheriff in a habeas corpus case, in which a person convicted of crime has been imprisoned but procures a writ of habeas corpus on the ground that he is illegally imprisoned. I have had occasion to consider the question presented a number of times, and you will find the question briefly discussed

in the opinions of the Attorney General for the year 1900, pages 136 and 137.

The conclusion which I have come to is, that the prosecuting attorney under the provisions of Section 1273 R. S. must act for the county in the prosecution of all criminal cases in the Probate, Common Pleas, and Circuit Courts; and under the provisions of Section1274 he is the adviser of all county officers. Butit is not made the duty of the prosecuting attorney to act for county officers in litigation except in certain specified cases, and in each of those cases provision is expressly made as to whether he shall receive extra compensation for such services. In all other cases the officers are left free to employ such counsel as they see fit, and if they employ the prosecuting attorney they do not employ him in his official capacity; hence must pay him as they would any other attorney. The habeas corpus proceeding was not a criminal case, nor is it a case in which the law requires the prosecutor to appear for the officer interested. Hence in my opinion he is entitled to reasonable compensation for his services.

Very truly yours,

J. M. SHEETS,

Attorney General.

PAYING EXCISE TAX ON INCREASE OF CAPITAL STOCK.

COLUMBUS, OHIO, February 5, 1903.

Hon. Lewis C. Laylin, Secretary of State, Columbus, Ohio.

MY DEAR SIR:—I am in receipt of yours of February 3d, seeking an opinion from me as to whether a corporation, when making its annual report under the Willis law, and paying the annual excise tax therein provided for, must report any increase of capital stock, and pay the tax thereon, if such increase was effected within six months prior to the time of filing its annual report.

The Willis law requires a graduated contribution, in the form of an excise tax, measured by the quantom or extent of the franchises granted, and this contribution is required to be annually.

Section 7 of this same act also provides in substance, that where a corporation has been organized, and been admitted into the state within six months prior to the month of May—the time for filing its annual report, and paying its excise tax— it is not required to file such report, or pay such tax until the May following; i. e., the payment of the annual tax is not exacted within six months from the time of the payment of the initial fee at the time of the incorporation of the company or its admission into the state. When a corporation increases its capital stock, it is required to pay the initial fee or tax of one-tenth of one per cent. on the amount of such increase. There would seem to be no more reason for exacting the annual tax on the increase of capital stock within six months from the time the increase was effected, and initial tax paid, than to exact the annual tax on the corporate stock of a company within six months from the time of its organization or admission into the state and the payment of the initial fee or tax of one-tenth of one per cent.

From these considerations I am of the opinion that the Willis law does not exact an annual fee on increased capital stock of a corporation within six months from the time the increase was effected, and hence should not be exacted of corporations.

Very truly yours,

J. M. SHEETS,

Attorney General.

PROBATE JUDGE HOLDING OFFICE UNTIL SUCCESSOR IS ELECTED AND QUALIFIED.

COLUMBUS, OHIO, February 5, 1903.

Hon. George K. Nash, Governor, Columbus, Ohio.

DEAR SIR:—Yours of recent date at hand and contents noted. The facts upon which you seek an opinion may be briefly stated as follows:

The office of Probate Judge of Meigs County became vacant by the resignation of the incumbent, whose term would have expired February 9, 1903; on November 7, 1901, you appointed a person to fill the vacancy; at the November election, 1902, a successor was elected; neither the nominating papers, the ballot, nor the certificate of election indicated whether the election was for the unexpired term or for the full term commencing February 9, 1903; before receiving a commission, however, and taking the oath of office, the person elected died; the person appointed by you still occupies the office, claiming to hold it by virtue of the appointment of November 7, 1901.

The question now is, will the office of probate judge of Meigs County become vacant on February 9th, 1903, being the date of the expiration of the regular term; or will the present incumbent hold the office until his successor is elected and qualified?

Article 4, Section 7, of the Constitution provides:

> "There shall be established in each county, a probate court, which shall be a court of record, open at all times, and holden by one judge, elected by the voters of the county, who shall hold his office for the term of three years, and shall receive such compensation, payable out of the county treasury, or by fees, or both, as shall be provided by law."

Article 4, Section 13, of the Constitution, provides:

> "In case the office of any judge shall become vacant, before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is elected and qualified; and such successor shall be elected for the unexpired term, at the first annual election that occurs more than thirty days after the vacancy shall have happened."

It will thus be observed that the section of the constitution last above quoted, provides, first, that the person appointed to fill a vacancy in the office of probate Judge, holds until his successor is *elected* and *qualified*.. Second, the successor is required to be elected at the next annual election occurring more than thirty days after the vacancy occurs.

Whether the successor to the present incumbent was elected at the November election, 1902, for the full term, whether he was elected for the unexpired term, or whether the election was void for uncertainty, I deem of no importance to consider, for in either event no successor was elected and *qualified.*

When a person is appointed to fill a vacancy occurring in the office of probate judge, the expiration of his term depends upon the happening of two events. First, the election of his successor. Second, the qualification of his successor after he has been elected. If the election was void for uncertainty then no person was elected to succeed him, and he continues to held the office for the reason that his successor was not elected. If a successor was elected, whether for the full term or the unexpired term, in either event, he failed to qualify, and the appointee still holds his office, for the reason that no person is qualified to succeed him.

It was evidently the purpose of the framers of the Constitution to provide that one appointment should last until there was an election and qualification of a successor, and in my opinion the provision of the constitution above quoted effectuates that purpose.

In order to make assurance doubly sure, and remove any question that might exist in the mind of anybody with reference to the right of the present incumbent to hold the office until a successor is both elected and qualified, it might not be out of place to issue a new commission to him, making his title to the office absolutely beyond dispute until his successor shall be elected and qualified.

Very truly yours,
J. M. SHEETS,
Attorney General.

LEASE OF A. O. BASSETT, WATERVILLE, OHIO.

COLUMBUS, OHIO, February 6, 1903.

Hon. Allen W. Thurman, President Special Canal Commission, Columbus, Ohio.

DEAR SIR:—Your letter of February 6th, 1903, submitting the following statement of facts and inquiries based thereon is received:

"The following are the facts in the Waterville case in the order in which ther occurred:

First. By the terms of the lease held by A. O. Bassett, of Waterville, the rent became due and payable on November 1, 1902.

Second. Notwithstanding urgent demands by the collector, the said Bassett failed to pay said rents, and never has himself tendered payment of same.

Third. On January 3, 1903, the collector at Toledo was ordered by the executive officer of the Board of Public Works—which action was upon the following day confirmed by the Board—not to receive any rent upon the lease of the Waterville property.

Fourth. Subsequent to the receipt of this order, one George Detwiler, tendered the amount due upon said lease to the said collector at Toledo, which tender was refused.

Fifth. On January 12, 1903, the Board of Public Works took the following action, to-wit:

"The water lease made to Christman and Metzgar at Waterville, Lucas County, Ohio, and bearing date of August 12, 1878 and transferred December 11, 1900, to A. O. Bassett, having been by the opinions of the Attorney General, which are on file in the office of the Board of Public Works, dated January 5th and January 12th respectively, forfeited by the non-compliance with its terms and provisions by the said lessee, the secretary is hereby instructed to notify the said Bassett of said forfeiture."

Sixth. The party was so notified by the secretary of the Board of Public Works.

Seventh. On January 13, 1903 the said Detwiler requested that he be permitted to enter a protest against the action of the Board which was not granted.

Eighth. On January 26, 1903, one Kirkley was appointed by the Common Pleas Court of Lucas County, receiver of the Waterville Milling Co. The following day he filed a communication with the Board of Public Works claiming that the lease of the said Bassett was till in force.

His attorney also again tendered the rent, which was refused by the Board.

First. Under these facts have not all of A. O. Bassett's rights, either in law or equity, ceased and determined.

Second. Has not the 2100 cubic feet of water formerly under lease to the said Bassett absolutely reverted to the State?

Third. Cannot the Board of Public Works lease this water to any other person?

Fourth. Cannot the Board of Public Works lease this water to be taken from the canal at any point not otherwise leased below Waterville?

Fifth. Has either the said Detwiler or the receiver of the Waterville Milling Co., any rights in the said 2100 cubic feet of water?"

In answer to the first, second and third inquiries, the answer is, yes. (See opinions rendered by this office on January5 and January 12, 1903.)

In answer to the fourth inquiry, I would say that the Board of Public Works has full power to lease the water referred to, and that it may be taken from the canal at any point below Waterville, provided such taking does not interfere with the rights of lessees under valid and subsisting leases.

In answer to the fifth inquiry, I answer, No.

Respectfully yours,
GEORGE H. JONES,
Assistant Attorney General.

COMMISSIONERS CAN ONLY EXERCISE SUCH POWERS AS ARE CONFERRED BY STATUTE.

COLUMBUS, OHIO, February 6, 1903.

Harry W. Miller, Portsmouth, Ohio.

DEAR SIR:—Yours of February 5th at hand and contents noted. I have no doubt that the tramway along the line suggested in your letter is a "consumation devoutly to be wished", but like you, I am unable to discover where the law gives the commissioners any such control over the public highways of their respective counties or over the bridges spanning the streams of their respective counties. It has been held as often as the question has ever been presented to the courts, that commissioners of counties can exercise only such powers as are conferred upon them by statute, and as the statute gives the commissioners no such control over the county roads and bridges as would empower them to authorize the construction of the character of a tramway such as mentioned in your leter, it is needless to say they have no such power.

There are occasions, however, when commissioners use a litle main strength and nobody makes any objection to it; whether it would be proper to use a little main strength in the present instance I do not know, and of course that must be left for local consideration.

Very truly,
J. M. SHEETS,
Attorney General.

MEMBERS OF BOARDS OF HEALTH HOLDING OFFICE UNDER NEW CODE.

COLUMBUS, OHIO, February 13, 1903.

Dr. C. O. Probst, Secretary State Board of Health, Columbus, Ohio.

DEAR SIR:—Answering yours of the 9th inst., relative to the operation of the new municipal code upon existing Boards of Health would say:

Section 2113 of the Revised Statutes provides for the establishment of a Board of Health in each city and village, to be composed of the mayor and six members to be appointed by the council. This same section was amended May 7, 1902 (95 O. L., p. 422) by which the number of members of the board of health was reduced to five and leaving the appointing power in the council.

Section 2114 R. S., fixes the term of office of the members at five years from the day of their appointment and until their successors have been appointed and qualified. (95 O. L., p. 423.)

This was amended May 12, 1902 (95 O. L., p. 643), leaving their term of office at five years and until their successors are appointed and qualified, and classifying the appointees and adding a proviso that in all municipalities now having a board of health in place of the two members of such board of health whose term of office shall first expire, one shall be appointed for five years; in place of the two members of the board whose term of offiffice shall next expire, one shall be appointed for two years and one for three years, and in place of the two members of the board whose term of office shall thereafter expire, one shall be appointed for four years and one for five years, and thereafter one shall be appointed annually.

Section 2114 thus fixes the term of office of the members. Section 2113 has been further amended by the adoption of the new municipal code.

Section 187 provides that the board shall be composed of five members *to be appointed by the mayor and confirmed by council.* The existing boards are not legislated out of office. The amendment provided in the code is merely a change as to the method of appointment after the terms of the present incumbents have ceased and determined.

Section 213 of the code also assists us in this construction by stating that the officers appointed by any authority now serving as such, shall remain in their respective offices and employment and continue to perform the several duties thereof under existing law, until their successors are chosen or appointed and qualified, or until removed by the proper authority.

In answer to your question as to whether or not the present members of boards of health in office in the several municipalities of the state serve out their existing terms, I would say they that undoubtedly have that right, but when it comes to the appointment of successors to them, such successors shall be appointed by the mayor and confirmed by council pursuant to Section 187 of the new municipal code.

Very truly yours,
J. M. SHEETS,
Attorney General.

NUMBER OF VOTES NECESSARY TO CARRY A MEASURE FOR LEVY FOR FOR SCHOOL PURPOSES.

COLUMBUS, OHIO, February, 25, 1903.

C. E. Marsh, Esq., Prosecuting Attorney, Celina, Ohio.

DEAR SIR:—I am in receipt of yours of February 20th in which you inquire whether, under the provisions of Sections 3991 and 3992 R. S,. the number of voters necessary to carry a proposition to levy an additional tax for school purposes must be a majority of all the electors of the township voting in favor of the proposition, or whether the number may be merely a majority of those voting at the election.

Section 3991 provides for submitting the question of an additional tax levy to the electors of a township. Section 3992 provides that "if a majority of the electors at such election vote in favor of levying a tax for such purpose, * * * the board shall certify the levy annually to the county auditor, etc."

This provision makes it quite clear that it is a majority of the electors voting at the election that controls, not the majority of the electors of the township. What matter if a minority of the electors of the township might by this construction impose a burden of taxation upon the township? All the electors of the township have a chance to vote if they desire to do so. If they do not it must be conclusively presumed that they will be content to abide the result of the election whichever way it may go.

Take the other horn of the dilemma; what methor does the law provide for determining how many electors there are in the township? Who shall say whether a majority of the electors residing in the township have voted in favor of the proposition or not, except as that number is determined by those casting their votes at the election. There is no provision of law for taking a census of the electors of the township; hence, as the law has provided no way of determining the number of electors in the township, it is very clear that the legislature did not intend that a majority of the electors of the township must necessarily vote in favor of the proposition.

Very truly yours,
J. M. SHEETS,
Attorney General.

CONSTRUCTION OF SECTION 897-5, R. S.

COLUMBUS, OHIO, February 25, 1903.

John A. Eylar, Esq., Waverly, Ohio.

MY DEAR SIR:—Yours of February 24th at hand and contents noted. You inquire whether under the provisions of Section897-5 R. S., (95 O. L. 501) the commissioners are entitled to receive out of the county treasury their personal expenses while engaged in their official duties, including hotel bills, horse feed, livery hire, etc. I have in a number of instances had occasion to pass upon this question, hence I will not elaborate.

The case to which you call my attention, to-wit, Richards v. State, 66 O. S., 108, involved a construction of the provisions of Section 897 R. S. It was there held that the expenses which are authorized to be paid a county commissioner by the last clause of Section 897 R. S., "include only his official expenses, "actually paid in the discharge of some official duty' as distinguished from those incurred

for his personal comforts and necessity. He has no valid claim against the county or its funds, beyond the per diem compensation and mileage allowed, for any of his personal expenses."

Following out this principle, the court there held that "expenses incurred for railroad fare, livery hire, charges for the use of his own conveyance, for the feed and shoeing of horses used by him, and for his board and others of like nature, are of a personal character, for which no valid claim can be made against the county, although they are incurred while about the business of the county."

The language used in Section 897-5 is identical with that construed by the Supreme Court in the 66 O. S., supra. It is needless to say that where a statutory provision has been construed by the Supreme Court, and the legislature in a latter enactment uses the same expressions, it is conclusively presumed that the legislature intended that the same construction should be placed upon the expressions used in the latter enactment. That being the case the provisions of Section 897-5 authorizing a county commissioner to receive out of the county treasury "any other reasonable and necessary expenses actually paid in the discharge of his official duty" cannot be held to include his personal and living expenses paid out while performing his official duties. The only material change between the old statute and the new is to limit the amount of expenses which he might draw out of the county treasury to $200.00 per year, and that, of course, must be such expenses as shall be incurred "in the discharge of his official duty," as construed in 66 O. S.

I appreciate fully, that the commissioners of the counties throughout the state are paid a very meagre compensation, and the legislature should make provision for an increased allowance, but until it does so, the officers required by law to pass upon the commissioners bills are compelled to enforce the law as they find it.

Very truly yours,
J. M. SHEETS,
Attorney General.

AUTHORITY OF COMMISSIONER OF LABOR TO COMPEL ANSWERS TO CERTAIN QUESTIONS

COLUMBUS, OHIO, March 3, 1903.

Hon. M. D. Ratchford, Commisssioner of Labor, Columbus, Ohio..

DEAR SIR:—I have your letter of the 3rd, inst., together with the enclosures therewith, consisting of the correspondence between your department and the general counsel of the National Biscuit Company of Chicago, Illinois, from which I gain that the question between you is, in substance, that you, as commissioner, have sent to them the formal blanks for making return to your office, and among other questions to be answered by them which they have refused to answer, is the amount of capital invested in grounds, buildings and machinery. You ask for a definition of your authority in the premises, and the method of procedure, to secure, if possible, such information as the statute authorizes you to secure.

The Company, as an excuse for not answering in detail the questions submitted, say that they cannot give the amount of capital invested in their various plants in different parts of this state, because they carry it on their book in one aggregate amount, representing all of their plants, and that they have no way of arriving at the figures which would represent the investment at any particular

plant. With this statement you have taken issue, and show by the correspondence that they are in possession of thirteen plants in the State of Ohio, of which two have made full and complete returns, seven incomplete, and four show no returns to date. They have thus evidently the information required, because it is furnished by two of the plants.

When these constituent companies were taken over into the one great corporation, known as the "National Biscuit Company," there was a schedule of all the property taken, inventories and appraised values affixed to each, which, by common rumor, was made the basis for determining the values attached to each of the constituent plants for the purpose of merger in the single corporation. It is evident that by consulting these reports, they could furnish the information you desire. But without taking issue upon the question of fact made by them, you are more concerned as to the method of discovering these facts, if they exist.

Uuder Section 308, R. S., as amended April 29, 1902,(95 O. L., p. 309) you, as Commissioner, are required to collect, arrange and systematize certain statistics relating to the industrial, social, educational and sanitary conditions of the laboring classes, and the productive industries of the state; you are to include among other things, the amount of capital invested in grounds, buildings and machinery. You are further authorized by virtue of that section, to appoint special agents to represent the Bureau, with authority to visit any delinquent firms and collect such statistics, and perform such other duties as may be required, with like power as is conferred by law upon the commissioner.

By Section 309, R. S., you, as Commissioner, have power to send for persons and papers; to examine witnesses under oath; to take depositions; to cause them to be taken by others by law authorized to take depositions. By that section, any person, agent or employe, who shall refuse the commissioner admission for the purpose of inspection, or who shall, upon request by him, wilfully neglect or refuse to furnish to him any statistics or other information relative to his lawful duties, which may be in their possession or under their control, or who shall willfully neglect or refuse for thirty days to answer questions by circular or upon personal application or who shall refuse to obey the subpœnas and give testimony according to the provisions of this act, shall, for every such willful neglect or refusal, be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars.

By this section and the preceding section cited, you can, either personally, or by deputy, take the depositions of all persons having any knowledge as to the answers to the questions required by you, within the State of Ohio. You may cause them to be sworn, and to either, in person, or by counsel, be fully examined with regard to the matters in question, and in case of their willful neglect or refusal to give the testimony relative to the questions asked, they can be afterwards sued, and upon conviction thereof, shall be punished as is provided in Section 309, R. S.

The procedure is by this statute defined, and it is the only method provided by statute to enforce the answers to the questions that you have submitted to this Company for answer.

After having served the necessary blanks upon the parties, and waiting a reasonable time for answer thereto, I would suggest that you proceed in conformity with these acts, and according to the procedure there outlined, acquire the information desired.

Any assistance that we can lend, will be cheerfully given.

I herewith return all correspondence to you.

Very truly,

J. M. SHEETS,

Attorney General.

AS TO AUDITOR OF STATE FURNISHING AFFIDAVITS IN DOW TAX PROSECUTIONS.

COLUMBUS, OHIO, March 4, 1903.

W. D. Guilbert, Auditor of State, Columbus, Ohio.

DEAR SIR:—We are in receipt from your office of a letter bearing date, February 24, 1903, from George W. Pettit, Esq., of West Union, Ohio, and addressed to you, in reference to your office furnishing him affidavits to be used in Cases Nos. 6813 and 6814, pending in the Court of Common Pleas of Adams County, Ohio, in which actions a restraining order has been issued against the treasurer of Adams County, restraining him from collecting the Dow tax against the plaintiffs in said cases.

It appears in the letter that in one of the cases, No. 6813, it is affirmatively alleged by the plaintiff, that the information you had upon which you based your order to the county auditor to place said Thompson on the duplicate, was to the effect that Thompson had paid the internal revenue tax about July 1, 1902. Now if this is true, it is sufficient information for you to act upon, because the law by its terms, Section 4364-15, provides that the payment of the special tax is *prima facie* evidence that the person so paying such tax is engaged in the business of trafficking in intoxicating liquors as defined by the Revised Statutes of Ohio. But it is entirely immaterial what the information was upon which such tax was placed upon the duplicate. The fact to be inquired about is, whether the person complained against, has been engaged in the business of trafficking in intoxicating liquors.

It occurs to me, if Mr. Pettit can secure the affidavits or testimony of the witnesses used by him in the prosecutions he refers to in his letter, that is, the prosecutions for violation of the ordinances of the village, that with such testimony, together with the admissions in the pleadings, that the parties charged have paid the internal revenue tax, he must certainly prevail, and have the restraining order dissolved.

I return herewith the letter together with the memorandum accompanying it.

Very truly,
GEORGE H. JONES,
Assistant Attorney General.

AS TO PUBLISHING FINANCIAL REPORT OF COMMISSIONERS AND REPORT OF COMMITTEE TOGETHER

COLUMBUS, OHIO, March 6 ,1903.

John S. Davidson, Esq., Prosecuting Attorney, Williamsburg, Ohio.

DEAR SIR:—Your letter of March 4th duly received. You ask first, whether the commissioners have a right to go ahead and publish their financial statement without the statement of the committee. In reply to this we would say, that the statute provides that the financial statement and the report of the committee shall be published together by the county commissioners. As far as the financial statement of the commissioners is concerned, it should contain only the transacions of the commissioners. In any case, the commissioners have no authority over the committee appointed to examine the statements and make their report. If the commissioners, in any given case, should refuse to order the publication of the statement and report, if their reasons for so refusing should be upheld

by the courts, then the commissioners would be protected in their refusal to publish such statement and report. While in the case you suppose, the restraining order is only operative against the statement of the committee, yet the statute evidently contemplates that such statement should be published together with the official statement, and I can see nothing to be gained by publishing the financial statement without the report or statement of the committee.

You also ask whether the commissioners have any right to modify the report of the committee or to judge of its relevancy. I do not think the commissioners are to judge of the relevancy of the report of the committee, and the report, that is, the financial report and the statement of the committee should be published together, unless some legal reason exists why they should not be so published. At all events I am inclined to the opinion that it would be advisable to await the final action of the court.

Very respectfully,
GEORGE H. JONES.
Assistant Attorney General.

CONSTRUCTION OF SECTION 6968-I, REGULATING THE SELLING OF BLACK BASS WITHIN THIS STATE.

COLUMBUS, OHIO, March 9, 1903.

Hon. J. C. Porterfield, Chief Warden, Columbus, Ohio.

SIR:—The receipt of your letter of March 2, 1903, enclosing letters from Charles H. Keith & Sons, of Cincinnati, is acknowledged.

You make two inquiries of this department.

First. Whether persons are subject to prosecution, who are selling black bass within this state, whether such black bass are taken from the waters within or without this state?

On November 12, 1902, this office rendered an opinion regarding Section 6968-1, in which it was held that, "in so far as Section 6968-1, R. S., undertook to prohibit the importation of bass or other fish, caught in foreign waters, it is inoperative and void, because it seeks to regulate interstate commerce." The inquiry you now make is of a different nature.

Under Section 6968-I, it is made "unlawful for any person, firm or corporation, to sell or offer for sale, barter or give away, or have in possession for any such purpose * * * * any black bass caught in any of the rivers, etc. * * * * in this state, * * * * or which was caught in any such body of water without the State of Ohio."

Such statute is applicable to any person who sells, offers to sell, etc., black bass, caught within this state, and held for the purposes referred to in such statute.

This section of the statute is also applicable to any person, who, in the State of Ohio, sells, offers for sale, barters, gives away, or has in his possession, any black bas taken from waters outside of the State of Ohio, but with this exception, that the importer or original consignee in this state, may sell, barter, etc., without violation of law, such fish being in the original packages. But any purchaser or donor from such importer who sells, barters, et cet., black bass so taken and shipped, is subject to the provisions of said Section 6968-I. So, likewise is the importer or original consignee, if he sells, barters, et cet., such black bass, other than in the original packages.

Your attention is called to the case of Roth v. State, 51 U. S., 209, wherein the Supreme Court sustained the provisions regulating in this state, the sale, etc., of quail, although such birds have been lawfully killed in another state. You will observe that the agreed statements of facts in this case, shows that the quail were not in the original packages, and were not sold in the original package.

Second inquiry. Whether the fact that a person has bass in his possesion for sale within the State of Ohio, would be *prima facie* evidence that they had been procured within the state?

In the absence of a provision of the statute making such possession *prima facie* evidence, such would not be the law in this state, and such possession would be either strong or weak evidence of the fact as connected with other circumstances, which might be shown in any particular case.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

AUTHORITY OF PERSONS LIVING IN OHIO TO HAVE IN THEIR POSSESSION, BIRDS OR ANIMALS MENTIONED IN SECTIONS 6961 AND 6963.

COLUMBUS, OHIO, March 11, 1903.

Hon. J. C. Porterfield, Chief Warden, Columbus, Ohio.

DEAR SIR:—Your letter of March 7th, received. You make the following inquiry:

"Can persons within the state of Ohio sell or have in possession for sale alive, any of the birds or animals mentioned in Section 6961 or 6963, provided that the purchaser lives in Ohio and represented the birds or animals were bought for the purposes of domestication and propagation."

A construction of the clause in Section 6964 with regard to the domestication or propagation of animals or birds, will answer your question. I construe such clause to mean exactly what it says, that the possession of such animals or birds, must be for the sole purpose of domestication or propagation, and for no other purpose.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

AS TO PROVISION FOR INSANE PERSON PENDING ADMISSION TO INSANE HOSPITAL.

COLUMBUS, OHIO, March 12, 1903.

W. S. Johnson, Esq., Prosecuting Attorney, Van Wert, Ohio.

DEAR SIR:—Your letter of March 10th received. You make this inquiry, what provision the laws of this state make for the retention of persons who have been adjudged insane , pending their admission to the hospital, and you have further suggested a case where application has been made to the hospital at Toledo for the admission of a patient, which application has been refused because the quota of the county is full.

It is true, as you have indicated in your letter, that Sections 707 and 708 have been repealed, and the question presented is one of some difficulty, but I will endeavor to make one or two suggestions in regard to the matter.

You will observe by Section 705 that after the hearing has been had before the probate judge and the certificate of the medical witness therein provided for has been furnished the judge, then, and not until then, shall the probate judge apply to the superintendent of the asylum for the insane situated in the district in which such patient resides, for the admission of such patient, and that when the probate judge has been advised by the superintendent of the asylum that the patient will be received, then the probate judge shall issue his warrant, commanding the sheriff to forthwith take charge of and convey such person to the hospital. So that your inquiry resolves itself into an investigation of the status of the insane person prior to his being committed by the probate judge. Of course the relatives of such insane person are in the first instance charged with the care and custody of such insane person, and in the case supposed, if such relatives are not able to properly take care of such patient, and such patient is dangerous, then it certainly would become the duty of the proper county authorities to so provide for such patient, so that he could neither injure himself nor other persons. In case the relatives of such patient are solvent, the expense of such care, properly, would be a charge againt them, and if it is paid for by the county in the first instance, it could be recovered from these relatives. No doubt any proper expenditure necessary to take care of such patient until he may be admited to the asylum would be a proper charge against the relatives, and if they were indigent, against the county. Upon the principle of self-preservation in an extreme case, it would be necessary for the county authorities to care for this patient.

I would also call your attention to Section 701, while not exactly in point, it does indicate a way by which room might be made for patients from counties which have more than their quota at the particular asylum in the district where the county is located. After all, the only thing that may be done is to take care of the patient, and if the relatives will not, the county must.

Very respectfully,

GEORGE H. JONES,

Assistant Attorney General.

FEES OF SHERIFF FOR TAKING A BOY OR GIRL TO HOME.

COLUMBUS, OHIO, March 16, 1903.

Hon. E. E. Corn, Prosecuting Attorney, Ironton, Ohio.

DEAR SIR:—Yours of March 14th, containing copy of a letter written by you to the probate judge of your county, is just received.

Upon consultation with Judge Sheets in regard to the construction of Sections 771 and 759 of the Revised Statutes, I am informed that it has been the holding of this office that Section 771 covers the fees of the probate judge, sheriff, etc., in the proceedings leading, up to the commitment of the girl, and that there is no provision of law allowing the sheriff or other person any fees for taking such girl to the Home, but that the transportation expenses shall be paid as provided in Sections 771 and 759. This being the construction of this office by its head, is conclusive of the matter as far as we are concerned. So that you will understand that the construction given in this letter is the proper construction, as far as this office is concerned.

You are probably familiar with the case of Clark v. Commissioners, 58 O. S., 107; and as the statutes we have been construing do not affirmatively authorize the payment of any other amounts than the actual expenses, and the fees of the court and the sheriff in the proceedings leading up to the commitment, there can be no legal allowance for any *per diem*, fees or mileage to the sheriff, for taking such boy or girl to the Home.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

AS TO WHETHER SECTION 4777a REPEALS BY IMPLICATION SECTIONS 4777 AND 4812 R. S.

COLUMBUS, OHIO, March 16th, 1903.

W. S. Johnson, Esq., Prosecuting Attorney, Van Wert, Ohio.

DEAR SIR:—Yours of March 14th at hand, and contents noted. You inquire whether in my opinion the provisions of Section 4777a R. S., (95 O. L. 454) repeals by implication so much of Sections 4777 and 4812 R. S., as authorize persons who are taxed for road improvement to petition for an extension of the time of the tax levy to pay the costs of such improvement, and as authorize the commissioners of their own motion to continue the tax levy for a period of fifteen years beyond the time named in the petition for the improvement, in order to pay the costs of the improvement.

Section 4777a provides that,

> "If at any time it shall be ascertained by the board of county commissioners, by the report of the road commissioners appointed by them or otherwise, that the property upon the tax duplicate for the purpose of raising a fund for the construction of any free turnpike or road, under the provisions of this chapter, heretofore granted or hereafter to be granted and about to be constructed, will not be sufficient during the time for which extra taxes may be levied and collected as provided in this chapter to build and construct a good road or the kind of road provided for by this chapter, the county commissioners shall, provided that no bonds have been issued that remain unpaid or if there are no unpaid certificates outstanding for work and labor done on said road or proposed road, order that said work on road or proposed road shall not be done, and shall at once notify the road commissioners of this order, and the county auditor not to levy any further tax or any tax for said road or proposed road, and all extra taxes heretofore levied for said road or proposed road and not paid shall not be treated as delinquent taxes, but by like order be canceled off the tax duplicate against the lands and personal property on which they were levied and said road or proposed road shall not be built until the commisioners are fully satisfied that the extra taxes to be levied will build a good and sufficient turnpike road as contemplated by the provisions of this chapter for that purpose."

It is thus seen that it was the intention of the legislature to cut off the power of the county commissioners to continue the levy for the period of fifteen years beyond the time named in the petition, as provided in Section 4812 R. S., and to prohibit the commissioners from ordering the improvement unless

the tax authorized to be levied under the terms of the petition for the improvement, would pay for the improvement.

The provisions of Section 4777a above quoted, and the provisions of Sections 4777 and 4812 above referred to, cannot both be operative. That being the case, the laws are inconsistent and the latter repeals by implication the former. This principle is elementary and needs no citation of authorities. See, however, Black on Interpretation of the Laws, page 112 and following.

Very truly yours,
J. M. SHEETS,
Attorney General.

TOWNSHIP CLERK APPOINTED TO FILL A VACANCY, HOLDS FOR THE UNEXPIRED TERM.

COLUMBUS, OHIO, March 18, 1903.

A. L. Clarke, Prosecuting Attorney, Greenville, Ohio.

MY DEAR MR. CLARKE:—After talking with you over the 'phone to-day, I examined the case in 10 C. C., 328, and am still of the opinion that a township clerk appointed to fill a vacancy, holds for the unexpired term.

At the time of the election of the treasurer whose office became vacant in that case, Section 1448, R. S., contained the following provision:

> "Provided, however, that in case of a vacancy in the office of either clerk or treasurer, his successor shall be elected for the unexpired term, at the next annual election thereafter, occuring more than thirty days after such vacancy shall happen."

On April 6, 1893, Section 1448 was amended so as to leave out this provision. It is true that the Legislature assumed to repeal Section 1448 as amended March 30th, 1888, instead of March 7, 1892, but it is quite apparent that the Legislature intended Section 1448 of the Revised Statutes to be amended so as to read as it now reads. It will be observed that the act of April 6, 1893, is entitled,

> "An act to amend Section 1448, Revised Statutes of Ohio, as amended March 30th, 1888, relative to the election of township officers, and further amended March 7, 1892."

This clearly indicates a legislative purpose to change the provisions of Section 1448 as they existed under the amendment of March 7, 1892. This it accomplished. And the section as it existed under the amendment of March 7, 1892, was repealed by implication, if not otherwise. So that we have the provisions of Section 1448, R. S., which provide that

> "a township treasurer and clerk shall not be elected at the same annual election.

Section 1451 of the Revised Statutes provides that in case of a vacancy in a township office,

> "The trustees shall appoint a person having the qualifications of an elector to fill such vacancy; provided, in case of a vacancy in the office of clerk or treasurer, such appointee shall hold until his successor shall be elected as provided in Section 1448."

As Section 1448, R. S., prohibits the election of a township clerk and township treasurer at the same time, it becomes apparent that the clerk in the instance referred to by you, will hold for the unexpired term.

Very truly yours,
J. M. SHEETS,
Attorney General.

AUTHORITY OF DAIRY AND FOOD COMMISSIONER TO USE APPROPRIATION DESIGNATED AS "EXPENSES OF COMMISSIONER" FOR ALL PERSONAL EXPENSES WHILE ENGAGED IN THE BUSINESS OF THE OFFICE.

COLUMBUS, OHIO, March 20, 1903.

Hon. Horace Ankeny, Dairy and Food Commissioner, Columbus, Ohio.

DEAR SIR:—I am in receipt of yours of March 18th, in which you seek an opinion from me as to whether expenses incurred by you in traveling from your home to Columbus and return, and necessary living expenses while in Columbus (incurred while in the discharge of your official duties), may properly be paid out of the appropriation for your department, designated as "expenses of commissioner"?

Section 409-7, R. S., provides that the Dairy and Food Commissioner shall be paid a salary of "two thousand dollars a year, and his necessary and reasonable expenses incurred in the discharge of his official duties." Hence the question arises, are the items of expense above referred to comprehended within the term "necessary and reasonable expenses incurred in the discharge of his official duties"?

There is no provision of statute requiring the Dairy and Food Commissioner to live in the city of Columbus during his term of office. Hence he is at liberty to reside elsewhere within the State. While Section 409-10, R. S., provides that the Dairy and Food Commissioner shall have an office in the State House, "wherein shall be kept his books, records, and other property of his office," yet the duties of the office do not require his personal presence in the city of Columbus any particular portion of his time.

Section 409-8, R. S., provides that the Dairy and Food Commissioner and his assistants shall

> 'inspect any article of butter, cheese, lard, syrup, or other article of food or drinks, made or offered for sale in the State of Ohio, as an article of food or drink, and to prosecute or cause to be prosecuted, any person or persons, firm or firms, corporation or corporations, engaged in the manufacture or sale of any adulterated article or articles of food or drink, or adulterated in the violation of, or contrary to any laws of the State of Ohio."

Such being his duties, he may be required to travel to any part of the State where he has reason to suspect the pure food laws are being violated, or where he deems his presence necessary to prosecute infractions of the pure food laws. Consequently he may be in the city of Columbus a very small portion of his time.

If the Dairy and Food Commissioner is entitled to car-fare and other personal expenses incurred while traveling about the State in the discharge of his official duties, in my opinion, he is entitled to his car-fare while traveling from his home to the city of Columbus and return, and also his living expenses while at Columbus; provided, always, these expenses are incurred while in the discharge of his official duties. I am unable to draw any distinction between his expenses incurred while in the discharge of his official duties at Columbus, and in traveling to and from his home, and those incurred while traveling about the state. If he is entitled to either, he is entitled to all. It will hardly be claimed that the Dairy and Food Commissioner is not entitled to be reimbursed for his expenses incured while traveling about the state in the discharge of his official

duties; for, otherwise, the appropriation of fourteen hundred dollars for his expenses for the current year would have been a vain thing, and would lapse for want of power to use it.

For a time "whereof the memory of man runneth not to the contrary," other State officers have paid out of the "contingent fund" set apart for the use of their office, their personal expenses incurred while traveling about the State in the discharge of their official duties, although there is no specific statutory provision authorizing the payment of such expenses, and it has not occurred to any person to doubt the correctness of the use of this fund in this manner. With the Dairy and Food Commissioner, however, not only is there a statute authorizing the payment of his "necessary and reasonable expenses incurred in the discharge of his official duties," but there is also a liberal appropriation, amounting to fourteen hundred dollars for the current year, to be used solely for the "expenses of the commissioner."

When we take into consideration the duties of the Dairy and Food Commissioner, the fact that the statute makes express provision for the payment of his reasonable and necessary expenses incurred in the discharge of his official duties, and the liberal appropriation made for these expenses. I have no hesitancy in saying, that I am clearly of the opinion that he is entitled to be reimbursed for his living expenses incurred while in the discharge of his official duties at Columbus, and also for his car-fare expended in traveling from his home to the city of Columbus and return.

I have examined the case of Richardson v. The State, 66 O. S., 108, and in my opinion the principles there announced in no manner militate against the conclusions herein arrived at.

Very truly,

J. M. SHEETS,

Attorney General.

AS TO SECTIONS 3036 AND 3044.

COLUMBUS, OHIO, March 21, 1903.

General George R. Gyger, Adjutant General, Columbus, Ohio.

SIR:—This department acknowledges the receipt of your communication of March 18, 1903.

You inquire whether,

> "under Sections 3036 and 3044 Revised Statutes of the State of Ohio, officers of the National Guard who now hold commissions issued prior to the amendment of April 29th, 1902, and for a specified term, may continue to hold their offices by virtue of such commissions 'during good behavior and faithful performance of duty' "?

In answer to this inquiry, I would say that the officers of the National Guard now holding such commissions, were elected and commissioned for a specified term of years, and the object of the proviso of Section 3036, R. S., is to save to these officers such portion of their terms as remain to be served; but upon expiration of their said terms, as evidenced by their commissions, a new election must be held, and the persons chosen at such election must be commissioned to "serve during good behavior and faithful performance of duty."

Very respectfully,

GEORGE H. JONES,

Assistant Attorney General.

POWERS OF TURNPIKE DIRECTORS UNDER SECTION 4896, R. S.

COLUMBUS, OHIO, March 24, 1903.

E. L. Bush, Esq., Prosecuting Attorney, Washington C. H., Ohio.

DEAR SIR:—Yours of March 23d making inquiry as to whether the county commissioners when acting as a Board of Turnpike Directors under the provisions of Section 4896, R. S., and following, may adopt and carry out a rule in the words and figures following, is received.

> "For the purpose of enabling the respective pike superintendents to employ laborers and teams to improve and repair said roads, the Turnpike Directors shall from time to time as said Board may deem proper, place in the hands of such superintendents an amount of money not exceeding at any, any one time the sum of three hundred dollars (300.00), and said superintendents shall in expending such amounts for labor and teams take receipt for all amounts so disbursed and shall make a report to said Board of Turnpike Directors at least each regular meeting of said Board, and as often as said superintendents may need additional money for such expenditures, and together with such report shall file all vouchers for the money so expended, which shall be examined and approved by said Board; and all other expenditures for material and expenses shall be approved before made by said Board, and paid only upon the warrant of the county auditor."

Section 4896, R. S., provides that county commissioners, except in certain counties, shall act as Turnpike Directors, and perform the duties of such directors.

Section 4897, R. S., provides:

> "The directors at their first meeting shall divide the county into three districts, as nearly equal in number of miles of turnpike, and conveniently located, as may be practicable, and each director shall have the personal supervision of one of such districts, subject to all rules and regulations that may from time to time be agreed upon by the board; and the directors shall hold a meeting as such board at least once in three months, at their office at the county seat, and shall be governed in all transactions by the rules governing county commissioners."

It will thus be seen that while the County Commissioners, as Turnpike Directors, may prescribe certain rules concerning the supervision of their respective road districts, yet in all their "transactions" they must be governed "by the rules governing county commissioners." One of the rules governing county commissioners is prescribed by Section 894, R. S., which provides that,

> "No money shall be disbursed by the county commissioners, or any of them, but the same shall be disbursed by the county treasurer, upon the warrant of the county auditor, specifying the name of the party entitled to the same, on what account, and upon whose allowance, if not fixed by law."

This provision makes it entirely clear to my mind that your inquiry must be answered in the negative.

These Turnpike Directors act as a Board in all their financial transactions, and they could not do so, if each is given power to contract for the expenditure of any money.

I do not doubt in the least the inconvenience that will result from such a construction of the statute, but as the law seems to be plain upon the subject,

the argument is rather one to be addressed to the legislature for a remedy than to be addressed to an officer whose duty it is to construe its provisions.

Very truly yours,
J. M. SHEETS,
Attorney General.

CONSTRUCTION OF SUB-DIVISION 2, SECTION 6968-4, R. S.

COLUMBUS, OHIO, March 28, 1903.

Hon. J. C. Porterfield, Chief Game Warden, Columbus, Ohio.

DEAR SIR:—Your request for a construction of Sub-division 2, Section 6968-4 of the Revised Statutes of Ohio, is received.

Sub-division 2 of said section is as follows:

> "All fish caught and brought into any port, or to any shore, in the State of Ohio, upon which an import duty has not been paid under the laws of the United States, shall be deemed to have been caught in the waters mentioned in Section 6968-2 of this act, and the same shall be subject to the tonnage tax provided in said section."

In so far forth, as said sub-division places the burden of proof as to where the fish referred to have been caught, upon the possessor of said fish, such sub-division is operative.

Said sub-division, however, does not authorize the placing by the State of Ohio, upon fish caught in foreign waters (that is, waters foreign to the waters of this State,) any tonnage or other tax. To so construe said sub-division would violate Section 10, of Article 1, of the Constitution of the United States, which provides:

> "No State shall without the consent of Congress lay imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws."

And also Section 8, of Article 1, of the Constitution of the United States, which provides that Congress shall have power,

> "To regulate commerce with foreign nations and among the several States. * * * * "

Very truly yours,
GEORGE H. JONES,
Assistant Attorney General.

WHETHER LANDS SHOULD BE TAXED IN NAME OF OWNER OF FEE OR LESSEE.

COLUMBUS, OHIO, March 31, 1903.

Hon. W. D. Guilbert, Auditor of State, Columbus, Ohio.

MY DEAR SIR:—Yours of recent date, requesting an opinion from me as to whether lands should be placed upon the tax duplicate in the name of the owner of the fee, or in the name of the lessee, where the lease is less than a perpetual lease, is duly received.

This inquiry involves the construction of Sections 1034 and 1036 of the Revised Statutes of Ohio.

These two sections provide that each county auditor shall list for taxation all lands subject to taxation within his county, in the name of the respective owners. The question for solution then is, what construction shall be placed on the term "owner"? Shall it be construed as meaning the "lessee," or the owner of the fee?

In the case of Village of St. Bernard v. Kemper, et al., 60 O. S., 244, it was held that where lands were held by a perpetual lease (for 99 years, renewable forever), that the lessee was so far considered the "owner" as to authorize him to petition for a street improvement. Section 2897, R. S., seems to contemplate that lands held by a perpetual lease may be listed in the name of the lessee for taxation. Hence, taking into consideration the provisions of this section and the case of Village of St. Bernard v. Kemper, supra, it seems quite clear that lands held by a perpetual lease may be taxed in the name of the lessee, especially if by the terms of the lease he is required to pay the taxes thereon. The reason for this is clear. A perpetual lessee is to all intents and purposes considered the owner of the lands leased; the owner of the fee usually having no right in the premises, except the right to receive the stipulated ground rent, and the right to enforce a forfeiture, in the event of a failure to pay the rent. I am unable, however, to find any statutory provision indicating any legislative purpose to authorize the listing of lands for taxation in the name of the lessee where the lease is less than perpetual.

The word "owner," in the popular sense in which it is used, both in ordinary language and in the statutes, implies the person "who has dominion of a thing, real or personal, corporal or incorporal, which he has the right to enjoy and do with as he pleases, even to spoil or destroy it, as far as the law permits, unless he be prevented by some agreement or guarantee which restrains his right." 2 Bouvier's Law Dictionary, 268.

Hence, in my opinion, the word "owner" in Sections 1034 and 1036 R. S., should be construed as meaning the owner of the fee of the land, and not the lessee (unless the lease is perpetual), and lands should be listed for taxation in the name of the owner of the fee.

Very truly yours,
J. M. SHEETS,
Attorney General.

POWER OF ASSESSORS TO APPOINT MORE THAN ONE ASSISTANT.

COLUMBUS, OHIO, April 9, 1903.

W. H. Bowers, Prosecuting Attorney, Mansfield, Ohio.

MY DEAR SIR:—Yours of April 8th at hand and contents noted.

You inquire whether under the provisions of Section 2794, R. S., a district, township or ward assessor, where necessary in order to complete his work within the time prescribed, can appoint more than one assistant to help in the performance of his duties.

In my opinion he may. Indeed, this construction has become necessary because of the fact that in many instances it is impossible for an assessor, with one assistant, to perform the services required of him within the time prescribed. There is no good reason why the Legislature should limit the power of appointment to one assistant.

While the first part of this section provides that the assessor may "appoint some well-qualified citizen of his county or township to act as an assistant," yet the latter part of this section provides that "each assistant so appointed, shall, within the division of such district or township or ward assigned him, under the direction of the assessor, after giving bond and taking an oath, as prescribed by law, perform all the duties enjoined upon, vested in, or imposed upon assessors by the provisions of law."

It is clear from this provision that the Legislature contemplated that one assessor might have charge of more than one assistant, for the provision is, that "each assistant so appointed," shall be "under the direction of the assesor."

Let me further suggest that it is a well known rule of construction that where the exigencies of the case require, in order to remedy completely the evil sought to be remedied by the Legislature, words in the singular number may be construed as plural, and *vice versa;* especially is this the rule of construction where the context reasonably indicates the legislative purpose that the statute should have such meaning. (Black on Interpretation of the Laws, p. 154.)

As already suggested, the latter part of Section 2794, R. S., plainly indicates that the Legislature contemplated that one assessor might have under his supervision more than one assistant, and as more than one assistant is frequently necessary in order that the duties enjoined upon the assessor may be performed within the time prescribed, it is quite clear to me (as already suggested) that more than one assistant may be appointed where deemed necessary.

Very truly,

J. M. SHEETS,

Attorney General.

WHETHER COUNTY SCHOOL EXAMINERS ARE ENTITLED TO COMPENSATION OUT OF COUNTY TREASURY FOR CONDUCTING INVESTIGATION FILED AGAINST TEACHER.

COLUMBUS, OHIO, April 13, 1903.

Oliver N. Sams, Esq., Hillsboro, Ohio.

DEAR SIR:—Yours of April 11th at hand and contents noted. You inquire whether a county school examiner is entitled to compensation to be paid out of the county treasurer, for conducting an investigation of charges filed against the teacher under the provisions of Section 4073, R. S. This section provides, in substance, that the board of education may revoke a certificate for intemperance, immorality, incompetency or negligence; and that "when any recipient of a certificate is charged with intemperance, or other immorality, the examining board shall have power to send for witnesses and examine them on oath or affirmation touching the matter under investigation. The fees and other expenses of such trial shall be certified to the county auditor by the clerk and president of the examining board, and be paid out of the county treasury upon the order of the auditor."

The question then arises, does the phrase "fees and other expenses of such trial" which are authorized to be paid out of the county treasury include compensation to the county examiners conducting the investigation? If it does, what is the amount to be allowed and what statute authorizes its payment? It is well to remember at the outset that, "to warrant the payment of fees or com-

pensation to an officer, out of the county treasury, it must appear that such payment is authorized by statute." Clark vs. Commissioners, 58 O. S. 107.

Taking this rule as our guide, let us determine whether there is any statute authorizing the payment of compensation to county school examiners for conducting an investigation of charges against a teacher.

The only provision of statute that I am able to find, authorizing the payment of compensation to school examiners under any circumstances, is Section 4075, R. S., which provides that, "Each member of the board shall be entitled to receive ten dollars for each examination of sixty applicants or less, fourteen dollars for each examination of more than sixty applicants and less than one hundred, eighteen dollars for each examination of one hundred applicants or more, to be paid out of the county treasury on the order of the county auditor."

This section, however, authorizes the payment of compensation to school examiners only for conducting examinations of teachers applying for certificates, and not for conducting investigation of charges against the teacher for misconduct. Hence, I am clearly of the opinion that school examiners are not authorized to receive pay out of the county treasury for conducting an investigation of charges filed against a teacher.

The question may be asked, if the school examiners are not entitled to compensation for such services, what does the term "fees and other expenses of such trial," which are authorized to be paid out of the county treasury, include? In conducting such an investigation, the examiners are authorized to send for witnesses and examine them under oath—such being their authority they of necessity will incur expenses and witnesses would be entitled to their fees. Hence, in my opinion, these are the fees and expenses which the statute authorizes to be paid out of the county treasury.

Very truly yours,
J. M. SHEETS,
Attorney General.

DUTY AS RAILROAD COMMISSIONER UNDER ACT, APRIL 27, 1896.

COLUMBUS, OHIO, April 13, 1903.

Hon. J. C. Morris, Columbus, Ohio.

DEAR SIR:—You inquire whether under the provisions of the act of April 27, 1896, (92 O. L., 396), it is your duty as railroad commissioner to approve as "a Portable Chemical Fire Extinguisher," a dry powder, which, is used by throwing it upon the fire by hand.

The answer to this question depends upon the construction placed upon the act above referred to. Section 1, of this act requires every company operating a railroad within the State of Ohio, to equip each passenger coach with one, "Portable Chemical Fire eExtinguisher," for the purpose of protecting its passengers and employes from fire. Section 2, of this act provides:

> "That the said fire extinguishers shall be of sufficient size, durability, mechanical construction and able to withstand such pressure as will make it an efficient fire extinguisher, provided that such extinguisher shall first be approved by the commissioner of railroads and telegraphs and such different makes of extinguishers, as shall come within the requirements of this act, shall be approved by him, and his discretion relative to the approval thereof, shall be exercised in such a way as to invite and encourage the most extended competition."

It is thus seen that before you can approve a "fire extinguisher," it must "come within the requirements of this act." It will hardly be seriously claimed that dry powder applied to a fire by hand, is a "Portable Chemical Fire Extinguisher," such as described in this act. We are all familiar with the character of the "Chemical Fire Extinguisher," in use at the time the act in question was passed. It consisted of a cylindrical tube, charged with a liquid chemical; the pressure of the chemical being sufficient to force it through a hose attached to the cylinder and to throw it to a considerable distance. This is clearly the character of the "Portable Chemical Fire Extinguisher," which comes "within the requirements" of the act, and which you are authorized to approve.

I, do not mean to be understood as maintaining that the legislature can constitutionally select a particular kind of fire extinguisher and require railroad companies to use it to the exclusion of other kinds, equally as efficient. But what I want to be understood as saying is, that you have no power except such as is given you by statute, and that the statute in question has not authorized you to approve dry powder fire extinguisher.

Very truly yours,

J. M. SHEETS,

Attorney General.

AS TO THE PUBLICATION OF THE PROPOSED CONSTITUTIONAL AMENDMENTS.

COLUMBUS, OHIO, April 13, 1903.

Hon. Mark Slater, Supervisor Public Printing, Columbus, Ohio:

MY DEAR SIR:—I am in receipt of your inquiry requesting an opinion from me as to whether you are at liberty to separate the different amendments to the Constitution, proposed for adoption, and publish some of them in one newspaper, and the remainder in another, of the same political party. In other words, would such a publication be a compliance with the provisions of Section 3 of the act above referred to?

In my opinion, it would not.

Section 3 of this act provides that the state supervisor of public printing shall cause the amendments to the constitution, "proposed at the present session of the General Assembly," to be published in not less than one newspaper of general circulation in each county of the state, once each week for six months, and until the first Tuesday after the first Monday in November, 1903,

> "and in counties where newspapers of general circulation represent each of the two leading political parties, then such amendments shall be published in one newspaper of each political party once each week for six months, and until the first Tuesday after the first Monday of November, 1903."

It is thus seen that statute requires that "such amendments shall be published in one newspaper of each political party," not separated, and some of the proposed amendments published in one newspaper and some in another. There is reason for this requirement.

If the supervisor of public printing could divide the proposed amendments so as to publish some of them in one paper and some in another, then he might divide them so as to publish one in each of five different papers, as there are five amendments to be voted on. Voters generally could not well afford to take

all five of the newspapers in which these different proposed amendments might be published, but could well afford to take one, and most likely would take the paper in which all five amendments were published. The ostensible purpose of this publication is not to help the newspapers, but to notify the people of the proposed constitutional amendments, and evidently the Legislature thought it best for the widest publication of these proposed amendments, that they all be published in one paper.

Very truly yours,
J. M. SHEETS,
Attorney General.

IN REGARD TO DUCK SHOOTING.

COLUMBUS, OHIO, April 17, 1903.

Hon. J C. Porterfield, Chief Game Warden, Columbus, Ohio:

DEAR SIR:—Your letter containing a letter of inquiry from C. B. Carr, J. P., with request from you for an opinion upon the matters inquired about, is received.

The first inquiry is, "has a person the right to shoot ducks during the season in and on the Sandusky River?"

The answer to this inquiry involves the construction of a portion of Section 6961 of the Revised Statutes, in so far as such section defines the open season. The section is clumsily worded, and at first glance seems considerably involved, but my opinion is that the open seasons, as far as ducks are concerned, are fixed by the section as follows:

Between the fifteenth day of March and the twentieth day of April, inclusive, it is lawful to hunt and kill ducks, upon any of the waters of the State of Ohio. But between the first day of September and the fifteenth day of December, inclusive, ducks may only be hunted upon the lakes, bays and reservoirs of the state, including Lake Erie and its bays, Buckeye and Indian Lakes.

Second inquiry: "Has a person the right to shoot over decoys in the river opposite or near the Ottawa Shooting Club House, so long as he is not shooting from the shore, and while his boat from which he shoots, floats free?"

In answer to this inquiry, I would say I am of the opinion that in the season, a person has such right.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

WHETHER COUNTY COMMISSIONERS ARE ALLOWED FIVE CENTS BOTH IN GOING TO AND RETURNING FROM OFFICIAL DUTIES.

COLUMBUS, OHIO, April 22, 1903.

John A. Eylar, Esq., Prosecuting Attorney, Waverly, Ohio:

MY DEAR SIR:—Yours of April 21st at hand and contents noted.

The question for solution is whether the provision in Section 897, R. S., authorizing the payment to the county commissioners the sum of five cents per mile for necessary travel, shall be considered five cents per mile both ways, or only

five cents per mile to the place where they are called upon to perform their duties?

You were very kind in calling my attention to the many different statues providing for mileage. You have materially assisted me in that way, for which I thank you.

The original act providing compensation and mileage for county commissioners which has been amended from time to time, and has been finally carried into the Revised Statutes as Section 897, is found in O. L. Volume 55, page 38 (Swan and Critchfield's Statutes, page 647). This enactment provided, among other things,

> "That each county commissioner shall be allowed $2.50 per day for each and every day that he may be employed in his official duties, and five cents per mile in going to and returning from the county seat, etc."

This provision with varying modifications remained in force until April 29th, 1872, (69 O. L. 182), when it was amended so as to read:

> "Each county commissioner shall be allowed $3.00 for each and every day that he may be employed in his official duties, and five cents per mile for his necessary travel, etc."

It will thus be observed, the words "going to and returning from the county seat" were omitted. The section became more general in its terms, giving the commissioners simply five cents per mile for necessary travel in the performance of their official duties, regardless of whether that travel was in going to or returning from the county seat or traveling elsewhere about the county.

It is a very well known rule of construction that a mere change of phraseology in a revised or amended statute does not change the form of construction further than evidently intended.

This rule is so familiar, I do not deem it necessary to cite authorities.

It does not appear evident to me that the legislature intended to give the county commissioners five cents per mile in going to the place where they were required to perform their duties but nothing for returning to their respective homes. Without any other mileage clause in the statute, it seems to me the term "five cents per mile for necessary travel" means five cents per mile for each mile traveled, whether going to or returning from their duties.

The law providing five cents mileage was enacted when the railroads of the state were authorized, and many of them did charge much more than three cents per mile for conveying passengers, and also at a time when our public roads were not in as good condition for travel as now. It must be presumed that the legislature intended to, at least, compensate the commissioners for expenses incurred in traveling. Five cents per mile traveling one way, even now, would not compensate the commissioners if they traveled by steam railroads, and of course it would cost them more if they traveled by horse and buggy.

From these considerations, it seems to me quite clear, that the commissioners are entitled to five cents per mile for each mile traveled when traveling about the county in the discharge of their official duties, whether going to or returning from the place where their services are required to be performed.

Very truly yours,

J. M. SHEETS,
Attorney General.

WHETHER BOARD OF EDUCATION MUST CERTIFY LEVY TO TAX COMMISSIONERS OF CITY.

COLUMBUS, OHIO, April 24, 1903.

Hon. Lewis D. Bonebrake, State School Commissioner, Columbus, Ohio.

DEAR SIR:—Answering your communication of the 23rd, inst., containing the inquiry of the Clerk of the Board of Education of the City of Dayton, relative to whether the board of education of such city must certify its levy to the Board of Tax Commissioners of such city, would say:

The board of tax commissioners for certain cities was created by Section 2690a R. S., which would include the city of Dayton. But by the enactment of the Code, that section was expressly repealed and while the succeeding section 2690c, as contained in 95 O. L. 415, was not expressly repealed, it was repealed by implication, and the repealing of the first named section having abolished the Board of Tax Commissioners in all cities, the levy made by the Board of education will not be certified to such board; but the board of education should, pursuant to Sec. 3960 R. S., certify the same to the county auditor on or before the first Monday in June, as therein provided.

Very truly yours,
SMITH W. BENNETT,
Special Counsel.

WHEN COUNTY FUND IS OVER-DRAWN DOES IT CREATE INDEBTEDNESS UNDER SEC. 3834a AND MAY BE REFUNDED BY ISSUING BONDS.

COLUMBUS, OHIO, April 29, 1903.

Fred E. Guthery, Esq., Prosecuting Attorney, Marion, Ohio.

MY DEAR SIR:—Yours of April 26th at hand and contents noted.

The question submitted for solution is, whether where the county fund of a county has been over-drawn, it creates an indebtedness, which under the provisions of Section 3834a R. S., may be refunded by the issuing of bonds.

When you speak of over-drawing a county fund, I understand you to mean, that when the county fund is exhausted, the commissioners continued to contract obligations, which should be paid out of the county fund; the auditor continued to issue his warrants upon that fund and the treasurer continued to pay the warrants out of other funds in his hands. How this could be legally done, I am at a loss to understand, for Section 3834b provides that:

> "The commissioners of any county * * * shall not enter into any contract, agreement or obligation involving the expenditure of money, nor shall any resolution or order for the appropriation or expenditure of money be passed * * * unless the auditor * * * shall first certify that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate, and in process of collection and not appropriated for any other purpose."

If the certificate of the auditor thus required was not filed with the county commissioners, then of course these obligations were wholly illegal and cannot be the basis for issuing bonds. If the auditor falsely filed these certificates

with the county commissioners, then he would be liable on his bond for the amount of this illegal expenditure. Take either horn of the dilema and I am unable to see wherein there is any legal indebtedness which may form the basis for the issuing of bonds.

It will be observed that Section 3834a provides that there must be a finding by commissioners that there is a valid and legal outstanding indebtedness, before they are authorized to issue bonds. The purpose of the law referred to is plain. It used to be the habit of the county commissioners in some counties, at least, to create obligations where there was no fund upon which they could draw to pay them, and then upon the theory that there was an outstanding legal obligation against the county, they would issue bonds. The law in question was enacted to protect the people against that class of debts.

Very truly yours,

J. M. SHEETS,

Attorney General.

THE DOW TAX IS REQUIRED TO BE PAID BY PERSONS DEALING IN BISHOP'S BEER.

COLUMBUS, OHIO, April 29, 1903.

Hon. W. D. Guilbert, Auditor of State, Columbus, Ohio.

MY DEAR SIR:—In accordance with your request, I have taken up and further considered the subject as to whether persons who sell "Bishop's Beer," shall be required to pay the Dow Tax, regardless of the per cent. of alcohol contained in it.

This question becomes important, especially in view of the results following your recent order to county auditors not to charge dealers in "Bishop's Beer" with the Dow Tax, unless the amount of alcohol in the beer sold, exceeds two per cent. It appears from your statement that since that ruling has been promulgated, beer saloons are springing up in every part of the state, in which they advertise nothing but "Bishop's Beer" for sale.

In a number of instances, however, it appears that the beer sold contains alcohol in an amount exceeding two per cent; also that if the present rate of increase continues, the number of beer saloons advertising nothing but "Bishop's Beer" for sale, will soon reach into the thousands.

As occurred when the Dow Law was first enacted, which provided that persons dealing in malt liquors only need pay a tax of but a hundred dollars a year, these persons who purport to sell nothing but "Bishop's Beer," will be selling intoxicating liquors surreptitiously. It will then become practically impossible to enforce the provisions of the Dow Law. Each person will insist that he is selling nothing but "Bishop's Beer," and it will be difficult to prove that he is selling spirituous liquors surreptitiously, or is selling beer containing more than two per cent. alcohol, and it will also result in endless litigation. The difficulties which will thus be experienced in enforcing the provisions of the Dow Law, is an element which should properly be considered in construing the legislative intent when the act in question was passed.

Section 1 of the Dow Law as originally enacted, reads as follows:

> "That upon the business of trafficking in spirituous, vinous, malt, or any intoxicating liquors, there shall be assessed, yearly, and shall be paid into the county treasury as hereinafter provided, by every person corporation or co-partnership engaged therein, and for each place

where such business is carried on by or for such person, corporation or co-partnership, the sum of two hundred dollars; provided, if such business continues through the year, to-wit: From the fourth Monday of May, exclusively; in the trafficking in malt or vinous liquors, or both, such assessment shall be but one hundred dollars." (83 O. L., p. 157.)

It will thus be seen that under the provisions of the act as originally passed, the tax on the traffic in malt liquors was required to be paid, regardless of whether they were intoxicating.

It having become apparent to the Legislature that persons paying the tax for trafficking in malt liquors were surreptitiously selling spirituous liquors also, in order to put an end to this fraud upon the State, the law was so amended as to require the same tax from a person dealing in malt liquors as though he dealt in all the different classes of liquors named in the act.

The act as thus amended reads as follows:

"Upon the business of trafficking in spirituous, vinous, malt, or any intoxicating liquors, there shall be assessed, yearly, and shall be paid into the county treasury, as hereinafter provided, by every person, corporation or co-partnership engaged therein, and for each place where such business is carried on by or for such person, corporation or co-partnership, the sum of three hundred and fifty dollars." (R. S. Section 4364-9.)

It is a well known rule of statutory construction, that a mere change in the phraseology in a revised or amended statute, does not change the former construction further than appears evidently intended. It was evidently intended by the amendment of Section 1 of this act, that persons dealing in malt liquors should pay the same tax as those dealing in spirituous or other intoxicating liquors, and to my mind it was not evidently intended to change the meaning of this section any further.

It can be claimed with a great deal of plausibility, that the proper construction of Section 1 as it now reads with reference to trafficking in malt liquors, regardless of their intoxicating character, would be that the person dealing in malt liquors regardless of whether they are intoxicating, must pay the tax imposed by Section 1 of the act. It will be observed that this section provides that "upon the business of trafficking in spirituous, vinous, malt, or any intoxicating liquors, there shall be assessed and paid into the county treasury," the annual Dow Tax. This provision does not necessarily imply that the malt liquors must be intoxicating. If the Legislature intended that the Dow Tax should be charged only against those dealing in intoxicating liquors, it could have easily so said, and the statute then could have read, "upon the business of trafficking in intoxicating liquors, there shall be assessed, yearly, etc." The words, "spirituous," "vinous" and "malt" could have been left out.

While I am not wholly confident of the correctness of the views herein expressed, yet I am quite strongly inclined to the proposition, that persons who deal in malt liquors must pay the Dow Tax, regardless of the intoxicating character of the same.

Very truly yours,

J. M. SHEETS,
Attorney General.

AS TO SECTIONS 6968 AND 6968-I R. S., IN REGARD TO CATCHING BLACK BASS.

COLUMBUS, OHIO, May 6, 1903.

Hon. J. C. Porterfield, Chief Game Warden, Columbus, Ohio.

DEAR SIR:—Your letter of May 5th, received. You ask whether it is lawful for a person to hire another by the day to catch black bass for him in any of the waters in the State of Ohio; and if a hotel keeper who lawfully catches black bass, may lawfully serve them to his guests?

Section 6968-1 R. S. regulating Lake Erie, fishing, provides that black bass shall not be caught in any manner between the 20th day of May and the 10th day of July.

Said section also provides that it "shall be unlawful for any person, firm or corporation to sell, offer for sale, barter or give away or have in their possession for any such purpose * * any black bass caught in any of the rivers, brooks, ponds, lakes or other bodies of water in the state or covered by the provisions of this act."

It will be seen by Section 6968-1 that it is unlawful to catch black bass in Lake Erie between 20th day of May and the 10th day of July; also that it is unlawful for any person to sell, offer for sale, barter or give away, or have in possession for any such purpose, any black bass caught in any of the waters of the state.

This latter provision is evidently for the purpose of confining the taking of bass during the open season to persons who catch them for their own use, and not for barter or sale.

Section 6968 R. S. provides that "no person shall in any of the waters of the state, natural or artificial, including Buckeye Lake, Indian Lake, Grand or Loramie Reservoirs, take or catch in any manner * * any black bass, between May 1st and June 1st inclusive."

Of course during the closed season it is not lawful to take bass at all. In the open season, a person may catch bass for their own use only; and in the case supposed by you of the hotel keeper, while it would be lawful for him to take bass in the open season, it would not be lawful for him to serve such bass to his guests.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

AS TO DOW TAX. EXPENSES OF COUNTY COMMISSIONERS. WHETHER PROBATE JUDGE CAN RECEIVE PAY FROM COUNTY FOR JOURNAL WORK IN INSANE CASES, SECTION 719.

COLUMBUS, OHIO, May 11, 1903.

George E. Young, Esq., Prosecuting Attorney, Lebanon, Ohio:

DEAR SIR:—Your letter of May 8th received. You make several inquiries.

First: Should the Dow Tax be charged on the business of selling Hop Tea?

If Hop Tea is the disguised name of a liquor intoxicating in its nature, the tax should be charged. If Hop Tea is a liquor similar to what is known as Bishop's Beer, and contains two per cent. or less of alcohol, I would say there is

a case now pending in the Supreme Court of the State upon the question of whether trafficking in Bishop's Beer and similar liquors is within the terms of the Dow Law, and will be decided probably in a few days.

Second: Whether county commissioners are allowed expenses for meals, horse feed and other similar expenses to the amount of $200.00 per year in addition to their per diem and mileage while in their county?

This office on February 4, 1901, construed Section 897 R. S. and held that the expenses of the kind referred to when incurred within the county are not proper charges and cannot be allowed as legal expenses.

In the case of Higgins v. Commissioners 62 O. S. 621 will be found a construction of the class of items you ask about. And finally in the case of Richardson v. State 66 O. S., 108 you will find authoritative construction and answer to your inquiry. The act of May 10, 1902, (95 O. L., 501), supplemental to Section 897 merely limits to $200.00 the amount of the expenses formerly allowed, and not including the kind of expenses you inquire about in your letter.

Third: Whether or not probate judges are entitled under Section 546 to receive pay from the county for their journal work in insane cases, which is under Section 719 R. S.

In reply would say, that the probate judge, under Section 719 is only entitled to charge and receive the fees specified in said section. In addition to the $2.00 for holding the inquest, he is entitled to the same fees as are allowed by law to the clerk for each warrant, certificate or subpoena he may issue and the amount of postage on communications to and from the Superintendent of the hospital and none other.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

POWER OF TOWNSHIP TRUSTEES TO LEVY THE TAX PROVIDED BY SECTION 4686-30, WHERE THE COUNTY COMMISSIONERS HAVE BEEN PETITIONED TO IMPROVE CERTAIN ROADS.

COLUMBUS, OHIO, May 13, 1903.

George Goodrich, Prosecuting Attorney, Upper Sandusky, Ohio.

MY DEAR MR. GOODRICH:—Yours of May 12th, at hand and contents noted. I should judge from the statement in your letter, that the trustees of some township are expecting you to act as their legal adviser. If they are, and are willing to pay you, well and good. Out of courtesy to you however, I gladly give you an opinion upon the subject inquired of.

It seems from your statement, that under the provisions of the Act of April 4, 1900, (97 O. L., 96), some of the townships of your county have applied to the county commissioners to macadamize certain pikes named in their petitions and located within their townships. That the commissioners have granted these petitions, and are building pikes according to the provisions of this act.

Other townships, which have not petitioned the commissioners, are desirous of levying a tax under the provisions of Section 4686-30, for the purpose of building pikes within their respective townships. But as this section provides that it

"shall not apply to townships in any county where the county com-

missioners have improved or now are engaged in improving by macadamizing and graveling the highways of the county,"

the question arises whether the township trustees are prohibited from levying this tax. In my opinion they are not. The provision above quoted, in my judgment, applies only where the county commissioners under the statutes of the state, are levying a tax upon the taxable property of the county, and improving the public highways of the county, by macadamizing, piking, etc.

The purpose of the act was to protect the people from double taxation. It was evidently the intention of the Legislature, where the commissioners have exercised their powers by levying a general tax upon the taxable property of the county, for the purpose of macadamizing the roads, to prohibit the township trustees of any township within such county, from levying an additional tax for the same purpose.

If I am right in this conclusion, then the trustees of the township mentioned in your letter, have a right to levy a tax under the provisions of Section 4686-30.

Very truly yours,
J. M. SHEETS,
Attorney General.

DUTIES OF THE SECRETARY OF THE STATE BOARD OF PHARMACY WITH REFERENCE TO ENFORCING THE PROVISIONS OF LAW REGULATING THE SALE OF POISONS.

COLUMBUS, OHIO, May 13th, 1903.

Hon. William R. Ogier, Secretary Ohio State Board of Pharmacy, Columbus, Ohio:

DEAR SIR:—Yours of May 12th, at hand and contents noted. You inquire whether, in my opinion, the provisions of the Act of April 14, 1902, (95 O. L., 145), and of the act of April 28, 1902, (95 O. L., 280), are required to be enforced by the Secretary of The Ohio State Board of Pharmacy?

In my opinion they are not.

The State Board of Pharmacy is a Board created by an act of the Legislature, requiring all persons to pass an examination before they shall be authorized to engage in the compounding and sale of drugs; i. e., in the practice of pharmacy. The Secretary of the Ohio State Board of Pharmacy is only charged with the duty of enforcing laws relating to the practice of pharmacy.

The two acts referred to in your letter merely restrict the sale of poisons, and have no particular application to the practice of pharmacy. These acts do not provide that the Secretary of the Ohio State Board of Pharmacy shall enforce their provisions. That being the case, he has nothing to do with their enforcement, but it must be left to the local authorities.

We have had statutes for years restricting the sale of poisons, and providing penalties for an infraction of these statutes.

If the Secretary of the State Board of Pharmacy is required to enforce the provisions of law with reference to these two acts referred to, it becomes equally his duty to enforce the provisions of law that have long existed restricting the sale of poisons, and it could hardly be claimed that his duties go to that extent.

Very truly yours,
J. M. SHEETS,
Attorney General.

A VILLAGE MAY APPOINT EITHER A BOARD OF HEALTH OR A HEALTH OFFICER, BUT THE PROVISIONS PROVIDING FOR THE APPOINTMENT ARE MANDATORY.

COLUMBUS, OHIO, May 15, 1903.

Dr. C. O. Probst, Secretary State Board of Health, Columbus, Ohio:

DEAR SIR:—Yours of the 13th, inst., received requesting an opinion of this department, relative to the powers of village councils to abolish the board of health therein and appoint a health officer; and further, if the board of health be abolished, is the health officer appointed by such board, to be retained under the provisions of Section 189 of the municipal code?

In answer to your first inquiry, I would say that pursuant to Section 187 of the municipal code, "the council of each city and village shall establish a board of health." "In villages, the council may appoint a health officer instead of a board of health, and fix his salary and term of office, such appointee to be approved by the state board of health, who shall have all the powers and perform all the duties granted to or imposed upon boards of health, etc."

The provisions contained in Section 187 are mandatory upon village councils to provide for either a board of health or a health officer, and in the absence of either being provided for, 'the state board of health may appoint a health officer * * * and fix his salary and term of office." The council is thus made in the first instance, the creative body and by ordinance is required to establish a board of health.

As the Legislature has the power to repeal a law creating an office, so have village and city councils the power to repeal an ordinance establishing an office, and it is within the power of a village council to substitute for the board of health, a health officer. And the mere fact that such board of health has been established by a former or an existing council, does not forbid the repeal of the ordinance establishing such board and the substitution therefor of a health officer, as mentioned in Section 187. But it is imperative that each village and city shall have either a board of health or an officer, to perform the duties incumbent upon a board of health or health officer. It has been frequently held, "the repeal of a statute or an ordinance creating an office, abolishes the office."

It seems, therefore apparent, that the first question propsed, must be answered in the affirmative, and that a village council may abolish its board of health and appoint a health officer instead.

Second: If the board is abolished, its functions cease and the appointments made by it, are also abolished. The appointees cease to hold office as soon as the office is abolished.

Section 189 of the Municipal Code, contains the following language:

> "All employees now serving in the health department, shall continue to hold their said positions, and shall not be removed from office or reduced in rank or pay except for cause assigned, and after a hearing has been afforded them before the board."

This does not forbid the repeal of the ordinance under which such board was established and the employees appointed. And it presupposes that there is a board of health established and existing, in order to support the right to make appointments thereunder, and the right of such appointees to serve in their respective capacities.

If a village seeks to abolish their board of health, it must be done by the repeal of the ordinance establishing it, and the passage of a new ordinance, pro-

viding for the appointment of a health officer, in lieu of the board, and such power of appointment is vested in the village council, the appointment to be approved by the State Board of Health.

Very truly yours,
J. M. SHEETS,
Attorney General.

WHETHER POOR FUNDS CAN BE USED TO PAY EXPENSES OF QUARANTINE. WHETHER MUNICIPALITY ENTITLED TO ANY PORTION THIS FUND FOR EXPENSES OF QUARANTINE OUT OF CORPORATION. WHETHER AFTER BURIAL PERMIT HAS BEEN GIVEN WHERE PERSON DIED THERE WOULD HAVE TO BE ANOTHER PERMIT FROM BOARD OF HEALTH IF BURIED SOME OTHER PLACE.

COLUMBUS, OHIO, May 18, 1903.

Dr. C. O. Probst, Secretary State Board of Health, Columbus, Ohio:

DEAR SIR:—I beg to acknowledge receipt of yours of May 14th, in which you ask an opinion from me concerning the question as to whether poor funds collected by taxation pursuant to a levy by the trustees of a township upon all the property of the township, including that of a municipal corporation located within the township, may be used to pay the expenses of quarantine at the time of contagious diseases; also whether the municipality is entitled to any portion of this fund to bear the expenses incident to quarantine within the corporation; also whether after a burial permit has been given by the proper health officer, located at the place where the person has died, another burial permit must be given where the corpse is removed to some other place for burial, before it can be interred?

In answer to the first inquiry, let me say that funds collected by taxation for the care of the needy poor, cannot, under the law, be used to pay the expenses of quarantine, and if the township to which you refer has been doing that, it has been using these funds for illegal purposes. If in the opinion of the township authorities a fund is needed to pay the expenses of the board of health, including those of quarantine, etc., a levy should be made for that purpose. It can no more take the poor funds and use them for that purpose than it could take the township general fund and use it for that purpose.

The answer to the first inquiry in effect answers the second, but let me say, I can find no provision of law, which authorizes a division of the township poor fund between a village located within the township and the territory located without the village. In this there seems to be a defect in the law. Frequently this question has come up, and I am unable to suggest any solution except an appeal to the legislature.

As to the second inquiry, let me say, where a burial permit is given at the place of the death, that is sufficient for all purposes.

Section 2141 R. S. provides that,

> "No sexton, superintendent, or other person in charge of any cemetery, burial grounds or crematory, shall receive a corpse for burial or cremation, unless accompanied with the permit of the board of health provided for herein."

It is thus seen that before a corpse may be received for burial or cremation, it must be accompanied by a permit from the board of health. A permit

from the board of health where the person died is amply sufficient to fulfill this provision of the law. Hence a permit from the board of health at the place of burial or cremation, where it takes place beyond the jurisdiction of the board of health where the person died is wholly unnecessary. Provided always, the board of health having jurisdiction over the territory where the person died, has given the proper permit.

Very truly yours,
J. M. SHEETS,
Attorney General.

THE BUSINESS THE ALLIANCE PROTECTION CORPORATION PROPOSES TO CARRY ON IN THIS STATE, CANNOT LAWFULLY BE CONDUCTED HERE, WITHOUT ITS APPLICATION BE AMENDED.

COLUMBUS, OHIO, May 18, 1903.

Hon. Lewis C. Laylin, Secretary of State, Columbus, Ohio.

DEAR SIR:—I beg to acknowledge the receipt of your letter of recent date, enclosing copy of articles of incorporation of the Alliance Protection Corporation, a corporation organized under the laws of the State of New York; also a copy of the application of the company for admission into the State of Ohio.

You inquire whether, in my opinion, the business which this company desires to transact in Ohio, can lawfully be carried on in this State? This involves an inquiry into the terms and conditions of the charter of this company, and the business it proposes to carry on in Ohio.

The company states in its application for admission, that it proposes to carry on in this state, the following business:

"1st. To act as agent for a good and reliable Casualty and Indemnity Company and as such agent to sell and place contracts of indemnity or policies of indemnity to be issued by said Casualty and Indemnity Company, in a regular and proper manner; and to deal as agent, broker or factor, in such insurance policies to be issued by regularly incorporated Insurance or Indemnity Companies. (See Exhibit 'A'.)"

"2nd. To act as agent in securing an attorney or attorneys-at-law at such points or places as will be convenient to such policy-holders, who will give without cost to said contract-holders advice and legal opinions as to the law relative to any cause of action for either personal or property damages which may be submitted to the said attorney or attorneys-at-law."

"3rd. To act as agents in securing an attorney or attorneys-at-law who will without cost to the policy holder seek for baggage and personal belongings of such contract holders as may have been lost in transportation, and if necessary, who will in the name of the said contract holder prosecute an action for the recovery of the value of said property when in the opinion of said attorneys liability exists therefor."

"4th. To act as agent in securing an attorney or attorneys-at-law who will, if such policy-holder be killed or injured by the negligence of a third person or a corporation and where a statutory liability arises, in the name of such contract-holder or his legal representatives, institute action for damages, if in the opinion of such attorney or attorneys-at-law there is an enforcible right of action in the jurisdiction where the

action occurred, and said contract holder and attorneys agree upon the the terms of said attorneys employment; and in such case this corporation will agree to advance as a loan the necessary expense in procuring the testimony required to prosecute such action."

"5th. To carry out the terms set forth in the agreement or contract annexed hereto, and marked Exhibit 'B'. To exercise any other act or power given by the charter of the corporation annexed hereto."

Upon an examination of its charter, it will be seen that it is authorized, among other things, to engage,

First: In the purchase and sale of real estate.

Second: To borrow money without limit as to amount.

Third: To acquire and hold stocks in other corporations in Ohio, and to exercise the power of voting stocks so held by it, and all other privileges of ownership.

The charter of this corporation being perpetual, it cannot engage in the purchase and sale of real estate in this state. (R. S., Section 3235.) Nor can it borrow money without limit as to amount—the amount it can borrow being limited under the laws of Ohio, to the face value of stock issued. (R. S., Section 3256.) Neither can it own and vote shares of stock in other corporations, except kindred, non-conpeting corporations. (R. S., Section 3256)—(95 O. L., 390.)

But before this statute was enacted, it was held in Bank v. Bank, 36 O. S., 334:

"There would seem to be but little doubt, either upon principle or authority, and independently of express statutory prohibition of the same, that one corporation cannot become the owner of any portion of the capital stock of another corporation, unless authority to become such owner is clearly conferred by statute."

See, also, Railway Company v. Iron Company, 44 O. S., 44.

Indeed, courts of equity have generally held, that "power to deal in stocks of other companies, is against public policy and such power cannot be conferred by its charter."

(People v. Trust Company, 130 Ill., 268.)

The reason for this is plain. If one corporation were permitted to hold and vote shares of stocks in other corporations, the way would be made clear for illegal combinations in restraint of trade.

Two other questions also arise, which deserve consideration.

First: Is the business proposed to be carried on in Ohio, professional business?

Second: Is it champertous?

If the business proposed to be carried on is professional, then it cannot be carried on by a corporation. If it is champterous, as individuals could ont lawfully engage in such business, neither can a corporation. (R. S., Section 3235.)

Upon first reading the character of business proposed to be carried on in this State, and the character of contract proposed to be written (Exhibit "B" attached to application), I was of the opinion that the business proposed to be carried on in Ohio, was professional business, and that the character of contract proposed to be written, was champertous. But upon more careful examination into the questions, I have changed my views.

It will be observed that the corporation does not propose, through its officers and stockholders, to act as the attorney and counselor-at-law for its

contract holders, but merely contracts to act as agent in securing attorneys in certain contingencies, for its contract holders.

It seems to me that if this company is to be regarded as engaging in professional business, then an Employers' Liability Company comes within the same category. For these companies contract with those taking their policies, to employ and pay lawyers to defend all suits brought against their policy-holders for personal injuries received by their employes.

The right of these companies to do this class of business in Ohio has never been questioned, and I am of the opinion that their business is so thoroughly established that they could not be successfully attacked on the ground that they are engaging in professional business.

Is the contract proposed to be written in Ohio, champertous?

In answering this question, I deem it important to consider only two provisions of this contract.

First: In case a suit is brought by a contract-holder for damages, resulting from personl injury, the company (in case an attorney employed by it gives a legal opinion that an enforcible right exists against the defendant), "agrees to advance as a loan the necessary expense in procuring testimony required to prosecute such action."

Second: During the pendency of the action, the company agrees, in case of destitution and incapacity from earning a living because of such injury, "to advance as a loan to such person the sum of ten dollars a week until final judgment or settlement of said action is had."

In the case of Railway Company v. Volkert, Spear, Judge, in speaking for the court upon the subject of champerty and maintenance, says: (page 372.)

> "It is stated by text writers, and the proposition is accepted by a number of decisions, that there are three elements to constitute the offense of champerty: 1st. And this is common to all forms of maintenance, the absence of any other interest in the case on the part of the champertor than that arising from his champertous contract. 2d. The assumption by the champertor of all expenses in conducting the case. 3d. A previous agreement for his remuneration from the proceeds of the suit."

Measured by this test, the contract in question is not champertous. The Company does not assume all expenses in conducting the case; neither is there an agreement that the company shall receive its 'remuneration from the proceeds of the suit."

It may not be out of place to further remark, that the contract proposed to be written in Ohio, was evidently prepared by a lawyer of no mean ability, and who first carefully examined the law of champerty, and so prepared his contract as to steer clear of these breakers.

If the company will so amend its application to engage in business in the State of Ohio, so as to eliminate therefrom the provision, "to exercise any other act or power given by the charter of the corporation annexed hereto," and limit the business it proposes to do in Ohio to that named in the application after being so amended, I see no reason for refusing its application.

Very truly yours,

J. M. SHEETS,
Attorney General.

COUNTY TREASURER NOT COMPELLED TO EMPLOY PROSECUTING ATTORNEY IN SUITS FOR THE COLLECTION OF DELINQUENT TAXES.

COLUMBUS, OHIO, May 18, 1903.

A. R. McBroom, Prosecuting Attorney, Logan, Ohio:

MY DEAR SIR:—In accordance with your request, I have examined Section 1104 of the Revised Statutes, with a view to determine whether or not the county treasurer is compelled to employ the prosecuting attorney, where he proceeds to collect delinquent taxes by suit. After reading this section carefully, I am inclined to the view that he is not compelled to employ the prosecuting attorney.

Let me say, however, so far as I am aware, it is almost the universal custom throughout the State, to employ the prosecuting attorney to attend to these suits. He being the legal adviser of county officers, they have in a very great majority of instances followed his advice; consequently, it appears to be the only proper thing to do to continue his services in relation to these matters.

Enclosed find a letter which I received from The Hocking Sentinel, requesting an opinion from me upon the subject as to whether a sheriff's proclamation of an election, shall be published more than once. As this inquiry should come through you, I beg to give my answer through you.

This question was submitted to me more than two years ago, and you will find the answer in my report of 1900, page 172.

Thinking that you may not have that report in your possession, I enclose you under separate cover, the report.

Please call the Sentinel's attention to this.

Very truly yours,
J. M. SHEETS,
Attorney General.

COLUMBUS, OHIO, May 23, 1903.

Hon. Lewis C. Laylin, Secretary of State, Columbus, Ohio:

DEAR SIR:—In accordance with your request I have examined the charter of the Alliance Protection Corporation, and their application for admission to the State of Ohio, with a view to determine whether the business which the company proposes to transact in this state is insurance, or whether it is business substantially amounting to insurance.

The business which this company proposes to do in Ohio may be briefly stated as follows:

First: To act as agent for a casualty or indemnity company to solicit and write insurance for such company.

Second: To act as agent in securing competent attorneys at law for policy holders who have taken our indemnity or casualty insurance through this company as agent, which attorneys are to give their legal opinions free of cost to the policy holder respecting their rights under certain contingencies; and who will seek for the personal belongings of policy holders that may have been lost, and to prosecute actions for damages where loss has accrued; also to prosecute for such policy holders actions for personal injuries upon such

terms as may be agreed upon between the policy holders and attorneys employed.

Third: In case action is brought for such personal injury to loan the person suing, money to use in procuring testimony, and in paying his living expenses during the pendency of the action.

Is any of this business proposed to be done insurance?

The following definitions have been generally adopted by courts as completely taking within their scope all phases of insurance:

"Insurance in its most general sense, is a contract whereby one party agrees to indemnify another in case he shall suffer loss in respect to a specific peril."

(Am. and Eng. Ency. of Law.)

"Insurance is a contract whereby one for a consideration undertakes to compensate another if he shall suffer loss."

(May on Insurance. Section 1.)

"A contract whereby for a stipulated consideration one party undertakes to indemnify the other against certain risks."

(I Phillips on Insurance. Section 1.)

"Insurance strictly defined is a contract whereby one for a consideration agrees to indemnify another for liability, damages or loss by certain perils to which the subject may be exposed, but the contract of life insurance and of accident insurance covering death, are not strictly contracts of indemnity."

(Joyce on Insurance. Section 2.)

"Life insurance is a contract dependent upon human life whereby one, for a consideration, agrees to pay another a certain sum of money upon the happening of a given contingency, or upon the termination of a specified period."

(Idem. Section 7.)

"Accident insurance is a contract whereby one, for a consideration agrees either, first, to indemnify another against personal injury resulting from accident, or second, to pay another a certain sum of money in case of death caused by accident."

(Idem. Section 8.)

"A contract by which one party, for a consideration, promises to to maket a certain payment of money upon the destruction or injury of some thing in which the other party has an interest, is a contract of insurance, whatever may be the terms of payment of the consideration by the assured, or the method of estimating or securing payment of the same to be paid by the insurer in event of loss; and although the object of the insurer in making the contract is benevolent and not speculative."

(105 Mass., 149.)

Measured by these definitions can it be said that the business proposed to be carried on in Ohio by the Alliance Protection Corporation is insurance?

I think not. I can discover no contract of indemnity in the contracts proposed to be written in Ohio.

Acting as agent for indemnity and cosualty companies to solicit and write insurance for these companies cannot be considered as "engaging in the business of insurance." If such were the holding, every local agent in Ohio engaged

in soliciting insurance would be "engaging in the business of insurance" within the meaning of Section 289, Revised Statutes, and would have to comply with the laws of Ohio relating to insurance companies.

There are many corporations organized solely for the purpose of soliciting and writing insurance in other companies, and they are not looked upon by the courts as insurance companies. Indeed, none of them indemnify anybody against anything; they merely write insurance for other companies which do indemnify. Nor is agreeing to loan the contract holder money under certain contingencies, and to employ legal counsel to furnish advice and service free of charge under certain other contingencies, insurance. There is no element of indemnity against loss in such agreements.

The Supreme Court of Ohio in the case of State ex rel. v. The P., C., C. & St. L. Railway Co., held that the voluntary relief department of the Pennsylvania Railway Company was not insurance. Briefly stated, this company makes contracts with its employes whereby it takes out of their monthly wages assessments which it passed to the relief department fund, and in the event of sickness, injury or death, the policy holder is entitled to certain specified sums of money; the employe also contracting with the company that in case of injury while in the line of his duties he waives all right to damages against the company upon accepting relief from the Relief Department of the company. Here is a contract on the part of the railroad company to indemnify the employe in case of injury, sickness or death in consideration that the employe will pay into the relief department of the company certain specified sums of money monthly, and waive his right to damages against the company in case of injury. If that is not insurance, surely the contracts proposed to be written by the Alliance Protection Corporation is not insurance.

Very truly yours,
J. M. SHEETS,
Attorney General.

THE TOLEDO FIRE AND MARINE INSURANCE COMPANY CANNOT REINSURE PROPERTY LOCATED IN OHIO OR NOT LOCATED IN OHIO, FIRST INSURED IN A COMPANY NOT LICENSED TO DO BUSINESS IN THIS STATE.

COLUMBUS, OHIO, May 26, 1903.

Hon. A. I. Vorys, Superintendent of Insurance, Columbus, Ohio:

DEAR SIR:—Your communication of April 28, 1903, received. You inquire "whether the Toledo Fire and Marine Insurance Company may reinsure risks on Ohio or non-Ohio property, in a company not licensed in this State?"

You call attention to Section 3691-13, Revised Statutes, viz:

> "That any fire, marine, fidelity, accident, plate glass, boiler or other insurance company, now or hereafter organized or existing, under or by virtue of the laws of Ohio, shall have authority by and with the consent and approval of the commissioner of insurance, to re-insure any and all risks undertaken by it, in any company authorized by law to transact a similar class of insurance business in this state."

The Toledo Fire and Marine Insurance Company is organized under and by virtue of the special acts of the legislature of this state, passed February 2, 1848.

The powers conferred upon this corporation are detailed in Section 7 of the act referred to, and are as follows:

"Section 7. That the corporation herein and hereby created shall have full power and lawful authority to insure all kinds of property against damage or loss by fire, water and inland navigation upon rivers, lakes or canals; to make all kinds of insurance upon life or lives, to cause themselves to be insured against any loss or risk they may have incurred in the course of business, and generally to do and perform all other necessary matter and things connected with and proper to promote these objects."

Section 3234, Title II, Revised Statutes, provides as follows:

"Corporations created before the adoption of the present constitution, which take any action under or in pursuance of this title, shall thereby and thereafter be deemed to have consented, and shall be held to be a corporation, and to have and exercise all and singular its franchises under the present constitution and the laws passed in pursuance thereof, and not otherwise; provided, that any fire insurance company so created, complying with the requirements of sections three thousand and six hundred and fifty-four, and three thousand six hundred and fifty-five, or of any police regulation contained in chapter eleven of this title, or in chapter eight of title three, part first, shall not be deemed to have consented, and shall not be affected by the provisions of this section by reason of such compliance."

Section 3641, Paragraph 1, Title II, Revised Statutes, and Section 3641a, Title II, Revised Statutes, provide as follows:

"A company organized under this chapter may:

"Insure houses, buildings and all other kinds of property against loss or damage by fire and lightning and tornadoes, in and out of the state, and make all kinds of insurance on goods, merchandise and other property in the course of transportation, whether on land or water, or on any vessel or boat wherever the same may be."

"All companies heretofore organized or that may hereafter be organized, for the purpose of insuring against loss or damage by fire, may insure against loss or damage by lightning, explosions from gas, dynamite, gunpowder, and other like explosions and tornadoes."

It is to be understood that prior to the passage of these sections and the sections of which they are amendatory, a fire insurance company in Ohio had no authority to insure against direct loss or damage by lightning.

On January 27, 1903, this Department having before it the charter of the Toledo Fire and Marine Insurance Company, rendered an opinion to you, from which I quote:

"At the time of the passage of the act incorporating this company (The Toledo Fire and Marine Insurance Company), fire insurance companies in the State of Ohio were not authorized or empowered to insure against direct damage by lightning. But since the adoption of the constitution of 1851, the legislature, by general law, has authorized fire insurance companies to insure against direct loss or damage by lightning. The Toledo Fire and Marine Insurance Company, therefore, under its charter, had no power to take such class of risks.

"It is a fact, however, that The Toledo Fire and Marine Insurance Company, has been and is now insuring property against direct damage by lightning. The conclusion must follow, that either this cor-

poration is exercising a franchise not conferred upon it by its charter, or that such corporation has accepted the provisions of the general laws governing fire insurance companies of the State of Ohio, and has thus placed itself for all intents and purposes, under the regulation of such general laws."

We have no reason to change the opinion then expressed, that The Toledo Fire and Marine Insurance Company, by assuming and exercising the power to insure against direct loss or damage by lightning, has taken action under and in pursuance of Title II of the Revised Statutes, and has consented to be a corporation and to exercise all and singular its franchises under the present constitution and the laws passed in pursuance thereof, and not otherwise.

Now, if this conclusion is a correct one, then The Toledo Fire and Marine Insurance Company is subject to such general laws, including Section 3691-13 already referred to, as are other domestic fire insurance companies.

It has been suggested that Section 3691-13 should be construed as permissive rather than restrictive, in its terms and operation, and does not apply to The Toledo Fire and Marine Insurance Company, because such corporation is granted power to re-insure by its charter.

First: In regard to this Section 3691-13 being perimssive, it is a complete answer to such claim to say, that fire insurance companies had always possessed the right to re-insure, and that Section 3691-13 must be considered restrictive and prohibitory to give it any effect whatever.

Second: That The Toledo Fire and Marine Insurance Company by its charter, was empowerd to re-insure, gave only to such company the rights that all fire insurance companies possessed.

And this company by its own acts, having elected to be a corporation under the general provisions of the law, stands exactly upon the common plane of all domestic fire insurance companies.

It has also been said that risks upon property outside of Ohio, are not within the letter of said Section 3691-13. This section by its express terms, includes "any and all risks undertaken by it."

In the case of State ex rel. v. The Amazon Insurance Company, Ohio *Law Bulletin*, Vol. 48, page 387, the Franklin Circuit Court held:

"Fire insurance company, organized under the laws of another state, that maintains an office in this state and there enters into contracts of insurance respecting property in other states, or transacts the business of insurance respecting property in other states, is engaged in this state in the transaction of the business of insurance contrary to law, notwithstanding it does not enter into contracts of insurance with citizens of this state, nor insure property in the state."

The Toledo Fire and Marine Insurance Company is doing business in the State of Ohio, even as to risks taken outside of the state, and the State of Ohio has plenary power to regulate the insurance of risks taken by such company, whether such risks are within or without the state.

This Section 3691-13 is a police regulation, to which The Toledo Fire and Marine Insurance Company would be subject, even had not such company brought itself by its own act within the general laws governing all domestic fire insurance companies.

Therefore, The Toledo Fire and Marine Insurance Company, in my opinion, is not authorized to re-insure risks on Ohio or non-Ohio property, in a company not licensed in this state.

Very respectfully,

GEORGE H. JONES,

Assistant Attorney General.

AUTHORITY OF MEDICAL BOARD TO MAKE CERTAIN KINDS OF RULES.

COLUMBUS, OHIO, May 28, 1903.

Ohio State Board Medical Registraation and Examination, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication of the 26th inst., in which you ask my opinion as to the legality of the following rule adopted by your Board:

> "*Resolved*: That every medical student in order to comply with the law regulating the practice of medicine in the State of Ohio, shall, before entering a medical college in the State of Ohio, be required to submit his or her credentials for admission to medical college, to one of the certified examiners of the State Board of Medical Registration and Examination. If said certified examiner shall find that the entrance credentials comply with the provisions of Section 4403c of the law regulating the practice of medicine in Ohio, passed April 14, 1900, and the rules of the State Board of Medical Registration and Examination, he shall issue his certificate to that effect. In case a student does not possess the credentials required by Section 4403c of the law regulating the practice of medicine in Ohio, passed April 14, 1900, he shall submit to an examination before said examiner in accordance with the provisions of Section 4403c of the law regulating the practice of medicine in Ohio, passed April 14, 1900, and the rules of the State Board of Medical Registration and Examination, and if this examination is satisfactory, the examiner shall issue his certificate to that effect."

In reply thereto I would say:

The powers of your Board are of two kinds, express and implied. The express powers of the Board are strictly statutory, and the implied powers are only such as are necessary to carry out the express powers. It is by reference to the doctrine of implied powers that you find your authority to enact rules for the government of your Board. The Board may enact rules which may be required to assist in carrying out its express powers conferred, but cannot by the enactment of rules, enlarge the powers granted to it.

In examining the express or statutory powers of the board governing the subject of requirements for the practice of medicine, surgery, or mid-wifery, we find but three classes of persons embraced therein (Section 4403c, Revised Statutes), viz:

1. Those seeking examination by the Board as preparatory to their initial entrance into the profession.

2. Those who having practiced elsewhere, desire to comply with the statutory requirements to entitle them to practice within this State.

3. Those who being entitled to practice under and by virtue of the provisions of the Act of February 27, 1896, and hence exempt from the examination.

In the several requirements imposed by the statute (Section 4403c, Revised Statutes, upon applicants for examination, it will be observed that they are imposed as conditions of admission to the examination, and nowhere in the Act can be found any power vested in the Board to require a person to submit his or her credentials for admission to a medical college, to one of the examiners of your Board.

This rule is an attempt to require a person proposing to enter a medical college in this State for the study of medicine, to first submit his or her credentials *for admission to such medical college*, to one of the certified examiners of the Board.

The Board is not interested in the credentials of a person at the time of *"entering a medical college,"* but rather at the time of applying for admission before the Board.

You have said the purpose of such rule, and the intention of the Board is, "to hold that any school which shall admit students who have not secured a certificate of entrance from an Ohio examiner, shall be refused recognition in Ohio."

It seems plain to me that no such power is given to the Board. It has full power to determine, for the purposes of the Act governing it, whether or not the diploma presented by the applicant is from a "legally chartered medical institution in the United States in good standing." (State, ex rel. v. Medical College; 60 O. S., 122.) But this is not to be determined by the Board refusing recognition to such schools or colleges, because they do not comply with such rule, and permit only those to enter who have first secured a certificate of entrance from an Ohio examiner.

I think this rule would thus operate as adenial of substantial rights; (*a*) To the individual, who is denied the right to qualify for his profession, in a college other than such as would observe such rule. (*b*) To the college, which is denied the right to qualify students, who do not secure such certificate from an Ohio examiner.

In conclusion, I would say, the Courts would in my opinion, sustain any reasonable rule of the Board by which to determine the qualification of the applicant, and the character of the medical institution issuing to such applicant a diploma, but would not permit discrimination against colleges of good standing, and applicants otherwise worthy at the time of applying for examination, who have failed or refused to observe such rule.

Very respectfully,

J. M. SHEETS,

Attorney General.

DEPARTMENT OF INSURANCE NOT AUTHORIZED TO ISSUE LICENSE TO THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY BECAUSE OF CONTRACT BETWEEN SAID COMPANY AND THE AMERICAN AGENCY COMPANY.

COLUMBUS, OHIO, June 8, 1903.

Hon. A. I. Vorys, Superintendent of Insurance, Columbus, Ohio.

DEAR SIR:—I have before me yours of the 29th ult., enclosing copy of a contract between The Columbian National Life Insurance Company, a corporation under the laws of Masachusetts, and The American Agency Company, a corporation under the laws of New Jersey, and in which you inquire, in view of the existence of such contract, can license be lawfully issued to the Insurance Company and to its agents.

The contract submitted to me provides for a method of doing business by the life insurance company not heretofore in vogue in the State of Ohio; and it is probably conceded that the life insurance company, independent of this contractural relation which it sustains to The American Agency Company, has in

every way complied with the requirements of your department, and of the laws of the State of Ohio, and the question to be here considered, is as to the effect such contract may have, not upon its right to do business in Ohio, but to do business in the method set forth in such contract.

It is not claimed that the agency company has been qualified in the State of its creation nor elsewhere, to do the business of a life insurance company; and it is specially contended by the representative of the insurance company, that the manner of business sought to be accomplished by the agency company, is fully set forth and contained in the contract submitted, and that it, the agency company, has been fully authorized by its incorporation under the laws of New Jersey, to do and perform the several things which it has agreed to perform, as contained in such contract.

The question first arises under the statute law of the State of Ohio, as to the power of an incorporated company to act as agent for an insurance company in this State. Section 283 of the Revised Statutes is as follows:

> "It shall be unlawful for any person, company, or corporation in this State, either to procure, receive, or forward applications for insurance in any company or companies not organized under the laws of this State, or in any manner to aid in the transaction of the business of insurance with any such company, unless duly authorized by such company and licensed by the superintendent of insurance, in conformity to the provisions of this chapter."

Does the agency company in any manner aid The Columbian National Life Insurance Company in the transaction of the business of insurance?

From such contract we quote the following clauses as bearing upon the agreements of the agency company. The agency company agrees as follows:

> "1. To use its exclusive and best efforts in the advancement of the interests of the insurance company.
>
> "2. To make no contract for its services with or act for any other company in the business of life insurance.
>
> "3. To turn over so far as lies in its power, its own agents and offices to the insurance company.
>
> "4. To pay all expenses of the insurance company for rents, salaries, advertising, commissions to agents, taxes, medical and state fees, legal expenses, furniture, fixtures, safes, etc., etc., covering all necessary and usual expenses of an insurance company, it being understood and agreed that the sum to be paid by said agency company in any year for said expenses, exclusive of commissions to agents, shall not be less than forty per cent. of the expense loading upon the premiums received by said insurance company, during the year, and that the total of such expenses, not including agents' commissions, shall not exceed in any one year after nineteen hundred and five, fifty per cent. of the expense loading upon the premiums received during such year, etc., etc.
>
> "5. To use its best efforts to secure additional agencies and connections and to furnish such agents and brokers as the interests of said insurance company may reasonably require and as shall be satisfactory to said insurance company; it being understood however that said insurance company shall not be liable for the acts, doings or expenses of any employe of said agency company."

The insurance company on its part agrees as follows:

> "A. To hire only such agents and brokers, not including officers as aforesaid, as shall be mutually satisfactory to both parties to this con-

tract; such agents and brokers, when hired, to be under the exclusive control of and acting for said insurance company, and their compensation to be fixed by agreement with the agency company, said insurance company reserving the right to discontinue the services of, or to discharge any agent or employe.

"B. To pay to said agency company on monthly settlements the fifth day of each month so long as this contract remains in force, after deducting the amount then due for salaries, commissions, rents and other expenses, as follows: (then follows the amounts to be paid to such agency company on certain classes of policies, immaterial to here consider).

But no part of the above shall be paid said agency company until all salaries, commissions and expenses due shall have been deducted, and if the above sums at the time of monthly payment shall not be sufficient to meet the salaries, commissions and other expenses due, said agency company agrees to pay over to said insurance company sufficient money to cover any deficit there may be."

It is not necessary to quote further from such contract in this connection, in order to demonstrate beyond any doubt that the agency company does "aid in the transaction of the business of insurance with such company." And as it so aids in the transaction of the business of insurance, it would become necessary under section 283, R. S., before it could be authorized to do any such business within the State of Ohio, having been first duly authorized by such contract to represent the insurance company, to be licensed by your department in conformity to the provisions of Chapter 8 of the Insurance Laws of Ohio.

Your inquiry directs our attention to the immediate question as to whether you can lawfully issue to the insurance company a license to do business in Ohio; but the more direct question, as I view it, is, as to whether you can, under Section 283, or any other statute, license this agency company to do the business contemplated in this contract for the insurance company.

The contract in its various parts, presents questions for consideration in which the State or the public is not interested, and I only attempt to consider those terms of the contract in which, in my opinion, the public and State are interested. The objections I note to the contract, may, I think, all be summarized under one head, but bearing upon two features made prominent in the contract, as hereinafter set forth. The objections could be thus stated:

First: It is an attempted abdication or surrender of the powers of the insurance company, which the law considers personal to the company and embraced within its franchise, that could not be delegated to any person, association or corporation, as follows:

1. Its fiscal operations. The agency company as the fiscal agency, provides for the discharge of certain of the financial obligations of the insurance company. (Clause 4.)

The avowed purpose of the agency company is by this contract, to make a profit for itself out of the manipulation of the amounts, which by the contract, it is to receive from the insurance company. It is to pay not less than 40 per cent. and not more than 50 per cent. in any one year of the "expense loading" upon the premiums received by such insurance company after 1905. By its terms the contract is to extend for thirty years.

If the agency company can thus secure a profit for itself during this continuous period, the question might arise why the insurance company should not secure such profit for itself. This is a question in my opinion, directly affecting policy holders, because such insurance company issues participating poli-

cies, and it would thus by this contract, decrease the amounts in which such policy holders would have a right to participate. This would be violative of the public policy of this State, and should not receive the encouragement of your department.

2. The other feature of the contract to which I direct your attention, is that in which it recognizes the agency company as an employment agency or bureau, for by clause 5 of the contract, it provides for the employment of agents and brokers for the insurance company, and further provides that "the insurance company shall not be liable for the acts, doings or expenses of any employe of said agency company."

Clause A, of paragraph 6, also provides "that the insurance company shall only hire such agents and brokers as shall be mutually satisfactory to both parties to this contract."

It thereby makes the agency company an employment bureau, which of itself may be perfectly legal, to employ agents and brokers for the insurance company, but it places a limitation upon the power of the insurance company to employ none such but those who shall be mutually satisfactory to the agency company and the insurance company. It thus gives the agency company, an independent corporation which has no power to transact a life insurance business, dictatorial powers over the agents and brokers of the insurance company; and that it attempts to provide by the fifth clause, that the insurance company shall not be liable for the acts of the employes of the agency company, which does include by the terms of the contract, the agents, brokers and solicitors, who secure the risks and otherwise do and perform an insurance business in the name of the insurance company.

Authorities need not here be cited to show that an insurance company is bound by the representations of its agents, and while it might be conceded that as between the insured and the insurance company, such a clause would not limit or define the authority of the insurance company's agents, yet the incorporation of such a clause in a contract to be approved by this department, would be violative of a public policy which this State has never sanctioned or approved.

Under a contract such as we are now considering, it would be possible for the officers or stockholders of the insurance company, under the guise of an agency company of the kind referred to, to secure to themselves at the expense of the other stockholders and policy holders of the life insurance company, the entire assets to be derived from the expense loading. Such a contract under circumstances of the kind suggested, would be absolutely contrary to the policy of the State of Ohio, and if carried out, would absolutely defraud the insurance company, its stockholders and its policy holders.

I would therefore conclude that your department should not sanction or approve any such contractural relation between such companies. And if the insurance company should apply under section 283, Revised Statutes, for authority for the agency company to aid in or transact an insurance business, in the name of such company, such license should be refused; and the insurance company should be refused a license to do business in Ohio in the manner as contained in such contract.

Respectfully submitted,

J. M. SHEETS,
Attorney General.

IN RELATION TO ROAD IMPROVEMENTS.

COLUMBUS, OHIO, June 12, 1903.

H. C. Fish, Pomeroy, Ohio.

DEAR SIR:—I beg pardon for not giving your letter of June 5th more prompt attention, but other things have been in the way to prevent an earlier consideration.

In view of the fact that the Supreme Court has held that by virtue of the provisions of section 2621, R. S., a municipal corporation is entitled to receive such portion of the road tax levied by virtue of the provisions of Section 2824, Revised Statutes, and collected from property located within its limits and territory attached thereto for road purposes, you inquire:

First: Whether the county commissioners may continue to levy a tax under the provisions of Section 2824, Revised Statutes, to complete the improvement of roads already located?

Second: Whether the different townships of the county are entitled to participate in the road fund thus levied and collected, the same as the municipal corporations?

Third: Should the county auditor issue his warrant to each municipality for such part of the road fund as was collected from property located within its borders and territory attached thereto for road purposes, without request from the municipality?

Answering these inquiries in their order, let me say:

First: That there can be no question about the right of the county commissioners to continue the levy for the purpose of completing the improvements of the roads already located. The townships through which they pass have no duties to perform with reference thereto. If any of these roads to be improved are located within a municipality or territory attached to such municipality for road purposes, then of course the municipality having the control of such territory and receiving its proportion of the road fund, should improve such parts of the roads to be improved, as lie within the territory over which it has control.

Second: The different townships as such, are not entitled to participate in the road fund levied and collected under the provisions of Section 2824, Revised Statutes. At least I can find no provision of the statute authorizing the payment of any part of such fund to township trustees.

Third: As to whether the county auditor should isue his warrant to the several municipal corporations for their proportion of the road fund collected under the provisons of Section 2824, Revised Statutes, without being requested so to do, let me say is a matter of conscience on his part. While he has a right to do so, yet there is no penalty attached for not making such payment.

I am reliably informed that but few of the municipalities of the State are receiving their proportion of the road fund levied and collected under the provisions of Section 2824, Revised Statutes.

Respectfully,
J. M. SHEETS,
Attorney General.

ARTICLES OF INCORPORATION OF THE OHIO POWER COMPANY REFUSED BECAUSE DO NOT COMPLY WITH SECTION 3237, R. S.

COLUMBUS, OHIO, June 12, 1903

Hon. Lewis C. Laylin, Secretary of State, Columbus, Ohio.

DEAR SIR:—In regard to the proposed articles of incorporation of "The Ohio Power Company"submitted by you to this department, I have to say that said proposed articles of incorporation fail to comply with Section 3237, Revised Statutes. Said section is as follows:

> "When the organization is for a purpose which includes the construction of an improvement which is not to be located at a single place, the articles of incorporation must also set forth,
>
> 1. The kind of improvement intended to be constructed.
>
> 2. The termini of the improvement, and the counties in or through which it or its branches shall pass."

The main objection to said proposed articles of incorporation attaches to that part of the expressed purposes, which reads as follows:

> "And in other municipal corporations, and without the limits of such municipal corporation, and connecting municipal corporations in this state and connecting such corporations with like corporations in other states, and for the purpose of constructing, acquiring, maintaining and operating stations or plants for generating electricity for all purposes for which the same may be used, and for selling the same for all such purposes, and to acquire, erect, maintain and operate the necessary poles, conduits, wires, and all other things necessary or convenient to the generating, selling, conveying and distributing of electricity for light, heat, power and all other purposes for which the same may be used, and for furnishing, providing and selling electric light, heat and power to persons and municipal corporations, and for selling and furnishing electricity for any and all purposes."

It is apparent that the proposed articles of incorporation do not set forth "the termini of the improvement, and the counties in or through which it or its branches shall pass."

In Atlantic & Ohio R. R. Co. v. Sullivant, et al., 5 O. S. 275, the Supreme Court, Bartley, J., in construing the provisions of the act for the creation and location of incorporated companies in the State of Ohio, passed May 1, 1852, held that, under a clause contained in said act, viz., "the name of the place of the termini of said road and the county or counties through which said road shall pass," shall be specified in the certificate.

"It is essential to the validity of such certificate of organization, that certain and definite points be named or described therein as the termini of such road, and also each county in the State through which such road is to be located and constructed. And where such certificate has left the company the discretion to select through which of several counties named, the road may be constructed, and also provided simply that the termini of such road shall be a point, not designated, on the Ohio and Pennsylvania state line, in the county of Trumbull, and a point not designated on the Ohio river, in either the county of Brown or the county of Adams, in the State of Ohio, it is void for want of conformity to the statute."

The above case, while it has been distinguished in 11 O. S. 516 and 13 O. S. 379, has never been overruled.

In that part of the proposed articles objected to, there is not the semblance of location of termini or route, neither a beginning nor ending. Reasonable certainty is required as a limitation of the powers granted and for the purpose of avoiding conflict in prior or subsequent grants of corporate power for like purposes, as well as for other reasons.

I am of the opinion therefore, that such proposed articles should not, in their present form, be accepted or filed.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

A TAX NOT IN PROCESS OF COLLECTION UNTIL THE DUPLICATE IS MADE UP AND IN THE HANDS OF THE COUNTY TREASURER.

COLUMBUS, OHIO, June 16, 1903.

Michael Cahill, Prosecuting Attorney, Eaton, Ohio.

DEAR SIR:—Yours of June 14th at hand and contents noted.

You inquire whether in my judgment a tax is levied and "in process of collection" when the levy has been made and placed on the duplicate, but the duplicate is not yet made up and put in the hands of the county treasurer for collection.

I am quite clearly of the opinion that your county auditor is right in the view he takes of the law. That is, the duplicate must be made up and in the hands of the treasurer before a tax is "in process of collection." A tax is not in process of collection until the time has arrived for the payment of the tax, and the person authorized to collect it has the necessary authority in his own hands for the receipt of the taxes. The authority of the county treasurer for the receipt of the taxes is the duplicate, which is made up and handed to him by the county auditor.

Very truly,
J. M. SHEETS,
Attorney General.

WHETHER COUNTY AUDITOR IS ENTITLED TO PAY OUT OF COUNTY TREASURY FOR SERVING COPIES OF NOTICE UNDER SECTION 4451a, R. S.

COLUMBUS, OHIO, June 17, 1903.

D. F. Openlander, Esq., Prosecuting Attorney, Defiance, Ohio.

DEAR SIR:—I beg leave to acknowledge receipt of yours of June 15th, in which you inquire as to whether the county auditor is entitled to pay out of the county treasury for copies of notices which, pursuant to the provisions of Section 4451a, R. S., are served on lot and land owners and corporations affected by a proposed ditch improvement?

The solution of this question is easy if we bear in mind the well recognized principles of law bearing upon this subject.

Before a public officer is entitled to pay out of the public treasury for services rendered, it must appear that the services which he renders are enjoined

upon him by law, and that payment for such services are authorized by statute.

(See Clark v. Commissioners, 58 O. S., 107, and cases cited.)

Section 4451a, R. S., provides that the county auditor shall prepare and deliver to the petitioners, or any one of them,

> "a notice in writing directed to the lot and land owners, and to all corporations, either public or private, affected by said improvement, setting forth the substance, pendency and prayer of such petition, a copy of which notice shall be served upon each lot and land owner or left at his usual place of residence, and upon an officer or agent of each public or private corporation having its place of business in the county, at least fifteen days before the day set for hearing, and the person who serves such notice shall make return on the notice, under oath, of the time and manner of service, and file the same with the auditor on or before that day."

This section, however, does not provide that the copies to be served on the lot and land owners shall be prepared and furnished by the county auditor. The only duty enjoined upon him is to prepare *a notice* and give it to the petitioners, or one of them. There the duties of the county auditor end. He has nothing to do with making the copies of the notice to be served. That devolves upon the person making the service. Hence, when the county auditor assumed to perform this service it was not for the public, but for a private individual, and if he desires pay for these copies, he must look to the private individual for his compensation. For the one notice which the law requires him to prepare and give to the petitioner he is entitled to compensation, but not for any copies made by him.

Very truly yours,
J. M. SHEETS,
Attorney General.

AS TO DUTIES OF TOWNSHIP TRUSTEES AND TREASURER UNDER SECTION 1411, R. S.

COLUMBUS, OHIO, June 20, 1903.

Hon. W. D. Guilbert, Auditor of State, Columbus, Ohio.

DEAR SIR:—You inquire, under date of June 19, 1903, "Under Section 1411, Revised Statutes, what is the duty of the trustees and treasurer of an Original Surveyed Township with reference to moneys in their hands received from the rents of unsold Section Sixteen School Lands?"

Section 1411, R. S., provides substantially, that when there is money in the hands of the treasurer arising from the rents of school lands, the trustees shall, after the payment of all just claims and necessary expenses, and at least once a year, meet at the office or residence of the treasurer and make a dividend thereof among the several school districts or parts of districts within the Original Township in proportion to the number of youths of school age in the several districts or parts of districts, and upon their order making such dividend, the treasurer shall pay out the money.

Section 1412, R. S., is as follows:

> "The clerk of the board of education of any district, which in whole or in part is composed of territory within the bounds of any Original Township incorporated as in this title provided, shall on demand of the

clerk of such township, furnish to him a certified copy of the enumeration of youth within the school age residing within the bounds of such Original Township in the several sub-districts of such school districts, and such dividend shall be made on the basis of such enumeration."

From these sections and preceding sections it is obvious that the treasurer of the original surveyed township receives the rents; that after the payment of all just claims and necessary expenses, the trustees declare a dividend, at least once a year, for the youths of the several school districts or parts of districts included in such original surveyed township. When such order is made by the trustees declaring the dividend, it is the duty of the treasurer to pay out to the several school districts their proportionate share of the dividend so declared.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

AS TO DUTY OF INSPECTOR OF WORKSHOPS AND FACTORIES UNDER SECTION 2573c-1.

COLUMBUS, OHIO, June 20, 1903.

Hon. J. H. Morgan, Chief Inspectors of Workshops and Factories, Columbus, Ohio.

DEAR SIR:—In regard to the letter of Mr. Gilbert Harmon to you of date June 18, 1903, and which you have submitted to me, I would say, that Section 2573c-1, R. S., provides among other things, that the district inspectors appointed by you, shall personally inspect the process of manufacture, the handling and *storage* of such explosives, and may direct and order changes or additions that he may deem necessary in or about the manufactories, magazines or store houses for the safety of the employes and the public. And said section further provides that if on inspection, it is found that any manufactory, magazine or store house is in close proximity with a residence or dwelling, that such inspector may cause such explosives to be removed to a place of safety.

You are clearly within your powers in directing reasonable modifications in the storage of high explosives by the Hercules Torpedo Company. Under the first part of the section above referred to, you are supposed to take into consideration, not only the protection of the employes, but the public generally; and the order or direction that you have given is clearly within the terms of Section 2573c-1.

The letter of Mr. Harmon is herewith returned.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

AS TO WHAT COUNTY AUDITOR IS ENTITLED TO UNDER SECTION 1071 R. S.

COLUMBUS, OHIO, June 23, 1903.

W. R. Alban, Esq., Prosecuting Attorney, Steubenville, Ohio.

MY DEAR SIR:—I am in receipt of yours of June 18th in which you inquire:

First: Whether the county auditor is entitled, under the provisions of Section 1071, R. S., to 4 per cent. of the tax levied and collected by reason of the

action of the Board of Equalization in increasing the value of the property returned for taxation?

Second: Whether the county auditor is entitled to 4 per cent. of the tax collected on the real property which has been omitted and placed by him on the tax duplicate?

Third: Whether the county auditor is entitled to fees of 4 per cent. for property omitted and placed by him on the tax duplicate, even though the tax has not been collected?

Fourth: Whether the amount due the county auditor for taxes collected on property which has been omitted and placed by him on the duplicate is a claim which should be presented to the commissioners for allowance before it is paid out of the county treasury.

It is entirely clear that your first inquiry should be answered in the negative Where property has been returned for taxation it is not "omitted property". The board of equalization in performing its duty simply raises the value of property already returned. "Omitted property" means only such as the owner in his effort to evade taxation, omits to return, and which the auditor by his industry and zeal, under the provisions of Sections 2781 and 2782, R. S., places on the tax duplicate. This is a liberal compensation to the county auditor and is given to stimulate him in his effort to ferret out tax dodgers, and thus compel them to bear their just burdens of taxation.

The second inquiry must also be answered in the negative. The reasons already given for answering the first inquiry in the negative apply to the second. There is another reason also for answering this inquiry in the negative, and that is, that the owner of real estate cannot evade taxes. His land cannot be hid. If they are omitted from the tax duplicate, they are omitted by reason of the error of the taxing officers. If the county auditor were entitled to 4 per cent. upon real estate which had been omitted from the duplicat,e and which he, on discovering the error, has placed on the duplicate, he would be entitled to a reward for his own inefficiency and negligence. Indeed he could systematically omit from the duplicate real estate—then place the same on the duplicate and afterward claim his 4 per cent. for such omissions. It will hardly seriously be claimed the legislature ever contemplated that "omitted property" should include omissions of real estate from the tax duplicate.

Your third inquiry should also be answered in the negative. Section 1071, R. S., does not authorize the payment to the county auditor of any sum whatever for omitted property placed by him on the duplicate until the tax has been collected and paid into the county treasury. True he has done his duty when he has placed the "omitted property" upon the duplicate, and even though his term should expire before the tax is collected, yet when it is collected he is entitled to his 4 per cent. but not before.

Your fourth inquiry must be answered in the affirmative. Section 894 R. S., provides that "no claims against the county shall be paid otherwise than upon the allowance of the county commissioners, upon the warrant of the county auditor, except in those cases in which the amount is fixed by law, or is authorized to be fixed by some other person or tribunal." The *rate* of compensation due the county auditor for services in placing "omitted property" on the tax duplicate is fixed by law, but not the *amount*. The amount is determined by taking 4 per cent. of the amount of tax collected by reason of his diligence in placing "omitted property" upon the tax duplicate. This is a question of evidence and must be sumbitted to the county commissioners, and they determine upon the

evidence submitted, the amount of tax thus collected, and the amount due the county auditor therefor.

Upon re-reading your letter I discover a further inquiry, as to whether the county auditor is entitled to 4 per cent. of the tax derived from property omitted from the tax duplicate, which has been discovered by the Board of Equalization, and ordered by it to be placed upon the duplicate? This inquiry must also be answered in the negative. The county auditor must discover the "omitted property" and place it upon the duplicate himself, before he is entitled to the 4 per cent. provided for in Section 1071.

As already stated this liberal allowance is made in order to stimulate his diligence and zeal in ferreting out omitted property and placing it upon the duplicate. If the Board of Equalization in the performance of its duties discover omitted property, and order it placed upon the duplicate, the county auditor acts merely as the servant or clerk of these taxing officers in placing property discovered by them upon the tax duplicate.

Very truly yours,
J. M. SHEETS,
Attorney General.

PUBLICATION OF RECEIPTS AND EXPENDITURES OF COUNTY OFFICERS UNDER SECTION 852, R. S.

COLUMBUS, OHIO, June 26, 1903.

F. W. Woods, Prosecuting Attorney, Medina, Ohio.

DEAR SIR:—Yours of the 25th at hand and contents noted. You inquire whether the exhibit of receipts and expenditures which is required to be published under the provisions of Section 852 of the Revised Statutes, is the same as that required to be published under Section 917, R. S.

In my opinion it is not. Section 917 requires the financial transactions of the county commissioners only, to be published. The "financial transactions" of the county commissioners mean only such money expenditures as come within the province of the commissioners. It does not mean the transactions of the infirmary directors, nor does it mean the moneys paid out of the county treasury upon the warrant of the clerk of the court in criminal and other cases.

Section 852 provides that the commissioners shall at their September session, compare the accounts and vouchers of the county auditor and treasurer, and count the funds in the treasury and direct the auditor to publish an exhibit of the receipts and expenditures for the past year. That, of course, includes all the receipts of the treasurer and all his expenditures, which would include, of course, all moneys authorized to be spent by the commissioners, as well as that authorized to be expended by any other person, board or officer. This exhibit of receipts and expenditures, of course, may be very brief. Probably the amount of receipts in each fund and expenditures of that fund, should be stated in bulk form and published once.

Very truly yours,
J. M. SHEETS,
Attorney General.

AS TO SECTION 1104, R. S.

COLUMBUS, OHIO, June 30, 1903.

Hon. Walter D. Guilbert, Auditor of State, Columbus, Ohio.

DEAR SIR:—You inquire whether under the provisions of Section 1104, R. S., as amended April 4, 1902, (95 O. L., p. 93), the county treasurer can proceed to foreclose the lien provided for in the Dow law without regard to any remedy by distress he may have against the chattels?

Under Section 4364-10, being original Section 2 of the Dow law, the assessment under such law, together with any increase as penalty thereon, shall attach and operate as a lien upon the real property on and in which such business (trafficking in spirituous, vinous, malt or any intoxicating liquors) is conducted as of the fourth Monday of May of each year.

Section 1104, as amended, provides that the remedy by civil action to enforce the lien for such tax is in addition to all other remedies provided by law.

Therefore, such proceeding of foreclosure may be instituted without regard to any previous levy or distress upon the chattels or personal property of the person engaged in the business above refrrd to.

You also inquire whether in case the county treasurer shall refuse to collect the tax under the Dow law, and said Section 1104 as amended, an action to foreclose a lien for such tax, as provided in Section 2 of the Dow law, may be enforced in the name of the State of Ohio in an action brought by the prosecuting attorney of the county.

In reply to this inquiry, I would say, that such action may be brought by the prosecuting attorney in the name of the state whenever a county treasurer either refuses or neglects to perform his duty in the collection of such tax.

Very respectfully,

GEORGE H. JONES,

Assistant Attorney General.

AS TO WHO SHALL ACT FOR BOARD OF REVIEW IN DEFENDING IN AN ACTION BROUGHT AGAINST THEM.

COLUMBUS, OHIO, July 1, 1903.

C. L. Taylor, Esq., Prosecuting Atorney, Jefferson, Ohio.

DEAR SIR:—Your letter of June 30th in which you inquire who should appear for the Board of Review of your city in defending an action brought against them, is at hand.

You will observe that the act creating boards of review passed May 10, 1902, (95 O. L., 481) in Section one, among other things, provides that, "said board of review shall have all the powers and perform all the duties heretofore conferred upon or required of the annual city board of equalization, the decennial city board of equalization, the annual city board of revision and the decennial city board of revision under any and all laws now in force pertaining to such municipalities, and that city boards of review shall be the succesors of boards of revision, said annual city boards and said decennial city boards.

Section 2805, R. S., creating annual city boards provides that the city solicitor of the city shall act as the legal adviser and attorney for said board.

The object of the creation of city boards of review being for the purpose of equalizing the real and personal property within the limits of the city only,

and having taken the place of said annual city board of equalization, I am of the opinion that the city solicitor of the municipal corporation is the legal adviser and attorney for the board of review.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

DUTIES OF COUNTY AUDITOR IN REGARD TO COLLECTION OF DOW TAX.

COLUMBUS, OHIO, July 2, 1903.

Hon. W. D. Guilbert, Auditor of State, Columbus, Ohio.

DEAR SIR:—Your letter of June 30th received. You make two inpuiries.

First: Can a county auditor lawfully accept an application and charge and collect Dow tax from a dealer in a local option district who makes oath that he only proposes to sell non-intoxicating malt liquors therein?

Second: Are we correct in advising county auditors not to accept voluntary applications from dealers in intoxicating liquors in such districts?

In answer to the first inquiry, as was said by the Supreme Court in the case of Stevens v. The State, 61 O. S., 606:

> "The Dow law and the local option law are two distinct and different systems adopted by the legislature for the purpose of regulating the evils resulting from the trafficking in intoxicating liquors under the power conferred by Section 18 of the Schedule. * * * * * The Dow law seeks to regulate the evils resulting from the traffic by imposing a tax on it and the place where it is carried on; the local option law seeks to regulate the evils by prohibiting the trafficking in intoxicating liquors as a beverage in any form at any place in a township where the people have availed themselves of its provision."

The Supreme Court of the state on June 25, 1903, in construing Section 4364-9, R. S., held:

> "Revised Statutes, Section 4364-9 imposes a tax on the business of trafficking in any intoxicating liquors, and also on the business of trafficking in spirituous, vinous or malt liquors. The generic term "malt liquors" includes both non-intoxicating and intoxicating malt liquors. The statute was declared to be constitutional in Adler v. Whitbeck, 44 O. S., 539 and in Abderson v. Brewster, 44 O. S., 576-581. The petition therefore states facts sufficient to warrant the relief prayed for, and the demurrer is overruled and a peremptory writ of mandamus is awarded as prayed."

Under this opinion the Dow tax is assessed upon the business of trafficking in non-intoxicating malt liquor, so that any person, corporation, etc., engaged in trafficking in non-itoxicatig malt liquors must pay the Dow tax.

The local option or Beal law has to do solely with intoxicating liquors, whether malt, vinous or spirituous. It will be observed by Section 4364-20b (95 O. L., 88) that the proposition submitted to the voters is, shall or shall not the sale of intoxicating liquors as a beverage be prohibited?

Section 4364-20c defines the phrase "intoxicating liquors" as used in the Beal law "to mean any distilled, malt, vinous or any other intoxicating liquor."

It is plain that the local option or Beal law does not in any manner attempt to regulate or prohibit trafficking in any non-intoxicating liquor, whether

malt or any other. In fact the only law taxing the business of trafficking in non-intoxicating malt liquor is the Dow law.

Upon this state of fact and law, the business of trafficking in non-intoxicating malt liquors may be pursued in a local option district without contravening the provisions of the Beal law; and it is therefore the duty of the county auditor to charge and collect the Dow tax from a dealer in a local option district who sells non-intoxicating malt liquors therein.

In answer to the second inquiry, you are correct in the advice given to the county auditors, as no person may lawfully traffic in intoxicating liquors in a local option district; yet if he does he is liable under the local option law and also to pay the Dow tax.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

IN REGARD TO CONSTRUCTION OF SEWER SYSTEM IN VILLAGE OF WAPAKONETA, OHIO.

COLUMBUS, OHIO, July 2, 1903.

Dr C. O. Probst, Secretary State Board of Health, Columbus, Ohio.

DEAR SIR:—I am in receipt of yours of the 1st inst., stating certain facts with regard to the construction of a sewer system in the village of Wapakoneta, Ohio, and asking for my opinion relative to the powers of the State Board of Health in the premises.

From your letter I am informed that in April, 1901, certain plans for extending the sewers for that municipality were presented to the State Board of Health and were disapproved for good and sufficient reasons. In June 1902, plans for a different system were also disapproved and the authorities of that village were notified that they must provide a proper means to purify the sewerage before approval would be given to extend their sewers. In October 1902, certain plans were presented and were approved by the State Board of Health, but it now appears that the village council proposes to construct a system not in accordance with the plans submited, and which have been approved by the State Board, but according to a plan which has been expressly disapproved by said State Board.

Section 409-25, R. S., of Ohio provides that:

> "No city, village, corporation or person shall introduce a public water supply or system of sewerage or change or extend any public water supply or outlet of any system of sewerage now in use, unless the proposed source of such water supply or outlet for such sewerage system shall have been submitted to and received the approval of the State Board of Health.

Section 409-29, R. S., provides that prosecutions and proceedings may be instituted by the State Board of Health for the violation of any of the provisions of that chapter, or for the violation of any of the orders or regulations of the State Board, and that such prosecution and proceeding shall be instituted by the secretary on the order of the president of the Board.

Sestion 2119, R. S., provides a penalty for violating any order or regulation of the Board of Health or for obstructing or interfering with the execution of any order, or wilfully or illegally omitting to obey such order. The penalty is a

fine in any sum not exceeding one hundred dollars or imprisonment for any time not exceeding ninety days or both.

By Section 2122, R. S., the State Board is authorized to bring civil actions for the abatement or removal of all nuisances, and the right to abate a nuisance created by an imperfect or improper sewerage system is fully conferred upon that Board and may be instituted upon your request by the Attorney General to abate the same.

So in conclusion I would say that the remedy afforded by the statute is full and complete, both as to the right to proceed by criminal process and also by civil action.

Very truly yours,
J. M. SHEETS,
Attorney General.

COLUMBUS, OHIO, July 3, 1903.

Hon. L. C. Laylin, Secretary of State, Columbus, Ohio.

DEAR SIR:—I beg to acknowledge receipt of yours of July 2nd enclosing letter from the Co-operative Home Purchasing Company, of Galesburg, Illinois, in which this company inquires what steps are necessary in order to authorize it to solicit members in Ohio. I beg to answer that this company comes within the provisions of the act of April 13, 1900, (94 O. L., p. 147). The act in question requires that such companies shall, before soliciting busines in Ohio, deposit with the treasurer of state, either money or securities to the amount of one hundred thousand dollars, for the purpose of securing the faithful performance of their contracts with their Ohio contract holders.

Let me say also, that this act further provides that any agent soliciting business for any such company, before the company has complied with the laws of Ohio upon the subject, is subject to a fine of not less than one hundred dolars nor more than one thousand dollars, and imprisonment not less than thirty days nor more than six months.

And it will be the duty and pleasure of this department to see that this law is faithfully enforced.

Very truly yours,
J. M. SHEETS,
Attorney General.

AS TO ARTICLES OF INCORPORATION OF MANUFACTURER'S INDUSTRIAL INVESTMENT COMPANY.

COLUMBUS, OHIO, July 3, 1903.

Hon. L. C. Laylin, Secretary of State, Columbus, Ohio.

DEAR SIR:—I am in receipt of yours of July 2nd, enclosing proposed articles of incorporation of the Manufacturer's Industrial Investment Company, in which you request an opinion from me as to whether the purposes for which this company propose to organize are lawful when tested by the provisions of the law of Ohio.

It will be observed that this company states that it "is formed for the purpose of loaning money and credit to persons, parties and corporations for the purpose of creating, organizing and conducting manufacturing and other enter-

prises in the state of Ohio, for the purpose of purchasing, acquiring, owning, holding and dealing in stock and bonds of any corporation incorporated for any of said purposes, and generally for the purpose of assisting in the location, establishment, financing and operation of manufacturing and other enterprises in said state, and promoting any and all such enterprises therein."

There are several purposes incorporated within this one general purpose clause, one of which is that of dealing in stocks and bonds of other corporations. This, in my opinion, is clearly inhibited by the laws of the state of Ohio.

It is against public policy to allow one corporation to deal in the stocks of other corporations, and as early as in Bank v. Bank, 36 O. S. 354, it was stated that:

> "There would seem to be but litle doubt, either upon principle or authorities, and independently of express statutory prohibition of the same, that one corporation cannot become the owner of any portion of the capital stock of another corporation, unless authority to become such owner is clearly conferred by statute."

The principles here announced, I think remain as the law of Ohio, except to the extent that they may have been modified by the act of May 6, 1902, (95 O. L., 390). This act provides, among other things, that "a private corporation may purchase, or otherwise acquire, and hold shares of stock in other kindred but not competing private corporations, whether domestic or foreign, but this shall not authorize the formation of any trust or combination for the purpose of restricting trade or competition."

This being the state of the law, it follows as a matter of course that the proposed articles of incorporation of this company should be rejected by your department.

The articles of incorporation of this company are subject to the further objection, that the purposes are so indefinitely stated that it is difficult to determine what character of business the company propose to engage in.

Yours very truly,

J. M. SHEETS,
Attorney General.

AS TO EXCISE TAX ON PROPERTY OF CORPORATION HAVING PRINCIPAL OFFICE IN OHIO, BUT MONEY IN BANKS IN OTHER STATES, SUBJECT TO DRAFT FROM HOME OFFICE.

COLUMBUS, OHIO, July 10, 1903.

Hon. L. C. Laylin, Secretary of State, Columbus, Ohio.

DEAR SIR:—On my return home I found on my desk correspondence between yourself and A. M. McCarthy, respecting your ruling to the effect that where a corporation, organized under the laws of another state, and whose principal office is in Ohio, has money deposited in banks of other states, subject to draft from the Ohio office, the money thus deposited should be considered as property of the company located in Ohio for the purpose of determining the amount of the annual excise tax due from the company to the state of Ohio.

It appears that certain other states in which this money is deposited claim it should be regarded as property located within the state where deposited for the purpose of determining the amount of the excise tax due from the corporation to such state. Hence, the qustion arises, whether you as Secretary of State

have a right to consider money depositd in banks of othr states under the circumstances above named, as a part of its property in Ohio, in determining the amount of excise tax due the state from the corporation depositing the money? I am of the opinion that you have. It is your duty to take into consideration that part of the property of the corporation "owned and used in Ohio." The law providing for the levy and collection of the excise tax does not specifically define what shall be considered as "property owned and used in Ohio". Hence, resort must be had to the principles of the common law to determine the situs for the purpose of taxation of the character of property under consideration. When a person deposits money in a bank, the money becomes the property of the bank and the bank becomes merely the debtor of the depositor to an amount equal to the money deposited. In other words, an obligation arises on the part of the banker to pay the depositor a sum equal to the amount of the deposit, such an obligation being in tangible property, unless there is a statute to the contrary, its situs for the purpose of taxation is the place where the owner of the obligation resides. Hence, where a corporation has its principal place of business in Ohio, money deposited by it in banks of other states, subject to draft from the principal office, must be regarded as "property owned in Ohio".

It matters not that this construction may result in double taxation. California and Oregon, and possibly other states, require obligations secured by mortgage to be taxed in the county where the land covered by the mortgage lies. That fact does not release the mortgagee from returning the obligation secured by the mortgage for taxation at the place of his residence if he happens to reside in another state.

There is no constitutional guarantee against double taxation. Hence, when property has been subject to double taxation the owner has no remedy.

And lastly I can discover no reason why Ohio should yield up her right to tax this property any more than the other states now claiming the same right.

Very truly yours,

J. M. SHEETS,

Attorney General.

SECTION 2804, R. S., EQUALIZATION OF PROPERTY.

COLUMBUS, OHIO, July 15, 1903.

A. E. Jacobs, Esq., Prosecuting Attorney, Jackson, Ohio.

MY DEAR SIR:—Yours of July 14th at hand and contents noted.

Section 2804 R. S. clearly authorizes the annual county board of equalization to *equalize* the values of real property within its jurisdiction. True it cannot change the values of property in cases of gross inequality, and when it reduces the value of any real estate it must increase the value of some other real estate in order that the aggregate value of the duplicate may not be reduced. In the case of the mill which you mention, of course there would be gross inequality and the annual county board of equalization would have a right to reduce the value, provided always, it increases the value of some other real property to correspond. The very purpose of the legislature in giving the annual board of equalization jurisdiction over real property was to correct gross inequalities, and it matters not how these gross inequalities came about, whether from deterioration of property, increase in the value of property or a mistake of the assessing officers in the first instance. It is the purpose of the law to equalize the burdens

of taxation, and this could not be done if there was no power resting anywhere to increase or decrease the value of real estate except once in every ten years.

Very truly yours,
J. M. SHEETS,
Attorney General.

AS TO WHO COLLECTS CITY TAX.

COLUMBUS, OHIO, July 15, 1903.

W. R. Graham, Esq., Prosecuting Attorney, Youngstown, Ohio.

DEAR SIR:—Yours of July 13th at hand and contents noted.

As a matter of course the county treasurer continues to collect the city tax just as he collects the county, township, village and state taxes. There has been no change in the law upon that subject that I have any knowledge of. When a township or municipality levies taxes for township or municipal purposes, it certifies that levy to the county auditor, who places it upon the duplicate, it is then collected by the county treasurer and is paid to the treasurer of the township or municipality as the case may be.

If it is a special assessment which is levied for sewer, street or sidewalk improvements, etc., then as I understand the law, it may be paid direct to the city authorities, but if it becomes delinquent, it then may be certified to the county auditor who places it upon the duplicate against the particular property assessed, and in that event this assessment would be collected by the county treasurer.

Very truly yours,
J. M. SHEETS,
Attorney General.

SECTION 1069 R. S. AS TO PERCENTAGE OF AUDITOR ON DELINQUENT PERSONAL TAX.

COLUMBUS, OHIO, July 15, 1903.

Hon. W. D. Guilbert, Auditor of State, Columbus, Ohio.

DEAR SIR:—I am in receipt of your communication, in which you call my attention to an opinion dated December 9, 1902, which I gave in response to an inquiry from Hunter S. Armstrong, prosecuting atorney of Belmont County, in which I state that in my opinion, under the provisions of Section 1069, R. S., as amended May 12, 1902, the county auditor is entitled to 5 per cent. on delinquent personal taxes collected. You inquire whether it was my purpose in that opinion to make the statement above referred to. Let me say to you, that the statement that the county auditor is entitled to receive 5 per cent. on delinquent personal tax collections is clearly an error. You will observe in the opinion referred to, that I regard the delinquent personal taxes as part and parcel of the grand duplicate of the county. Such being the case, all the taxes collected on the grand duplicate, including delinquent taxes as well as those not delinquent, the county auditor is entitled to pay according to the provisions of Section 1069 of the Revised Statutes. This section provides, among other things, that the county auditor shall be allowed as compensation for his services

certain percentages "on all moneys collected by the county treasurer on the grand duplicate of the county." The percentages here allowed apply to the gross amount collected, and there is no distinction made between delinquent tax collected and those collected which are not delinquent.

The argument in the opinion referred to is a contradiction of the statement that the auditor is entitled to 5 per cent on delinquent personal tax collections, and probably is the reason why you called my attention to this opinion. Indeed, the letter from Mr. Armstrong only requested an opinion upon the question as to whether the county auditor was entitled to any fees on the personal taxes collected on the delinquent duplicate provided for in Section 2855, R. S., and why this error crept into that opinion I am unable now to explain.

Very truly yours,
J. M. SHEETS,
Attorney General.

MUTUAL INDEMNITY COMPANY ADMISSION INTO THE STATE.

COLUMBUS, OHIO, July 16, 1903.

Hon. Lewis C. Laylin, Secretary of State, Columbus, Ohio.

DEAR SIR:—I am in receipt of your communication in which you ask an opinion from me as to whether the Mutual Indemnity Company, a foreign corporation, is entitled to admission into the State of Ohio to do business.

The business which this company proposes to transact is the writing of contracts whereby it agrees, in consideration of certain stipulated weekly payments, to furnish to the contract holder, or those dependent upon him, medical attendance in case of sickness, and to bury the remains after death, all to be done in consideration of the stipulated weekly payments above referred to. In the case of sickness the company agrees to furnish one of its regular physicians who is regularly employed by the company and who looks to the company for his compensation.

Two questions are thus presented for solution.

First: Is the business proposed to be transacted in Ohio professional business?

Second: Is the business proposed to be transacted insurance, or does it amount substantially to insurance?

Of these in their order:

First: Is the business proposed to be transacted professional business?

Section 3235, R. S., provides that a corporation may be organized under the laws of Ohio to transact any business for which individuals might lawfully associate themselves, except for carrying on professional business.

Section 148d, R. S., provides that a foreign corporation may be admitted to the State of Ohio to engage in any business that may be lawfully transacted by one or more domestic corporations. Hence, it follows that if the business proposed to be transacted by the Mutual Indemnity Company is professional business, it is not eligible to be admitted into the State. If it is not professional business it comes very close to the line. The company enters into contracts with person to furnish medical attention in case of sickness, and has regularly employed physicians to attend to all patients with whom it has such contracts. The contract holder pays the company for this medical attention; the company pays its regularly employed physicians for the medical attention given by them. The practice of medicine is a profession; and as a corporation can only act by agent,

if a company organizes for the purpose of engaging in professional business, as a matter of course, it could act only through its employes.

In the case under consideration, the company has its regularly employed agents to render the medical services which the company has agreed with its contract holders to furnish in case of sickness. These considerations incline me to the view that the Mutual Indemnity Company proposes to carry on a professional business.

Second: Is the business proposed to be transacted insurance, or does it amount substantially to insurance?

Section 289, R. S., as amended May 12, 1902, (95 O. L. 553) provides, among other things, that,

> "It is unlawful for any company, corporation, or association, whether organized in this State or elsewhere, either directly or indirectly, to engage in the business of insurance, or to enter into any contracts substantially amounting to insurance, or in any manner to aid therein, in this State, or to engage in the business of guaranteeing against liability, loss or damage, unless the same is expressly authorized by the statutes of this State, and such statutes and all laws regulating the same and applicable thereto have been complied with."

If the business proposed to be engaged in is insurance, or substantially amounts to insurance, then as the laws of Ohio make no provision for this character of insurance, it follows that the company cannot be admitted into the State. For it is an elementary principle of law that corporations may be entirely excluded from doing business in a State other than that of its creation, or if admitted into another State at all, it must comply with such requirements as the legislature may prescribe as a condition of its admission.

The caracter of business proposed to be engaged in is, first, to furnish medical attention to the contract holder in case of sickness; second, to bury the remains of the contract holder after death and bear the expenses incident thereto.

Suppose the contract proposed to be entered into were to pay the contract holder a certain sum weekly during illness, and to pay a funeral benefit of a certain sum in case of death, all would at once agree that such contract was insurance. Suppose the company, after entering into a contract to furnish this medical attendance in case of sickness and to bury the remains and pay the costs incident thereto, should fail to carry out the terms of the contract; that is, neglect to furnish the medical attendance during sickness, or neglect, in case of death, to bury the remains and pay the expenses incident thereto? What would be the remedy? Why, plainly an action at law against the company for the cost of the medical attendance in case of sickness, or funeral expenses in case of death. In other words, the contract proposed to be entered into is an agreement to indemnify the contract holder against the expense of medical attendance in case of sickness, and the expense incident to the burial of the remains in case of death. Hence I am of the opinion that the contract proposed to be written in Ohio substantially amounts to insurance.

For these reasons I am of the opinion that the application of the company to be admitted into the State of Ohio, should be rejected.

Very truly yours,

J. M. SHEETS,

Attorney General.

SAFE DEPOSIT AND TRUST COMPANY UNDER SECTION 3821a, b, and c.

COLUMBUS, OHIO, July 16, 1903.

Hon. Lewis C. Laylin, Secretary of State, Columbus, Ohio.

DEAR SIR:—I am in receipt of your communication of recent date in which you request an opinion from me as to whether the purpose clause, as set forth in the proposed articles of incorporation of a certain Safe Deposit and Trust Company (name not disclosed) comes within the provisions of Section 3821a, b, and c, of the Revised Statutes of Ohio; also whether a safe deposit and trust company located in one city may have a branch in another city?

As to the purpose clause set forth in these proposed articles of incorporation, I can discover nothing to criticise except the provision for "investing its capital and moneys received by it in trust or on deposit for safe keeping." Moneys received for safe keeping belong to the persons placing these moneys in the safety deposit vaults of the company. The company has no dominion over such moneys any more than it has over jewelry, plate, valuable books, or other property deposited for safe keeping. With this provision eliminated, the company would still have the power to invest and loan the funds of the company and those received on deposit or in trust, for that purpose is expressly stated in the proposed articles of incorporation, and the purpose clause objected to in so far as it would be proper to be inserted, is completely covered by the following purpose clause contained in another part of these proposed articles, to-wit: "Investing and loaning the funds of the company and those received on deposit or in trust." Hence, in my opinion, the clause objected to should be eliminated.

As to whether a safe deposit and trust company has a right to locate branches in any other place than that of its domicile, I am clearly of the opinion that it has not. A safe deposit and trust company operates in a dual capacity. One of those capacities is essentially that of a bank. I have already had occasion to examine into the question as to whether a savings and loan association of the State could establish branches in other locations than that of its domicile as stated in its charter, and came to the conclusion that it could not.

The act authorizing the incorporation of safe deposit and trust companies is an act supplementary to the act authorizing the organization of savings and loan associations, and in my opinion, the two acts should be construed together. Savings and loan associations cannot be organized under any circumstances with a capital less than twenty-five thousand dollars, and that only in villages containing less than twenty-five hundred population. In all municipalities containing more than that population, the capital stock must be at least fifty thousand dollars, thus evidencing a legislative purpose to confine the operation of such a bank to the place named in its charter as its domicile.

Banks receive the money of the people on deposit and, of course, become the debtors of their depositors. It is the policy of the legislature to protect as much as possible those who deposit their money in the banks of the state. The only protection which the depositors have is the capital of the company paid in and the stockholders' liability. If one of these institutions could establish a branch in any other location than that of its domicile, it could establish one in as many different municipalities of the State as it saw fit. In that event the depositors of the bank would, to a large extent, lose the security which they now have by reason of the fact that a bank has its place of business in but one place, and its depositors are the people of that community. While there is no express statute prohibiting one of these institutions from having a branch in a place

other than that of its domicile, yet I am clearly of the opinion that it must be confined to the place of its domicile, unless statutory authority is given to establish branches.

Very truly yours,
J. M. SHEETS,
Attorney General.

AS TO EX-COMMISSIONED OFFICER OF NATIONAL GUARD BEING PLACED UPON RETIRED LIST.

COLUMBUS, OHIO, July 17, 1903.

Colonel Edward T. Miller, Assistant Adjutant General, Columbus, Ohio.

SIR:—The receipt of your letter of inquiry of July 16th is acknowledged.

You inquire substantially whether an ex-commissioned officer of the National Guard, who has served as a member of the Ohio National Guard for a period of ten years, five of which has been as a commissioned officer, may be placed upon the retired list upon application made after such officer has been discharged from the National Guard.

Section 3049, Revised Statutes, provides that:

> "Any commissioned officer who shall have served as a member of the Ohio National Guard for a period of ten years, five of which shall have been as a commissioned officer, may at his own request be placed upon the retired list to be hereafter kept in the office of the Adjutant General. Officers so retired shall receive no compensation for their services except as hereinafter provided, but shall be permitted to wear the uniform of the grade upon which retired on all occasions of ceremony; provided, that all officers so retired may, in the discretion of the commander-in-chief, be detailed upon duty other than in the command of troops, and when so detailed, they shall receive the same pay and allowance as officers on the active list detailed or employed under like conditions."

This section, beyond all question, contemplates that at the time the request is made for retirement, the officer should be a member of the Ohio National Guard. As is provided in that section, such officers remain connected with the National Guard for the purpose therein provided. The discharge of an officer from the National Guard severs completely his connection with the Guard, and he is not liable to any service by reason of his having been a member of the National Guard. So it is my opinion that the request for retirement must be made by the officer while he is still a member of the Ohio National Guard, and that officers who have been discharged are not authorized to make the request provided for in Section 3049.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

AS TO MILEAGE OF COUNTY COMMISSIONERS WHEN TRAVELING IN COUNTY ESTABLISHING DITCHES.

COLUMBUS, OHIO, July 17, 1903.

B. F. Openlander, Esq., Prosecuting Attorney, Defiance, Ohio.

DEAR SIR:—Yours of July 15 at hand, and contents noted.

You inquire whether, when engaged in the performance of their duties in establishing ditches, the county commissioners are entitled to mileage for the number of miles necessary to travel in and about the performance of such duties, or whether they are confined to the $3.00 per day?

In my opinion they are entitled to $3.00 per day and mileage. Section 897, R. S., provides that the county commissioners "shall be entitled to receive five cents per mile when traveling in their respective counties on official business, to be paid out of the county treasury, etc."

Section 4506, R. S., provides that the county commissioners shall receive three dollars per day for their services while engaged in the establishment of ditches, but it is silent upon the subject of mileage.

Section 897 does make provision for mileage under all circumstances when the commissioners are engaged in the performance of their official duties and are required to travel about the county.

Hence, in my opinion, you should allow their claim for mileage.

I may voluntarily state, however, that as the Supreme Court has held in the case of Richardson v. State, 66 O. S. 108, that the personal expenses of the commissioners, such as railroad fare, livery hire, hotel bills, etc., are not a proper item of expense, such claims, of course, should be eliminated should they be presented for allowance.

Very truly yours,
J. M. SHEETS,
Attorney General.

AS TO ALLOWANCE TO CONSTABLE UNDER SECTION 1309.

COLUMBUS, OHIO, July 18, 1903.

Roy H. Williams, Prosecuting Attorney, Sandusky, Ohio.

DEAR SIR:—Yours of July 17th making inquiry as to whether a constable who has been allowed and paid under the provisions of Section 1309, R. S., his mileage which he has earned in pursuing a fugitive from justice, is entitled to receive in addition thereto pay for a conveyance hired by him and used in the search for the accused and in traveling to the place of residence of the accused, received.

Section 1310, R. S., provides that in addition to the allowance provided for in Section 1309, R. S., where the accused is charged with a felony and has fled the country, the county commissioners may allow and pay an officer his expenses in pursuing the fugitive. Hence, as a condition precedent to allowing pay for the actual expenses incurred, a fugitive must be charged with a felony and must have fled the country. If the word "country" in this section is not synonymous with the word "State," the fugitive must at least have fled the county of his residence, and must be attempting to evade the officers. Under such circumstances it is probable that the commissioners might be authorized

in allowing such expenses as the officer incurred in pursuing the fugitive. However, where the officer does nothing more than execute the warrant by going to the residence of the accused and returning with him, the law presumes the mileage to be sufficient compensation for the expenses incurred.

Very truly yours,
J. M. SHEETS,
Attorney General.

AS TO WHO OWNS SLACK WATERS OF THE STATE.

COLUMBUS, OHIO, July 12, 1903.

Hon. A. W. Thurman, President Special Canal Commission, Columbus, Ohio.

DEAR SIR:—Your letter of July 20th is at hand. You ask whether the opinion given by me on July 9th to your inquiry of July 8th applies to water taken from the different slack waters of the state?

In reply to this inquiry I would say that the slack waters in the State of Ohio, in the different streams which have been appropriated by the erection of dams in the construction and operation of the canals, are the property of the State of Ohio, and no water may be taken therefrom without application being made to and permission obtained from the Board of Public Works of the state. And in case pipes or any other material or obstructions are placed therein without such permission, the Board of Public Works has full authority to summarily remove the same.

Very truly yours,
GEORGE H. JONES,
Assistant Attorney General.

AS TO BOND OF CLARENCE A. PLANK, CLERK OF POLICE COURT, SPRINGFELD, OHIO. ALSO WHETHER COUNTY LIABLE FOR CASH BAIL IN POLICE COURT, EMBEZZLED BY CLERK.

COLUMBUS, OHIO, July 20, 1903.

Hon. John B. McGrew, Prosecuting Attorney, Springfield, Ohio.

DEAR SIR:—Your letter of July 14th received. Since seeing you I have been out of the city, consequently I have delayed answering up to this time.

You make two inquiries in your letter.

First: Are surities on the bond liable on same to the county for any moneys collected by the clerk in the way of fines and costs belonging to the county?

In answer to this inquiry, I would say that the bond submitted is a bond given by Clarence A. Plank as clerk of police court of Springfield, Ohio, to the city of Springfield, Ohio. Section 1808, R. S., provides, among other things, that "the clerk of the police court shall give such bond with sureties, as may be required by the council and county commissioners," etc.

I understand the fact to be that no bond was required by or given to the county commissioners by Plank. The bond you have submitted being in the nature of a contract between the city of Springfield, Ohio, and the clerk of the police court, the sureties on the bond are liable only for moneys collected by the

clerk which would belong to the city, and such sureties are not liable to the county for moneys collected by such clerk.

Second inquiry: Is the county liable to a party who put up cash bail in the police court for a person charged with a misdemeanor under a State law, the same being embezzled by the clerk?

The clerk of the police court has no authority to take cash bail. If he does take cash bail and turns it over to the proper county authorities, and such bail should have been forfeited, the county in that case may, in all probability, retain the money on the ground that such original payment is a voluntary payment; but inasmuch as in the case you suppose, the cash bail was never turned over to the county, the county in no event can be held liable for the same.

Very truly yours,

GEORGE H. JONES,

Assistant Attorney General.

AS TO EXPENDITURE OF COMPANY FUNDS FOR STOCK IN STOCK COMPANY ORGANIZED FOR ERECTION OF ARMORY.

COLUMBUS, OHIO, July 21, 1903.

General George R. Gyger, Adjutant General State of Ohio, Columbus, Ohio.

SIR:—I acknowledge receipt of communication dated July 16, 1903, from C. H. Post, Captain Company F, Second Infantry, O. N. G., addressed to you. Captain Post inquires "whether your department would approve of the expenditure of company funds for stock in a stock company organized for the erection of an armory at this place"?

I would make the following suggestions in regard to the matter inquired about: The company funds are supposed to be in the hands of the treasurer of the company, who gives bond for their safe keeping, and such treasurer is responsible for the disposition of such funds. I do not thing it the policy of the law controlling the Ohio National Guard to allow the expenditure of company funds in an investment in which persons, other than members of the National Guard, have interests. There could be no objection to the members of the company forming a corporation as individuals and erecting an armory, which I have no doubt might be rented to the State. But without a change in the law and regulations, an investment of company funds in the manner suggested would place upon the treasurer of the company the entire responsibility of the investment being a good or bad one. For these reasons and others which might be suggested, I do not deem it advisable for your department to approve of the expenditure of company funds in the manner indicated.

Very respectfully

GEORGE H. JONES,

Assistant Attorney General.

AS TO TWO RIVAL BOARDS OF HEALTH IN CITY OF DEFIANCE.

COLUMBUS, OHIO, July 22, 1903.

Dr. C. O. Probst, Secretary State Board of Health, Columbus, Ohio.

DEAR SIR:—I am in receipt of yours of recent date, in which you inform me that there are two rival boards of health in the city of Defiance, and request an

opinion as to which is the legally constituted body, as the State Board of Health is required to recognize one or the other of these bodies.

An answer to this question involves an inquiry into the circumstances of the organization of these two rival boards of health. Prior to the amendment of Section 2114, R. S., (95 O. L. 643) which changes the number of members of boards of health from six to five, the council of the city of Defiance had, pursuant to the power conferred upon it by Section 1692 and Section 2113, R. S., enacted the necessary ordinance creating a board of health for the city of Defiance, and the members of the board had been appointed and were then performing the duties of the office. Shortly after the amendment of Section 2114, R. S., as above referred to, the council of the city of Defiance passed an ordinance repealing the original ordinance which had provided for the creation of a board of health for that city, and under which the then board of health was acting. Some time after the repeal of this ordinance the council enacted a new ordinance providing for the creation of a board of health, and after the enactment of this ordinance members of the board of health which was created by this new ordinance, were appointed. The members of the old board of health refused to abrogate the office, claiming that the council had no power to repeal the ordinance upon the authority of which they had been appointed.

It thus appears that two rival bodies are claiming to be the lawfully constituted board of health for the city of Defiance.

The only question presented for solution then is, had the city council of Defiance the power to repeal the ordinance providing for the creation of a board of health? If it had not, then the old board of health is the legally constituted body. If it had the power which it assumed, then the newly appointed board is the lawfully constituted body. In my opinion, the question should be answered in the affirmative.

The old board of health was created by a municipal ordinance, not by the legislature. The only thing the legislature assumed to do in Section 1692 and Section 2113, R. S., was to authorize municipalities of the state to create boards of health. Hence, no board of health could exist until action was taken by the council in the form of an ordinance. Power to enact an ordinance carries with it power to repeal it. This proposition is elementary and need not be elaborated upon. The ordinances of municipalities are not like the laws of the Medes and Persians, "immutable and unchangeable," but are subject to amendment or repeal at the will of the council. This power to amend and repeal ordinances that have been created is in no manner limited or curtailed by the provisions of Section 2114, R. S. The only effect of this section is to provide how the members of the board of health shall be appointed and their number in municipalities having boards of health. It does not assume to prohibit municipalities that had boards at the time of the enactment of the law from repealing the ordinances by which such boards were created.

Since the council of the city of Defiance had the power to repeal the ordinance creating the board of health, the repeal of that ordinance of necessity abrogated the office, and there were no longer any members of the board of health or a health department in the city of Defiance.

In State ex rel. v. Jennings, 57 O. S. 415, the court held "an office created by an ordinance is abolished by the repeal of the ordinance, and the incumbent thereby ceases to be an officer."

On page 423, Minshall, J., speaking for the court upon this subject, said: "There is no question but that the council had power to repeal the former ordinance; and this being so, all the offices created by it, whatever they were,

being thus abolished, the incumbents ceased to be officers, for there can be no incumbent without an office."

From these considerations it follows that upon the repeal of the ordinance which created the old board of health, the health department of the city of Defiance ceased to exist. Upon the enactment of the new ordinance and the appointment of the new board, it then had authority under the law to perform the duties incumbent upon such officers, and is the legally constituted board of health of the city of Defiance.

Very truly yours,
J. M. SHEETS,
Attorney General.

COMPENSATION OF COUNTY COMMISSIONERS WHEN ACTING AS MEMBERS OF BOARD OF EQUALIZATION.

COLUMBUS, OHIO, July 23, 1903.

Charles F. Howard, Esq., Prosecuting Attorney, Xenia, Ohio.

MY DEAR MR. HOWARD:—Yours of July 22 at hand and contents noted. If when the commissioners are acting as members of the board of equalization they are performing duties as county commisioners, then they are entitled to the regular compensation provided for by Section 897 of the Revised Statutes. If, however, they are not performing duties as county commissioners, but are engaged in a separate and distinct occupation, to-wit, that of members of the board of equalization, then they can have no compensation other than that provided for members of the board of equalization.

While special salary acts were still in force the question was frequently submitted to me, whether county commissioners, who were upon a salary, must perform their duties as members of boards of equalization without any additional compensation. After carefully looking into the question, I made up my mind that county commissioners were performing a separate and distinct duty when acting as members of the board of equalization; hence were not performing the functions of county commissioners as such, consequently those who were serving under a salary as county commissioners were entitled to the regular fees provided for members of boards of equalization in addition to their salary as county commissioners. If I was right in my conclusion in that instance, then the commissionsrs while acting as members of boards of equalization are limited to the compensation specified in Section 2813, R. S., which is $3.00 per day. I fully recognize that it is unjust for those commissioners who live a considerable distance from the county seat to be compelled to serve for the same compensation that is received by any who happen to live at the county seat, yet we are not the makers of the law, and we must construe it as we find it.

Very truly yours,
J. M. SHEETS,
Attorney General.

AS TO RIGHT TO USE APPROPRIATION FOR TRAVELING EXPENSES FOR HIS EXPENSES TO CONVENTION OF INSPECTORS OF WORK SHOPS AND FACTORIES.

COLUMBUS, OHIO, July 27, 1903.

Hon. George H. Morgan, Chief Inspector of Work Shops and Factories, Columbus, Ohio.

MY DEAR SIR:—In response to your inquiry as to whether, under the item of appropriation entitled "Traveling expenses of Chief Inspector," you as such official are entitled to pay your traveling expenses in atending tne convention of Inspectors of Work Shops and Factories of the different states of the Union, to be held at the city of Montreal, Canada, I beg to state that, in my opinio, you are not. This particular item of appropriation made by the legislature, it is needless to say, was made to be expended by the chief inspector in traveling about the State in the performance of his official duties. It is not made the official duty of the chief inspector to attend a convention of the character above referred to. That is a volunteer association, organized by the Inspectors of Work Shops and Factories for their own individual benefit and pleasure. Such organization is not known to the laws of the State of Ohio.

Having heretofore had occasion to pass upon similar questions with reference to the right of superintendents of the different state hospitals of the state to be paid out of the funds set apart for the support of their respective institutions, expenses incurred by them in attending the National Convention of Superintendents of Hospitals for the Insane, and also with reference to the right of the officers of the National Guard of Ohio to be paid their traveling expenses in attending a meeting of the national asociation of such officers out of the fund appropriated for transportation of Ohio National Guard, I do not deem it important to elaborate upon the question now submitted by you, but I would respectfully refer you to opinions of the Attorney General of Ohio for the year 1901, page 96, and for the year 1902, page 63, where this question is more elaborately discussed. I beg to remain,

Very truly yours,
J. M. SHEETS,
Attorney General.

AS TO LIABILITY OF THE METZGER SEED AND OIL COMPANY UNDER SECTION 148c, R. S.

COLUMBUS, OHIO, July 28, 1903.

Hon. Lewis C. Laylin, Secretary of State, Columbus, Ohio.

DEAR SIR:—I beg to acknowledge receipt of your communication of July 25, enclosing a letter from King & Tracy, attorneys for the Metzger Seed & Oil Company, a foreign corporation, in which inquiry is made as to the liability of that company under the provisions of Section 148c, R. S., of Ohio.

From the facts stated in the letter of counsel for the company it appears that the company is a foreign corporation organized to engage in growing, buying and selling cereals, grains and seeds of all kinds, and manufacturing, buying and selling oils, linseed oil and cake and oil products, and also to deal in machinery and materials capable of being used in the oil business.

The business of the company now carried on, however, is the purchasing of linseed and the manufacture and sale of linseed oil and oil cake.

The company owns real estate at Toledo, Ohio, on which is located its plant and principal place of business. The company also owns a number of oil tank cars, used in the shipment of its oil product.

It is also stated that from ninety to ninety-five per cent of its business is conducted outside of the State of Ohio, which I assume means that from ninety to ninety-five per cent. of its product is shipped to points beyond the limits of the state.

It is claimed that these facts show the company to be engaged in inter-state commerce, and that Section 148c, R. S., expressly exempts it from its provisions.

With this contention I cannot agree. As I read Section 148c, R. S., it does not exempt foreign corporations engaged in inter-state commerce, but only those engaged in inter-state transportation. This section, in so far as is material to this inquiry, provides that "foreign * * * express, telegraph, telephone, railroad, sleeping-car, transportation, or other corporations engaged in Ohio in inter-state commerce business" shall be exempted from its provisions. This provision should be construed as though it read, "foreign * * * express, telegraph, telephone, railroad, sleeping-car, transportation, or other corporations *of like character* engaged in Ohio in inter-state commerce business," for the maxim *noscitur a sociis* applies. That is, the meaning of the words, "other corporations" must be limited by that of the asociated words; in other words, the term, "other corporations," must be held to include only such other corporations as are engaged in inter-state transportation. See State v. Lifring, 61 O. S. 39, 50.

The Metzger Seed & Oil Company is not engaged in transportation of any kind, either domestic or inter-state. The fact that the company furnishes its own cars into which its oil product is loaded for transportation does not make it a transportation company. The railroad company which takes its cars and hauls them to their destination is the transportation company. The company in question cannot be likened to the Pullman Company. For the cars of that company are manned by its employes and are under the control of the Pullman Company all the time. They make contracts direct with the people who ride upon their cars and they transport them to their destination. Not so with the Metzger Seed & Oil Company. It merely furnishes a receptacle into which its product is loaded preparatory to shipment. The railroad company transports the cars, and they are under the control of the company during transportation. The Metzger Seed & Oil Company paying for the services thus rendered.

If this company were held to be exempt from the operation of Section 148c, R. S., there is hardly a foreign corporation doing business in the State of Ohio to-day which would not also be exempt, for no doubt a large part of the output of these companies is sold and transported to points beyond the limits of the state

Surely it was not the legislative intention that there should be such a wholesale exemption of foreign corporations from the operation of Section 148c, R. S.

Very truly yours,

J. M. SHEETS,

Attorney General.

WHETHER LIEN ON PREMISES FOR DOW TAX IS SUPERIOR TO *OTHER LIENS.*

COLUMBUS, OHIO, July 28, 1903.

W. E. Weygandt, Esq., Prosecuting Attorney, Wooster, Ohio.

MY DEAR SIR:—Yours of July 27th at hand and contents noted. The question submitted by you for solution is whether a lien upon premises for the Dow tax, which became such, subsequent to the execution of a mortgage upon the same premises is a superior lien to the mortgage and should be first paid out of the proceeds of the sale of the premises?

Owing to press of other matters I am compelled to state briefly my conclusions, without going into an extensive argument.

In my opinion, the lien for the Dow tax is the first and best lien upon the premises. Section 4364-9, R. S., provides that

> "upon the business of trafficking in spirituous, vinous, malt or any intoxicating liquors, there shall be assessed yearly and shall be paid into the county treasury as hereinafter provided, by every person, corporation, or co-partnership engaged therein and for each place where such business is carried on * * * the sum of $350.00."

Section 4364-10 provides that

> "said *assessment*, together with any increase thereof as penalty thereon shall attach to and operate as a lien upon the real property on and in which such business is conducted as of the fourth Monday of May of each year, and shall be paid at the time provided by law for the payment of taxes on real and personal property in this state."

The tax thus imposed is clearly an *assessment* in the nature of an excise tax levied upon the business of trafficking in intoxicating liquors.

It will be observed that the statute levying this tax expressly designates it as an "assessment," which of course distinguishes this class of taxes from that of the ordinary real and personal tax levied according to the assessed value of the property taxed.

Section 1104, R. S., provides that

> "When any taxes or assessments stand charged against any land or lots or parcel thereof upon the general or any special duplicate * * * for any purpose authorized by law, and the same or any part thereof are not paid within the time prescribed by law for the payment of the same, the county treasurer, in addition to the other remedies provided by law, may enforce the lien of such tax and assessment, or either, and any penalty due thereon by civil action in the name of the treasurer for the sale of said premises in the court of common pleas of the county."

This section also provides that the treasurer shall make the proper parties defendant, and that the owner of the property upon which the tax or assessment is a lien shall be entitled to no exemption on judgment obtained for said taxes and assessments; also, "And if it be found that such taxes or assessments or any part thereof are due and unpaid, judgment shall be rendered for the same, penalty and costs, and said premises, or so much thereof as may be necessary to pay the same, shall be by order of the court sold to pay the same; and out of the proceeds of the sale shall first be paid said judgment, the balance being distributed as may be just."

The Dow tax referred to in your letter is clearly an assessment which comes within the provisions of Section 1104 above quoted, and by the express provisions

of this section is made the first and best lien upon the premises for it will be observed that out of the proceeds of the sale, the lien for the taxes and assessments must first be paid, even before the costs made in the case.

Very truly yours,
J. M. SHEETS,
Attorney General.

WHETHER MEMBER VILLAGE COUNCIL CAN BE APPOINTED HEALTH OFFICER.

COLUMBUS, OHIO, July 31, 1903.

Dr. C. O. Probst, Secretary State Board of Health, Columbus, Ohio.

DEAR SIR:—Yours of July 30th making inpuiry as to whether a member of a village council may hold the position of health officer, provided he receive no compensation therefor, duly received.

Assuming that the council has never established a board of health, and that the health officer, referred to in your letter, was appointed by the village council, I beg to state that, in my opinion, a member of the council is not eligible for such appointment. It matters not for the time being he may not be receiving compensation, it is against the policy of the law to allow any person to appoint himself to office. Not only that, but whether or not the health officer is to receive a salary depends upon the will of the council. In this instance then, there would be a member of the council who would necessarily be interested in seeing that he himself, as health officer, was voted a salary. I do not assume to say that in this instance anything improped would be done, but as it is the policy of the law to remove temptation, it is my opinion that a council of a village has no right to appoint one of its own members health officer.

Very truly yours,
J. M. SHEETS,
Attorney General.

WHETHER COUNTY COMMISSIONERS CAN ISSUE BONDS IN ANTICIPATION OF ASSESSMENT TO BE LEVIED UNDER ACT OF APRIL 15, 1902.

COLUMBUS, OHIO, July 31, 1903.

H. M. Haglebarger, Esq., Prosecuting Attorney, Akron, Ohio.

MY DEAR SIR:—In response to your inquiry of July 30th as to whether where the commissioners authorize the cleaning out of a ditch pursuant to the provisions of the act of April 15, 1903, (95 O. L., 154), they may isue bonds in anticipation of the assessments to be collected upon the lands benefited, I beg to state, that in my opinion, they cannot. Section 3 of the act expressly provides that the contractor who has performed the work of cleaning out the ditch "shall be paid by a warrant of the county auditor upon the county treasurer, out of the assessments made, and paid upon the certificate of the county surveyor, that he has performed the contract; but if at the presentation of the certificate all the assessments have not been paid, payment shall be made thereon pro rata."

This provision makes it very clear to me that the person performing the labor must wait for their pay until the assessments are paid in.

I beg to state that in the north-western part of the state where there is a great deal of ditching done, this method of payment is quite frequent. The person who bids, knowing that he will be compelled to wait some time for his pay, makes the bid correspondingly high.

Very truly yours,
J. M. SHEETS,
Attorney General.

CORRECTING OPINION GIVEN ON JULY 23, 1903.

COLUMBUS, OHIO, August 3, 1903.

Hon. Lewis C. Laylin, Secretary of State, Columbus, Ohio.

DEAR SIR:—I am in receipt of your communication enclosing a letter from Squires, Sanders & Dempsey, in which I am requested to re-consider my opinion which I rendered to you on July 23rd, to the effect that companies which had filed articles of incorporation with the Secretary of State, as required by the provisions of Section 3238, R. S., but which had not procurred 10 per cent. of its capital stock to be subscribed and had not elected officers, was nevertheless liable to an annual minimum tax of $10.00 under the provisions of the Willis law.

With this request I gladly comply. The Willis law (95 O. L., 124), provides that all corporations *organized* under the laws of the State of Ohio, shall pay a certain annual excise tax. The question then arises, when is a corporation *organized?*.

Before examining the question which you submitted to me, I had been of the opinion that the incorporation of a company and the organization of the company after being incorporated, were two separate and distinct acts, and had it not been for the provision of Section 3239, R. S., I should have so stated; but it seemed to me the provisions of this section breathed life into a corporation immediately upon the filing of the articles of incorporation and their record in the office of the Secretary of State; hence, gave the opinion of the character above stated. However, it seems the Supreme Court has in effect made nugatory the provisions of Section 3239, R. S. For in the case of State ex rel. v. Insurance Company, 49 O. S., 440, it was held,

> "That the making and filing for the purpose of profit, the articles of incorporation in the office of the Secretary of State, do not make an incorporated company; such articles are simply authority to do so. No company exists within the meaning of the statute, until a requisite stock has been subscribed and paid in, and directors chosen.

Being much pressed for time on the occasion of writing this opinion I overlooked the decision above referred to, hence make haste to correct the error into which I fell.

In view of the fact that under the provisions of the Willis law a company must be *organized* before it is called upon to pay the annual excise tax required by this act, and as a company cannot be organized until 10 per cent. of the capital stock is subscribed and officers elected, I beg to state that, in my opinion, until such organization takes place a company is not required to pay the annual tax under the provisions of the Willis law.

Very truly yours,
J. M. SHEETS,
Attorney General.

RIGHT OF DEPUTY INSPECTORS OF WORKSHOPS AND FACTORIES TO HAVE POWER TO PROSECUTE FOR VIOLATION OF STATUTE GOVERNING EMPLOYMENT OF MINORS.

COLUMBUS, OHIO, August 4, 1903.

Hon. J. H. Morgan, Chief Inspector of Workshops and Factories, Columbus, Ohio.

DEAR SIR:—In answer to the inquiry coming to me from your department as to whether or not a Deputy Inspector of Workshops and Factories would have the power to prosecute violations of the law governing the employment of minors within the State of Ohio, I would say, that while the statute reads that, "it shall be the duty of the Inspector of Workshops and Factories to prosecute all violations of this act when the same shall come to his knowledge before competent authority",it is also within the power of the Deputy Inspectors or any private citizen to make an affidavit and file it before a magistrate, and cause the arrest of any person who is violating any of the laws governing the employment of minors. It may be done by the parents of the minor or by any other person taking sufficient interest in it to see that the law is enforced. And while it is made the special duty of the Inspector, he is not the sole person who can make or cause such prosecutions to be made.

Very truly yours,
J. M. SHEETS,
Attorney General.

ADMISSION OF OHIO INVESTMENT CO. INTO STATE OF OHIO.

COLUMBUS, OHIO, August 11, 1903.

Hon. Lewis C. Laylin, Secretary of State, Columbus, Ohio.

DEAR SIR:—I am in receipt of your communication enclosing copy of articles of incorporation of the Ohio Investment Company, a foreign corporation, in which you request me to examine the purpose clause of this company and give you an opinion as to whether such company can be admitted to transact business in the State of Ohio.

The purpose clause of this company reads as follows:

> "The busines or objects of the corporation which it is engaged in carrying on, or which it purposes to engage in or carry on in the State of Ohio, is to buy, sell or lease factories, warehouses, dwelling houses or other buildings, to buy and sell real estate, to borrow and lend money, to buy and sell time and wages, to buy and sell claims, to carry on business in any other state or in any other part of the world, to hold meetings to transact business, and keep such books as may be necessary outside of the state of South Dakota, provided, however, that nothing is done inconsistent with the laws of South Dakota."

While the company proposese to engage in the buying and selling of real estate, also in borrowing and lending money, and in the purchase and sale of claims, yet as an Ohio corporation might be formed to engage in these classes of business, I see no reason why this company cannot combine all of them, as Section 148d provides, that a foreign corporation may be admitted into the state to do business, if its business is of a character that might be carried on by one or more domestic corporations.

The power to borrow and lend money and to buy and sell evidences of indebtedness doe not cary with it the power to engage in a banking business. I do not presume that the company in question contemplates engaging in a banking business under its charter. Hence, pass that question.

It appears that this company proposes to engage in the buying and selling of real estate. The life of a domestic corporation engaged in that class of business be limited to 25 years (R. S., Section 3235). Hence, it is my opinion that the life of this company in Ohio must be limited to 25 years, and its application for admission into the State of Ohio should expressly limit its life in this state to that length of time As its application for admission fails to contain this limitation, I would suggest that it be returned to the company for the insertion of such a clause.

Very truly yours,
J. M. SHEETS,
Attorney General.

AS TO CORONER'S FEES IN CERTAIN CASE.

COLUMBUS, OHIO, August 13, 1903.

C. C. Lemert, Esq., Prosecuting Attorney, Zanesville, Ohio

DEAR SIR:—I am in receipt of you letter of August 12th in which you inquire whether in my opinion the coroner of Muskingum County is entitled to fees for viewing the body of a person who had been shot in Morgan County, but who after the shooting had been conveyed to the hospital in Muskingum County for treatment, and there died?

Your letter is silent as to whether the shooting was self inflicted with suicidal intent, accidental, from a source unknown or whether it was purposely done by another. These are all important facts to be taken into consideration in determining the question whether an inquest should be held by the coroner of either county. For it is apparent that if the shooting was self inflicted with suicidal intent or accidental, and this fact was well known, the coroner of neither county would be authorized to hold an inquest. Assuming, however, that the shooting in question was perpetrated by a third person, I am still of the opinion that the coroner of Muskingum County had no authority to hold an inquest under the circumstances named.

Section 1221, R. S., provides:

> "When information is given to any coroner that the body of a person whose death is supposed to have been caused by violence, has been found within his county, he shall appear forthwith at the place where such body is, shall issue subpœnas for such witnesses as he deems necessary, and administer to them the usual oath, and proceed to inquire how the deceased came to his death, if by violence from any other person or persons, by whom, whether as principals or accessories before or after the fact, together with all the circumstances relating thereto; the testimony of the witnesses shall be reduced to writing, by them respectively subscribed, except when stenographically reported by the official stenographer of the coroner, and with the finding and recognizances hereinafter mentioned, if any, shall be by the coroner returned to the clerk of the court of common pleas of the county, and he shall, if he deem it necessary, cause the witnesses attending as aforesaid, to enter into re-

recognizance, in such sum as may be proper, for their appearance at the succeeding term of the court of common pleas of the county, to give testimony concerning the matter aforesaid, and he may require any and all of said witnesses to give security for their attendance, and if they or any of them neglect to comply with the requirements made, he shall commit the person so neglecting to the prison of the county, to remain until discharged by due course of law."

These provisions make it perfectly apparent that the only purpose of an inquest is to ascertain the cause of death, whether a crime has been committed, and if so who perpetrated it, and to secure and preserve the evidence to the end that justice may not be defeated.

Before a coroner is warranted in holding an inquest, the conditions of this statute must be met, to-wit: "The body of the person whose death is supposed to have been caused by violence", must have been "found within the county". That means, a dead body must have been found accompanied by such circumstances as to indicate that the death of the person was probably caused by violence. The remainder of this section points out very clearly the purpose of the inquest. This purpose, however, has already been stated, and need not be here repeated.

Where the facts and circumstances attending the death are well known, and there is no reasonable expectation that new and important evidence will be developed by an inquest, the law does not warrant one.

In this case, the person upon whose dead body an inquest was held by the coroner, had been injured by a gun shot wound, taken into another county and lingered several days before his death. Full opportunity was thus given to ascertain the cause and circumstance of the injury which finally resulted in death, and that too, before the death of the person injured.

What mystery there could be surrounding a death under such circumstances that required a coroner's inquest to clear up, I cannot comprehend. Again a coroner is required to issue his subpœnas for witnesses, examine them under oath and if necessary compel them to enter into a recognizance for their appearance at "the succeeding term of court of common pleas of the county"., This means, of course, the court of common pleas of the county over which the coroner has jurisdiction.

Hence, it is only crimes which are supposed to have been committed in his county, over which he has jurisdiction to investigate. The crime, if committed, in this case, was committed in Morgan County and the trial would have to take place in that county. (R. S., 7214) The sheriff of Muskingum county has no authority under the law to make his report to the court of common pleas of Morgan County and recognize the witnesses to appear before that court.

From these suggestions it follows that if power to hold an inquest at all, exists, it lies with the coroner of Morgan County.

Very truly yours,

J. M. SHEETS,

Attorney General.

AS TO SECTIONS 3238a AND 3263 R. S.

COLUMBUS, OHIO, August 15, 1903.

Hon. Lewis C. Laylin, Secretary of State, Columbus, Ohio.

DEAR SIR:—In accordance with your request I have made a further examination into the question as to whether a corporation organized under the laws of Ohio is authorized by virtue of the provisions of either Section 3238a or 3263 R. S., to change a part of its common stock into preferred stock and file a certificate of such change with the Secretary of State.

Upon such further examination I beg to state that I have no occasion to change my opinion as expressed to you in my letter dated January 5, 1903, bearing upon the same subject.

It will hardly be claimed that Section 3263 R. S., authorizes such a change. This section provides that,

> "Upon the assent in writing of three fourths the number of stockholders in any corporation, representing at least three fourths of its capital stock, the corporation may, increase its capital stock, issue and dispose of preferred stock as is authorized in Section 3235a; and upon any such increase of stock, a certificate shall be filed with the Secretary of State as provided in the preceding section."

It will be observed that this section does not provide for a change of any of the common stock into preferred stock, but for and increase of the capital stock and for making the increase preferred stock.

Section 3238a, R. S., provides that by a vote of three-fifths of the stockholders, the articles of incorporation, of any corporation organized under the laws of Ohio may be amended,

> "So as to change its corporate name, or the place where it is to be located, or where its principal business is to be transacted; or so as to modify, enlarge or diminish the objects or purposes for which it is formed; or so as to add thereto anything omitted from, or which might lawfully have been provided for in such articles originally."

It would hardly seem that in the enactment of this provision the legislature contemplated it was authorizing those owning three fifths of the stock of a corporation to change a part of the common stock into preferred stock, and that too, against the will of the remaining two fifths, especially as that very act might materially reduce the value of the remaining common stock and materially increase the liability of the holders of this stock. For by the provisions of Section 3235a R. S., in case of the insolvency of a company, the stockholders liability must be pursued and exhausted against the common stock before action can be taken against the preferred stock; and in case of the dissolution of the corporation, the holders of the preferred stock are entitled to receive out of the assets of the company the par value of their stock before the holders of the common stock are entitled to receive anything. It is hardly necessary to suggest that before the change of any part of the common stock into preferred stock, all stockholders stood on an equal footing, both as to the debts of the company and the right to share in its assets.

Hence, I am of the opinion that the power to amend the articles of incorporation conferred by Section 3238a, R. S., does not include the power to change a part of the common stock into preferred stock, and thus change the liability of stockholders without their consent.

I do not wish to be understood, however, as saying that even by a unanimous agreement among the stockholders, the characteristics of preferred stock cannot

be given to a part of the common stock, I am quite clearly of the opinion that this may be done; also that the courts will respect and enforce such an agreement. What I mean to be understood as saying is, that the amendments contemplated by Section 3238a, R. S., do not include the change of a part of the common stock into preferred stock. Hence, this section does not authorize filing the certificate of such change with the secretary of state.

Very truly,

J. M. SHEETS,
Attorney General.

COMPENSATION OF COUNTY TREASURER FOR COLLECTING DELINQUENT PERSONAL TAXES.

COLUMBUS, OHIO, August 22, 1903.

Hon. W. D. Guilbert, Auditor of State, Columbus, Ohio..

DEAR SIR:—Yours of recent date at hand and contents noted.

You inquire whether in my opinion the county treasurer, by virtue of the provisions of Section 1117, R. S., (95 O. L., 574), is entitled to receive an additional five per cent. over and above the five per cent. provided for in Section 2856, R. S., for collecting delinquent personal tax where he sues therefor, as authorized by the provisions of Section 2856, R. S.

In my opinion he is not. Section 2855, R. S., provides that immediately after the semi-annual August settlement between the county treasurer and county anditor, the county auditor shall make out a tax list and a duplicate thereof of all the delinquent personal taxes remaining unpaid in his county, containing the name, valuation and amount of personal tax due from each, and shall add ten per cent. penalty thereon, and shall deliver the duplicate to the county treasurer on the 15th day of September, annually. Section 2856 provides that,

> "The treasurer shall forthwith proceed to collect the taxes and penalty on said duplicate by any of the means provided by law, and for his services he shall be allowed five per centum of the amount collected, which shall be allowed to him out of the same on his next semi-annual settlement."

Here then is a provision that the treasurer shall receive five per cent. for the collection of these taxes, and he is given his choice of any of the means provided by law for the collection of delinquent taxes. One of the methods provided by law is suit. Section 2859, R. S., provides that,

> "When any personal tax * * * * * shall stand charged against any person, and the same shall not be paid within the time prescribed by law for the payment of such taxes, the treasurer of such county, in addition to any other remedy provided by law for the collection of personal taxes, is hereby specially authorized and empowered to enforce the collection by civil action in the name of the treasurer of such county against such person for the recovery of such unpaid taxes."

It will thus be observed that the treasurer need not wait until the semi-annual settlement in August, and until after the delinquent personal duplicate is made up,before he commences action under the provisions of Section 2859. Indeed, he may do so immediately after the 20th day of December, when, by reason of a failure to pay the first half of the taxes, the whole taxes become due and payable.

It could hardly be claimed that if the county treasurer commences an action to collect delinquent personal taxes before the delinquent personal duplicate is made up, that he would be entitled to more than five per cent. for his services thus rendered. What reason could there be for giving him an additional five per cent. for waiting and not performing his duty until after the delinquent personal duplicate is made up. In other words, it would seem very much like placing a premium upon the treasurer for his own negligence. For should he commence promptly after the taxes become delinquent to enforce their payment, he would be entitled to but five per cent. for his services, but should he wait for a period of more than nine months after it became his duty to act, and until after the delinquent personal duplicate is made up, he should then have not only the five per cent. originally provided for his services, but an additional five per cent. for proceeding thus tardily to perform his duties.

The law presumes that compensation provided for by the legislature is deemed to be fairly commensurate with the duties performed. The duties of the county treasurer in sueing for the collection of taxes upon the delinquent personal duplicate, are no more arduous than suing for the collection of taxes before that duplicate is made up.

It seems to me the purpose in amending Section 1117, R. S., was to collect as nearly as possible in one section, all the fees due the county treasurer for services rendered, and in addition thereto to provide that in defending cases in which taxes are finally collected, as well as prosecuting cases, he should have a compensation of five per cent. This later provision is an additional compensation given to the county treasurer, which he did not have prior to the amendment of this section.

I am quite clearly of the opinion that it was not the purpose of the legislature in amending this section, to provide an extra five per cent. to the treasurer for services, when suing for taxes upon the delinquent personal duplicate.

Very truly,

J. M. SHEETS,
Attorney General.

IN REGARD TO FUNDS BELONGING TO CITY SCHOOL DISTRICTS.

COLUMBUS, OHIO, August 27, 1903.

Hon. W. D. Guilbert, Auditor of State, Columbus, Ohio.

DEAR SIR:—I have your favor of August 24th, transmitting to this Department the letter of H. J. Jennings, City Treasurer of Defiance, Ohio, addressed to Mr. E. H. Archer, State Examiner, and in which you request an answer to the same for the guidance of the Bureau of Uniform Accounting under your Department

The question presented is one as to the authority of a city council to provide for the depositing of funds in the hands of the city treasurer, with some depository as provided in Section 135 of the Municipal Code. The question presented pertains alone to school funds which are received by the City Treasurer, pursuant to the requirements of Section 136 of the act above cited. The assumption of such power presupposes the existence of two requirements.

1. The existence of an express statute authorizing and providing for the creation of a depository for school funds.

2. That the city treasurer under and by direction of the city council shall deposit such funds in similar manner as that provided for funds of the city other than the school funds.

It is assumed that Section 136 in addition to Section 135 of the new Municipal Code, confers the power required upon the City Treasurer. Section 136 provides as follows:

> "The treasurer shall receive and disburse all funds of the city including the school funds, and such other funds as arise in or belong to any department or part of the city government."

Section 135 provides:

> "Council shall have authority to provide by ordinance for the deposit of all public moneys coming into the hands of the treasurer, in such bank or banks situated within the city which may offer at competitive bidding the highest rate of interest and give good and sufficient bond of some approved guaranty company, in a sum at least double the amount to be deposited, and to determine in such ordinance the method by which such bid shall be received, the authority which shall receive them, the time for the contracts for which deposits or public moneys may be made, and all details for carrying into effect the authority here given.
>
> "And provided further that as to any deposits made under authority of an ordinance of council pursuant hereto, neither the treasurer nor his bondsmen, if the treasurer has exercised due care, shall be liable for any loss occasioned thereby."

While Section 136 provides that the treasurer shall receive and disburse all funds of the city, including the school funds, yet Section 135, which might be known as the depository act, cannot be said to include within its terms, the school funds received by the city treasurer and held or disbursed by him, as required by Section 136, for the following reasons:

The City Council by the act above cited, has not acquired and does not have any authority to provide by ordinance for the deposit of school funds, nor has the City Council jurisdiction in any degree, to authorize the expenditure or provide for the keeping and custody of the city school funds. That act must be construed with reference to the powers still abiding in the Board of Education, and not repealed by the new Municipal Code. While by Section 136 the treasurer is to receive and disburse the school funds, that section does no more than abolish the separate office of treasurer of the school funds in cities, as the same existed by virtue of Section 4042, R. S. It does not change the relation of the city board of education to such funds, and does not in any way divest them of their authority and control over the same, and certainly does not confer upon the city council, the right to provide by ordinance for the depositing of such funds.

It was not the policy of the municipal code to in any manner divest the board of education of their duties with respect to that portion of the public moneys as theretofore existed, as is evidenced by the existing unrepealed statutes.

Section 3958, R. S., requires the levy for school purposes to be made by the board of education, and such board is to determine the amount of money necessary as a contingent fund for the continuance of the schools after the state funds are exhausted, for the purpose of purchasing sites for school houses, to erect, purchase, lease, repair and furnish the same and building additions thereto, and for other school expenses.

By Section 4047,R. S., the treasurer of the school funds is forbidden to pay out any school moneys, except on an order signed by the president and counter-signed by the clerk of the board of education.

By Section 4057, the board of education is required to make a report of its finances to the county auditor, annually, on or before the first day of September.

These and kindred sections might be cited to show that it is the board of education and not the city council which exercises jurisdiction and authority over such funds.

The council does not have the authority even to fix the bond of the city treasurer as treasurer of the school funds. It only has the power, pursuant to the requirements of Section 117 of the code, to fix the bonds of the officers to be elected under the authority of the municipal code. When the city treasurer gives bond as treasurer of the school funds, which he is required to do, he does it by virtue of Section 4043, R. S., and the same is to be approved by the board of education, and no order of the city council with regard to school funds in the hands of the city treasurer, could be made effective, so as to bind the sureties upon such bond, for such order would be in excess of the authority conferred upon the council.

I therefore am of the opinion that when Section 135 of the new municipal code provides for the deposit of moneys, by a city treasurer under provisions by ordinance of a city council, it can only contemplate such funds as come into the hands of the treasurer belonging to the municipality, and not to the school district.

I might further evidence the difficulties attendant upon a contrary course by pointing out the conflict that would arise when the limits of the school district exceeded the limits of the municipality, but enough has been said, I think, to support the conclusion above reached.

Very truly yours,
J. M. SHEETS,
Attorney General.

WHAT CHARGES ARE REQUIRED TO COMMIT A GIRL TO THE GIRLS' INDUSTRIAL HOME.

COLUMBUS, OHIO, August 28, 1903.

E. J. Brown, Superintentent Girls' Industrial Home, Delaware, Ohio.

DEAR SIR:—Yours of August 27th at hand and contents noted. You inquire whether a girl who is more than sixteen years of age, and who has been committed to your institution charged with truancy. (and by that I presume you mean that she was found guilty of being a juvenile, disorderly person) and who has been placed in a home found for her by the trustees, but was returned to the board of trustees, because of improper conduct, can now be taken back into the institution and kept there until she is eighteen years of age. In my opinion she cannot. From your letter it appears that she was placed in your institution upon the ground of truancy; that is, being a juvenile, disorderly person .Section 4022-8 R. S., provides a child committed to your institution charged with this offense, cannot be retained there longer than until she is sixteen years of age. This girl having arrived at that age, she is now entitled to her freedom.

You further inquire whether a girl may be committed to your institution charged with nothing but incorrigibility. It is very clear to my mind that she cannot. The law providing for the organization of the Girls' Industrial Home,

provides that it shall be a home "for the instruction, employment and reformation of evil disposed, incorrigible and vicious girls." (R. S., Section 765.) A girl then to be committed to this home, must be evil disposed, incorrigible and vicious. The statute authorizing the commission of girls to the Industrial Home, provides that they may be committed there when found guilty of a crime, or of being a juvenile, disorderly person, (Section 769) or when charged and convicted of "leading a vicious or criminal life." Hence the mere charge of incorrigibility forms no ground for receiving a girl into the Industrial Home.

Very truly,

J. M. SHEETS,
Attorney General.

COMMISSIONERS AUTHORIZED TO ORDER NEW ESTIMATE FOR COUNTY DITCH WHERE FIRST ESTIMATE MADE WAS TOO LOW.

COLUMBUS, OHIO, September 2, 1903.

Hon. C. R. Hornbeck, Prosecuting Attorney, London, Ohio.

DEAR SIR:—Yours of September 1st at hand and contents noted.

You inquire what is the proper course for the commissioners to pursue where the estimate of the cost of construction of a county ditch made by the surveyor is too low; i. e., so low that all bids for the construction of the work are above the estimate.

The estimate of the cost of construction being too low, it follows as a matter of course, nobody will take the contract of constructing the ditch without an increase in the estimated cost. The question then arises whether the commissioners have jurisdiction to order the engineer to make a re-estimate of the cost of construction. In my opinion the commissioners have. The commissioners do not lose jurisdiction over the ditch until the work is contracted for, the entire cost is ascertained and is apportioned by them among the lot and land owners benefited thereby. (R. S., Sections 4479, 4480 and 4481.)

The statement of Minshall, J., in Commissioners v. Krauss, 53 O. S., 632, in which he says:

> "With the fixing of the time for sale of construction of the improvement and the appointment of an engineer to superintend its construction, the connection of the county commissioners with the improvement substantially ends."

in no manner militates against the views above expressed. Even if this statement did, it is an *obiter dictum*, wholly unnecessary in the decision of that case. It would be absurb indeed, to claim that if the county surveyor made a mistake and estimated the cost of construction of the ditch too low, that the commissioners would have no jurisdiction to order a re-estimate of the cost. Indeed, it has been held on a number of occasions, that the commissioners after they have ordered the construction of a ditch, may re-examine into the question, may vacate their formal order and order the dismissal of the petition, the courts holding that when the commissioners get jurisdiction by the filing of a petition, their jurisdiction continues, and they are authorized to make such orders as in their opinion are just, until their connection with the ditch ends.

In the case mentioned by you, I think the proper proceeding for the commissioners would be, to make a finding on the journal to the effect that the engineer,

having made an estimate too low, he is ordered to re-estimate the cost of construction of the ditch, and make a report to the commissioners within a time named.

Very truly,

J. M. SHEETS,
Attorney General.

TOWNSHIP CLERKS AUTHORIZED TO ISSUE WARRANTS ON TOWNSHIP TREASURY FOR COMPENSATION TO TEACHERS WHERE A TAX HAS BEEN LEVIED AND IN PROCESS OF COLLECTION, EVEN THOUGH THERE IS NO MONEY IN THE TREASURY TO THE CREDIT OF THAT FUND.

COLUMBUS, OHIO, September 2, 1903.

Hon. W. D. Guilbert, Auditor of State, Columbus, Ohio.

DEAR SIR:—I am in receipt of your communication, in which you inquire whether it is lawful for township clerks to issue warrants on the township treasury to teachers for their compensation, when there is at the time no money in the treasury applicable to the payment of such warrants.

Section 2834b, R. S., provides that:

> "The commissioners of any county, the trustees of any township and the board of education of any school district, * * * * shall enter into no contract, agreement, or obligation involving the expenditure of money, nor shall any resolution or order for the appropriation or expenditure of money be passed by any board of county commissioners, township trustees or board of education, * * * * * * unless the auditor or clerk thereof shall first certify that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate, and in process of collection and not appropriated for any other purpose."

It will thus appear that if the tax has been levied and placed upon the duplicate, and in process of collection, and a certificate of that fact is made by the clerk, then it is proper to issue warrants to teachers for their pay, even though the money may not yet be collected and in the treasury, provided always, however, that it has been levied and in process of collection.

The effect of the provision above quoted is to authorize the anticipation of a levy of taxes, and permit the issuing of warrants on the treasury, payable out of the tax thus levied, even though it has not yet been collected.

Very truly,

J. M. SHEETS,
Attorney General.

IN REGARD TO STOCK OPTION CONTRACT ISSUED BY THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY.

COLUMBUS, OHIO, September 5, 1903.

Hon. A. I. Vorys, Superintendent of Insurance, Columbus, Ohio.

DEAR SIR:—I have read the correspondence passing between your office and the counsel representing The Columbian National Life Insurance Company, relative to the stock option contract proposed to be issued by that company, and

sold to policy holders in the company upon the terms as set forth in such option contract. Without going over the criticisms made of the contract by yourself in yours of August 14th, addressed to Mr. Arnold, and without taking the time to further comment upon the propositions therein involved. I would say, my conclusions arrived at relative to the contract may be summarized in the following propositions:

We may concede that policy holders in The Columbian National Life Insurance Company, the same as in any other company, may become stockholders in such company. The purchase of stock therein is and must be an entirely independent contract, separate and distinct from the policy of insurance, and the ownership of one should not be made the predicate for the other.

The contract for the purchase of stock, either in the form of an option to purchase, or as a straight-out purchase, cannot change the insurant's relation to the company which he sustains by virtue of his policy, nor can it enlarge or diminish his rights as a policy holder therein. I consider it accurate to say that the premium the insured pays to the company, is, or should be, the stipulated amount agreed upon between the insured and the insurer as the consideration for the contract of insurance. Further, taking into consideration the restrictions as contained in Section 3631-4, R. S., the premium cannot be increased nor diminished between insurants of the same class and equal expectation of life. Any distinction or discrimination in favor of any individual is absolutely forbidden by such section.

Taking the definition of "premium" as above given in connection with the facts in the matter before us, I am informed by you that an increase of ten cents per thousand is charged for a stock option contract to a policy holder, and the same is added to the premium in the policy, as is made evident, so I am informed, by examination of the rate book of such company. This proposition raises the very esential question as to whether or not this is not a "distinction or discrimination" in favor of some individuals between insurants of the same class and equal expectation of life. This would lead us to inquire what is or should be the basis of classification, so as to determine who are "insurants of the same class."

In answering this, I am of the opinion that a company cannot, by making some policy holders stockholders therein, thereby create them a class by themselves, as they propose to do by this stock option contract attached to the policy, because classification of insurants must be based upon some fundamental difference of the insured, and cannot be by reason of ownership of stock any more than it could be by ownership of other property. I can conceive of a real and substantial classification of insurants, based upon the character or employment of business in which they are engaged, or upon physical characteristics, or upon sex, or upon geographical locations in which they may reside, because these are fundamental differences, and have been upheld as true bases for distinctions or discriminations in individuals, and, hence, may be by the company classified by themselves, and the persons in such classes thus based upon such essential differences, physical or otherwise, would be within contemplation of Section 3631-4, R. S., "insurants of the same class."

If the table of rates shows such class, designated as "Class B," must pay an increased premium of ten cents per thousand, the predicate for the increased premium, as I have said, is not found in any different character of policy issued to them, but the policy is essentially the same, save for the addition of the stock option contract. It will not be contended that that changes the character of the insurance. It gives the insured holding such stock option contract, a right to purchase in a given period, one share of stock in the company, but it does change

the amount of premium or rate charged, as forbidden in Section 3631-4, R. S. To illustrate: Suppose two persons having the same kind of policy in this company, the one holding a stock option contract and the other not, the first pays an additional ten cents per thousand not charged theother. To my mind this is positively forbidden by the section last cited, and I view the stock option contract as a method of requiring a larger premium for the same class of insurance, and a discrimination or distinction between persons insured, which distinction is created in an arbitrary manner, and not based upon some fundamental difference as hereinbefore mentioned.

I therefore agree in the conclusions arrived at by you, that this method of selling stock to policy holders, or to those who would by this inducement become policy holders, should not be countenanced and not approved by your department.

Very respectfully
J. M. SHEETS,
Attorney General.

CORPORATIONS ORGANIZED UNDER LAWS OF THE STATE OF OHIO MAY BE ORGANIZED FOR BUT ONE PURPOSE.

COLUMBUS, OHIO, September 8, 1903.

Hon. Lewis C. Laylin, Secretary of State, Columbus, Ohio.

DEAR SIR:—I am in receipt of your communication of this date, in which you inquire whether a corporation may be incorporated under the laws of Ohio, which embodies the following purposes:

"A. To act as agent for insurance and indemnity companies.

"B. To act as agent in securing an attorney or attorneys-at-law at such points or places as will be convenient to holders of policies of insurance or contracts of indemnity placed by it as agent, who will give, without cost to said contract holders, advice and legal opinions as to the law relative to any cause of action for either personal or property damages which may be submitted to said attorney or attorneys-at-law.

"C. To act as agent in securing an attorney or attorneys-at-law who will, without cost to the policy holder, seek for baggage and personal belongings of said contract holders, as may have been lost in transportation, and if necessary, who will in the name of said contract holder, prosecute an action for the recovery of the value of said property when, in the opinion of said attorneys, liability exists therefor.

"D. To act as agent in securing an attorney or attorneys-at-law who will, if such policy holder be killed or injured by the negligence of a third person or corporation, and where the statutory liability arises, in the name of such contract holder or his legal representatives, institute action for damages if, in the opinion of such attorney or attorneys-at-law there is an enforceable right of action in the jurisdiction where the accident occurred, and said contract holder and attorneys agree upon the terms of said attorney's employment; and in such case, this corporation will agree to advance, as a loan, the necessary expense in procuring the testimony required to prosecute such action."

On another occasion I gave you an opinion to the effect that a foreign corporation embodying the above named purposes could lawfully be admitted into the State of Ohio—the question presented being, whether the busines proposed

to be engaged in could lawfully be transacted in Ohio by a foreign corporation.

Section 148d, R. S., authorizing the admission of foreign corporations into the state, provides that no foreign corporation shall be admitted to do business in Ohio until it receives from the secretary of state a certificate to the effect that:

> "It has complied with all the requirements of law to authorize it to do business in this state, and that the business of the corporation to be carried on in this state is such as can be lawfully carried on by a corporation incorporated under the laws of this state for such or similar business, or if more than one kind of business, by two or more corporations so incorporated for such kinds of business inclusively."

It will there be seen that a foreign corporation may be admitted into this state to do business, even though it combine several kinds of business which could not be combined by a domestic corporation.

A domestic corporation, as is well known, can be organized for but one purpose. Section 3235, R. S., provides that:

> "Corporations may be formed in the manner provided in this chapter for any purpose for which individuals may lawfully associate themselves."

Commenting upon this provision, Spear, J., speaking for the court in the case of State ex rel. v. Taylor, 55 O. S., 67, says:

> "It will be noted that the word is 'purpose,' not 'purposes.' Its use implies a limitation. This limitation must have been by design. It is a most wise and reasonable one. We cannot assume that the General Assembly would intentionally clothe corporations with capacity to unite all classes of business under one organization, as this would tend strongly to monopoly."

Section 3236, R. S., provides that the articles of incorporation of a company must contain "the purpose for which it is formed," not "purposes." Indeed, I understand it to have been the uniform policy of the office of Secretary of State to confine all corporations organized under the laws of Ohio to one purpose.

From these considerations it is quite clear to me that one company cannot be organized under the laws of Ohio containing the purposes above quoted.

At least three classes of business are included in these purposes:

"First: To act as agent for insurance and indemnity companies."

"Second: To act as agent in employing attorneys for certain classes of persons needing their services."

"Third: To lend certain classes of litigants money to be used in procuring testimony required to prosecute certain kinds of actions.'

Very respectfully

J. M. SHEETS,

Attorney General.

AS TO ALLOWING THE PERSONAL AND LIVING EXPENSES OF COUNTY COMMISSIONERS.

COLUMBUS, OHIO, September 10, 1903.

Robert Thompson, Prosecuting Attorney, Carrollton, Ohio.

MY DEAR SIR:—Yours of September 9th making inquiry as to whether under the provisions of Section 897-5, Revised Statutes, the county commissioners are entitled to be paid out of the county treasury, hotel bills, livery hire, horse feed,

repairs to vehicles, horse-shoeing, etc., and whether a commissioner may charge for the use of his own horse, duly received.

The language used in Section 897-5, Revised Statutes, authorizing the payment of expenses to county commissioners out of the county treasury is identical in form with that construed by the Supreme Court in the case of Richardson v. State, 66 O. S., 108. In that case the court held, as you will observe, that such items of expense did not come within the provisions of the statute, and could not be leagally paid out of the county treasury. The legislature having used the same language in this amendment as in the original enactment, is presumed to intend the same construction should be applied to it. That being the case, the items named could not be paid out of the county treasury.

It would seem from reading the later enactment, that the legislature made no change whatever in the law, except to limit the amount of expenses provided for in the act to two hundred dollars per year for each commissioner. These "expenses" are defined in the case referred to as being money paid out for and on behalf of the county, not for and on behalf of the personal and living expenses of the commissioners, or expenses incurred by them in travel.

I freely confess that it was probably the purpose of the man who prepared the amendment, to provide for the payment of the expenses of county commissioners, but he fell short of his purpose. As well as it was the purpose of Senator Royer when he had introduced and passed the first Royer Act, to extend the jurisdiction of the Supreme Court, yet as the language of the act read, he took away almost the whole jurisdiction of the court. We are compelled to construe a statute according to its language, not according to what some bungling legislator may have intended. The commissioners are entitled to better pay than they receive, but we must construe the law as we find it.

I beg to state further, however, the Bureau of Uniform Accounting has taken this matter up, and has established a rule as to what expenses of the commissioners should be allowed and what should not be allowed. These rules will be printed and published in a short time. If your commissioners will follow those, their bills will pass the scrutiny of this board.

Very truly,

J. M. SHEETS,
Attorney General.

AS TO WHETHER EMERGENCY HOSPITAL OF CLEVELAND, OHIO, IS CARRYING ON THE BUSINESS OF INSURANCE.

COLUMBUS, OHIO, September 18, 1903.

Hon. A. I. Vorys, Superintendent of Insurance, Columbus, Ohio.

DEAR SIR:—I beg to acknoweldge receipt of your communication of some time ago, seeking an opinion from me respecting the question as to whether the Emergency Hospital of Cleveland, Ohio, is transacting the business of insurance.

The company referred to by you in your inquiry is a corporation organized under the laws of the State of Ohio. The purpose, as stated in its articles of incorporation, being to "maintain a hospital in the city of Cleveland, Ohio, and to procure, receive and hold sufficient money and property to build and support said hospital."

In addition, however, to performing the specific functions named in its charter it seems that the company is engaged in writing contracts of the following character:

"THE EMERGENCY HOSPITAL COMPANY"

(Incorporated)

HOSPITAL

No. 772 Willson Avenue, Cleveland, Ohio.

"In consideration of two dollars, receipt of which is hereby acknowledged ..... is entitled to medical advice and surgical treatment at this hospital for one year from date at any hour, day or night, every day in the year, including Sundays and holidays. Doors never closed. This certificate is not transferable.

Cleveland, Ohio, ... day of ....., 190..

....., Secretary. ....., President.....

Hence, if the company is engaged in writing insurance, it must be by reason of the character of this contract.

By the provisions of this contract the Emergency Hospital Company agrees in consideration of the payment of two dollars to furnish the contract holder "medical andvice and surgical treatment" for the period of one year at the hospital of the company from and after the date of the contract. By entering into this contract and the payment of two dollars the contract holder is thus guaranteed medical advice and surgical treatment for the period of one year free of any additional cost to him. Suppose, after entering into this contract, the company fails to cary out these provisions, what is the remedy? Why, clearly, an action at law to recover from the company whatever reasonable sum may have been paid by the contract holder during the year, either for medical advice or surgical treatment.

Hence, it seems to me the effect of this contract is to indemnify the contract holder against any necessary expense incurred during the period named, either for medical advice or surgical treatment.

If I am right in this construction of the contract, it follows that the company is engaged in writing insurance. For, suppose the contract were to the effect that in consideration of two dollars the company should agree to indemnify the contract holder for the period named, against all expense necessarily incurred for medical advice or surgical treatment, all would agree that this was a contract of insurance.

Section 289, R. S., provides that,

> "It is unlawful for any company, corporation, or association, whether organized in this state or elsewhere, either directly or indirectly, to engage in the business of insurance, or to enter into any contracts substantially amounting to insurance, or in any manner to aid therein, in this state, or to engage in the business of guaranteeing against liability, loss or damage, unless the same is expressly authorized by the statutes of this state, and such statutes and all laws regulating the same and applicable thereto have been complied with."

It thus appears that the transaction of any business "substantially amounting to insurance" is looked upon by the Legislature of Ohio as insurance, and must be regulated by the insurance laws of the state.

As already suggested, I am constrained to the belief that this contract, if

it does not amount to insurance under a technical definition of the term, it is at least of a character "substantially amounting to insurance".

While it does not come within your province to consider the question as to whether the contract which is being written by this company amounts to the transaction of professional business, yet I am inclined to the view that this contract is inhibited by the provisions of Section 3235, R. S., which prohibits any company from carrying on a professional business.

In making this statement I am cognizant of the provisions of Section 3235, R. S., which permits the formation of hospitals "for the purpose of erecting, owning and conducting sanitariums for the receiving of and caring for patients and for the medical, surgical and hygienic treatment of diseases of such patients."

Very truly yours,
J. M. SHEETS,
Attorney General.

BY WHOM EXPENSES SHALL BE BORNE IN CARING FOR A NON-RESIDENT TYPHOID FEVER PATIENT.

COLUMBUS, OHIO, September 18, 1903.

Hon. W. D. Guilbert, Auditor of State, Columbus, Ohio.

DEAR SIR:—The letter dated September 3, 1903, from T. P. Kellogg, auditor, Norwalk, Ohio, and addressed to the department of supervision, has been referred to this office.

In this communication, the question is asked whether expenses incurred by a local board of health in caring for a non-resident case of typhoid fever is a proper charge against the city. Section 2128, R. S., (95 O. L. 428), provides that when expenses are incurred by the board of health in providing for persons quarantined, that such expense shall in the first place be paid by the person or persons quarantined, if able, and if not able, then by the city, village or township in which such person or persons are quarantined, but provided that when a person with a contagious disease quarantined in any county is a legal resident of some other county, and is unable to pay such expenses, they shall be paid by the county in which he has a legal residence, if notice and a sworn statement of the amount of such expenses are sent to the infirmary directors of said county within thirty days after the quarantine in such case is discharged.

It is probably the law that a board of health may only incur such expense as is provided for in the statute. The board of health has to do in so far as diseases are concerned, with those of a contagious or infectious nature. An ordinary case of sickness is not required to be looked after by the board of health, particularly when the sick person is a non-resident of the county. Such sick person, or if he be merely indigent and wanting the necessaries of life, must be taken care of by the infirmary directors of the county in which he is found. The sole question presented here is whether typhoid is a contagious or infectious disease within the meaning of the statute.

It will be observed that while Section 2125 includes typhoid fever as one of the diseases which physicians must report to the health officer, yet in Sections 2126, 2127, 2128 and 2129, which provide for the quarantine of a house or place where such patient is, there is no reference to typhoid fever.

Typhoid fever not being a contagious disease, and not infectious in the ordinary sense of the term, as are the other diseases referred to in the law, I am constrained to hold that a non-resident required to be taken care of while suffering from such disease, should be in charge of the infirmary directors, and not in that of the board of health; and that it is the duty of the infirmary directors of the county in which such sick person is found, in order that they may reimburse themselves for any expense incurred in taking care of such person, to notify the infirmary directors of the county in which the person is a resident, in order that they may recover the expense necessarily incurred in taking care of such sick person.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

AS TO SECTION 4404, R. S., AND SUBDIVISION 1, SECTION 6991.

COLUMBUS, OHIO, September 28, 1903.

Dr. H. C. Brown, Secretary State Board of Dental Examiners, Columbus, Ohio.

DEAR SIR:—Your letter of September 19th is at hand, in which you make several inquiries. I will answer them in the order propounded.

First: Whether an under-graduate who has been examined during the years 1902 and 1903 and has failed, may be re-examined within twelve months?

In reply to this inquiry, I would say that Sub-division 3 of Section 4404, R. S., provides for different classes of persons who may upon application be examined before your board. This section provides generally at its close that said applicant may be re-examined within twelve months without any additional fee. In as much as this section is intended to allow such under-graduate to make application for examination in the first instance any time during the years 1902 and 1903, I am of the opinion that in case such applicant fails, he may be re-examined within twelve months thereafter without any additional fee.

Second: Sub-division 3 of Section 4403, R. S., provides, among other things, that "any person or all persons who has or have been the proprietor or proprietors of a dental office or a place of performing dental work in this state continuously since January 1, 1893, may be exempted from examination upon application and payment of the license fee," and you ask, is there any limitation of time when such persons are not eligible to make application?

Section 4404, R. S., provides substantially that from and after June 1, 1902, it shall be unlawful for any person to practice dentistry in this state, unless such person shall have first obtained a certificate of qualification issued by the state board, as hereinafter provided. The class of persons referred to in this inquiry, if they would practice dentistry or perform dental work in this state after June 1, 1902, would be subject to the penalties provided in Sub-division 3 of Section 6991, but inasmuch as the law places no other limitation when such applicants are not eligible, in my opinion such application may be made at any time; but, as above stated, such person would be liable to the penalties of the law for attempting to practice dentistry prior to his application and payment of the license fee.

Third: You ask for a construction of the following part of Sub-division 3 of Section 4404, R. S., to-wit: "Upon an unanimous vote of the board said board may excuse from examination an applicant holding a license to practice

in some state requiring a diploma and examination, upon the payment of the examination fee."

Under this provision it would not be competent or legal for your board to enter into any arrangements or relations with the board of any other state, which would result in admitting to practice in this state, under the provisions referred to, any person holding a license in the other state, unless such person had been examined and received a diploma. In other words, your board has not authority to change, modify or render nugatory any of the provisions of the law of your creation.

Fourth: You inquire, "Are we entitled to any printing from state printers, such as stationery and the annual report of the board to be filed with the governor?"

In reply to this, I would call your attention to Sub-division 1, of Section 6991, R. S., which provides for the disbursement of the funds coming into the possession of the board under the law, and particularly to this sentence:

> "Said expenses shall be paid from the fees and assessments received by the board under the provisions of this act, and no part of the salary *or other expense of the board* shall ever be paid out of the treasury."

In my opinion, from a reading of the law creating and regulating your board, it was not intended that any expenses incurred by said board in the discharge of its duties should be paid out of the state treasury, and consequently that you are not entitled to printing from the state printers, such as stationery and the annual report of the board, provided for in Sub-division 2 of Section 4404, R. S.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

AS TO WHETHER SHERIFF MAY BE ALSO APPOINTED COURT CONSTABLE.

COLUMBUS, OHIO, October 1, 1903.

G. Ray Craig, Esq., Prosecuting Attorney, Norwalk, Ohio.

DEAR SIR:—Your letter of September 28th received. You inquire whether the duty imposed on the sheriff by Section 1211, R. S., as to attending upon the common pleas court preclude him from drawing compensation under Section 553 when he is appointed a court constable by the court to wait upon the grand jury?

In reply I would say that Section 553, R. S., is legislation on the subject of apointment, duties and compensation of court constables. Such officers may be appointed to preserve order and discharge other duties as the court requires, and when so directed by the court, shall have the same power to call and impanel juries, which by law the sheriff of the county has, except in capital cases.

Section 1211, R. S., provides among other things, that it is the duty of the sheriff to attend upon the common pleas court and the circuit court during their sessions, and the probate court when required etc.

The compensation of the sheriff is fixed by law for the discharge of his general duties, including those of attendance on the courts during their sessions. The object of appointing court constables is to discharge duties which the

sheriff may not be able to attend to on account of the fact that he is required to be in constant attendance at court, either in person or by deputy.

I am therefore of the opinion that a sheriff may not be appointed bailiff or court constable under Section 553, and that court constables or bailiffs are distinct officers from that of sheriff or deputy sheriff, and owe their creation and compensation to Section 553.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

AS TO WHETHER UNCLAIMED MONEYS MAY BE DRAWN OUT OF COUNTY TREASURY WITHOUT CERTIFICATE, AND WHO TO PAY FOR CERTIFICATE.

COLUMBUS, OHIO, October 3, 1903.

Hon. D. F. Openlander, Defiance, Ohio.

DEAR SIR:—Your letter of Otober 1t is received. You inquire whether unclaimed moneys that have been paid over to the county treasurer by virtue of Sections 1339 and 1340, R. S., may be drawn out without the certificate of the clerk, probate judge, or sheriff.

In reply, I would say that such certificate is required whenever the money has been properly paid over to the treasurer of the county.

You also inquire, in the case such certificate is necessary, what fees may be charged therefor and by whom paid. I am of the opinion that under Section 1264, Bates Revised Statues, fifth edition, a charge of ten cents may be made by the clerk for such certificate, which should be paid for by the person applying for the certificate.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

AS TO WHAT EXPENSES TO BE INCLUDED IN COST BILL FOR TAKING PRISONER TO ANOTHER COUNTY UNDER SUBPOENA.

COLUMBUS, OHIO, October 3, 1903.

Hon. E. A. Hershey, Warden Ohio Penitentiary, Columbus, Ohio.

DEAR SIR:—Your letter of inquiry of this date received.

You inquire, "what expenses, if any, are to be included in the cost bill for taking a prisoner in the penitentiary to the county jail of a county, in obedience to a subpœna issued by the court of such county"?

In reply, I would say, as bearing upon this inquiry, that on April 2, 1897, in the case of State ex rel, Rickey v. Coffin, 56 O. S., 240, the court held:

> "Guards of the penitentiary while engaged in taking a convict before the court which has issued a subpœna for him and there detaining him subject to its order, are engaged in the service for which their monthly compensation is fixed by statute; and no deduction can be made from such compensation because of their absence from the penitentiary while engaged in such service, nor can compensation of the guards for such service be taxed as costs in the case in which such subpœna is issued."

Subsequent to such decision and in the year 1898 (see Vol. 93, O. L., 224), the legislature provided as follows:

> "When such witness is in attendance upon any court, he may be placed for safe-keeping in the jail of the county; and the expenses of the officer in transporting him to and from the court to which he is summoned, including compensation for such guard or attendant of such prisoner, which compensation shall not exceed the per diem salary of such guard, for the actual time he is kept from the penitentiary, shall be allowed by the court and taxed and paid as other costs against the state."

From the law as now in force it follows that the expenses to be allowed and taxed as costs are the actual expenses of the officer for transporting the prisoner to the county and in returning him, and also compensation not exceeding the per diem salary of such guard.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

SECTION 4364-89s, R. S. WHETHER CHIEF EXAMINER SHALL COLLECT $2.00 FOR EACH EXAMINATION.

COLUMBUS, OHIO, October 7, 1903.

Hon. William E. Kennedy, Chief Examiner Steam Engineers, Columbus, Ohio.

DEAR SIR:—Your communication of October 7 is received. You inquire whether, under Section 8 of the law regulating stationary engineers, being Section 4364-89s, R. S., you should collect a $2.00 fee for every examination?

Section 8 referred to provides that the fee for license and examination shall be $2.00, and the fee for renewal of license shall be $1.00. It is undobuted your duty to collect $2.00 from each applicant for license and examination, which sum should be retained by you whether the applicant successfully passes the examination or not. There is no provision of law by which this fee may be returned to the applicant.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General

ARTICLES OF INCORPORATION OF FOREST CITY RAILWAY COMPANY.

COLUMBUS, OHIO, October 8, 1903.

Hon. Lewis C. Laylin, Secretary of State, Columbus, Ohio.

DEAR SIR:—You have submitted to this department the proposed articles of incorporation of the Forest City Railway Company, and have asked the consideration of the "purposes" expressed in such proposed articles.

After an examination, I am of the opinion that such proposed articles express a purpose for which there is no authorization in the laws of this state to any corporation proposing to operate or maintain a street railroad. The laws of Ohio do not authorize the use of steam as a motive power in the operation of street railroads within a municipality. I am of the opinion, however, that if the

word "steam" used in the "purpose" in these proposed articles is omitted therefrom, that then there is no legal objection to the acceptance and filing of such proposed articles of incorporation.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

AS TO SECTION 633-11. WHETHER ANY SECTION IN THE REVISED STATUTES MAKES IT THE DUTY OF COUNTY COMMISSIONERS TO INSPECT INFIRMARY.

COLUMBUS, OHIO, October 12, 1903.

Hon. Charles F. Howard, Prosecuting Attorney, Xenia, Ohio.

DEAR SIR:—Your letter of October 9th received. You inquire, first, whether county infirmaries are included under Section 622-11, R. S., and, second, whether there is any section in the Revised Statutes making it the duty of the commissioners to inspect the infirmary?

Section 633-11, as you are aware, is under Title 5, "Benevolent Institutions." This section specifically mentions the institutions which may be inspected by the county commissioners, or board of health, and then provides that "any institution exercising, or pretendng to exercise a reformatory or correctional influence over individuals" are also open to inspection by the county commissioners. The specific description of institutions and this general clause do not include county infirmaries. It will be observed that Sections 633-12 and 633-13 refer to the same institutions as those specifically and generally described in Section 633-11, so that none of these sections include county infirmaries.

In answer to your second inquiry, I owuld say there is no specific section making it the duty of the county commissioners to inspect the infirmary. It is no doubt true that the county commissioners are to be advised of the general conditions of the infirmary by reports from the directors, which directors are required by Section 966, R. S., to inspect the institution, that is, county infirmaries, at each monthly meeting, and at such other time as they may deem necessary. And Section 967 contemplates that the county commissioners may require from the directors such information as they think proper in regard to the condition and conduct of the county infirmary. It might be possibly necessary for the county commissioners, under some conditions, in order to satisfy themselves that the information called for is correct, and for their own satisfaction, to visit the county infirmary. But my examination of the statutes fails to show any section specifically devolving such duty upon them.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

AS TO PER DIEM CHARGE.

COLUMBUS, OHIO, October 13, 1903.

GENTLEMEN:—Yours of October 2nd, enclosing letter from James C. Wonders, *Bureau Uniform Accounting and Inspection, Columbus, Ohio.* surveyor of Logan County, is received.

You inquire whether, where the law provides for a per diem charge, more than one per diem may be charged for one calendar day?

In reply, I would say that the law does not recognize more than one day in any calendar day, and consequently a per diem charge is to be consiedred full compensation for a calendar day's work.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

CAN PAROLED INMATE OHIO STATE REFORMATORY, WHOSE STATUS IS THAT OF A FELON, CONTRACT MARRIAGE.

COLUMBUS, OHIO, October 13, 1903.

Hon. J. A. Leonard, Superintendent Ohio State Reformatory, Mansfield, Ohio.

DEAR SIR:—Your letter of October 12th received. You make this inquiry, "Can a paroled inmate of the Ohio State Reformatory, whose status is that of a felon in the custody of said institution, legally contract marriage?"

In reply, I would say that I know of no reason why such marriage contract may not be made and entered into by a paroled inmate during the period of his parole. There is no legal impediment in the status of the inmate.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

WHEN TIME IN CASE OF SENTENCE OF FELONY COMMENCES CAN JUDGE LESSEN MINIMUM TERM OF SENTENCE TO THE PENITENTIARY.

COLUMBUS, OHIO, October 28, 1903.

Hon. E. A. Hershey, Warden Ohio Penitentiary, Columbus, Ohio.

DEAR SIR:—Your letter of October 28th is received. You inquire at what time a sentence in the case of a felony commences, and whether the judges of the court of common pleas may, in cases of felony, lessen the minimum term of the sentence to the penitentiary by a declaration that the sentence shall be said to run from the first day of the term, or from any time prior to the delivery of the felon to the authorities at the penitentiary?

In reply, I would say that the statutes of Ohio prescribe in felony cases as punishment, "imprisonment in the penitentiary," and consequently the term of imprisonment commences upon the delivery of the prisoner to the warden or other authorized officer of such penitentiary. Section 7330 provides for the delivery of the prisoner into the custody of the warden of the penitentiary within thirty days after the sentence.

The trial court, when a conviction for felony is had, is required to sentence the accused to at least the minimum term fixed by the statutes, and, as has been said, within thirty days, such person so sentenced is to be delivered to the penitentiary, and such court has no authority to commute any portion of such sentence. If it is admitted that the judge of such court may declare that the sentence is to be ante-dated, and that the time the accused is in jail is time spent

in the penitentiary of the state, then the judge of the court must possess the power of pardon, which has always been denied him, and the governor of the state is superseded in the performance of duties devolved upon him by the statutes of the state.

Again, if it be admitted that a judge of the court may ante-date the commencement of a term sentence at all, it must necessarily follow that such court may antedate it to the commencement of any period of time. So that I am of the opinion that when a person is sentenced to imprisonment in the penitentiary for one year, such term begins upon his actual delivery to the warden at the penitentiary and terminates in one year therefrom, unless such person is sooner legally discharged.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

AS TO COUNTY DEPOSITORY FOR COUNTY MONEYS OF HURON COUNTY, OHIO.

COLUMBUS, OHIO, October 22, 1903.

G. Ray Craig, Prosecuting Attorney, Norwalk, Ohio.

DEAR SIR:—Your letter of October 20th received. You submit substantially this statement of fact: On the twenty-third day of October, 1900, the Norwalk Savings Bank Company, of Norwalk, Ohio, became the depository of the county moneys of Huron County, Ohio; on the twenty-third day of October, 1903, the term of three years will have expired, and no successor to said bank has been selected as a depository, and consequently no undertaking of a successor has been either tendered or accepted.

Now, based upon this statement, you make the following inquiries:

First inquiry: "Will the county treasurer be safe, and will it be lawful if he continues to turn over to the Norwalk Savings Bank Company, the present depository, the moneys of the county after the twenty-fourth day of October, 1903, and until the undertaking of a successor of the Norwalk Savings Bank Company is accepted by the county commissioners, which cannot be before November 9, 1903?"

In answer to this, I am of the opinion that it is perfectly lawful to turn over to the Norwalk Savings Bank Company the moneys of the county until the event transpires provided for in Section 1136-6, R. S., or until the commissioners of the county shall determine not to have provided a depository.

Second inquiry: "Do you think that the thirty days' notice provided for in Section 1136-6, R. S., should be served on the Norwalk Savings Bank Company now, in view of our situation, or on the ninth day of November, 1903?"

In reply to this, it is very clear to my mind that the provision as to the thirty days' notice contemplates that in the event that a new depository is to be selected, the notice may be given upon the selection and qualification of the new depository, because not until that time would there be any person other than the treasurer qualified to receive or hold it.

If the county commissioners determine no longer to create a depository, then notice may be given at any time after the removel of the moneys maye be legally ordered by the board of county commissioners.

Third inquiry: "Whether if the Norwalk Savings Bank Company succeeds itself as county depository, or it is succeeded by some other bank, all of the moneys of the county held by the Norwalk Savings Bank Company should be turned into the county treasury in cash and counted and then turned over by the county treasurer to the new depository?"

In regard to this inquiry, I would say that while perhaps this deposit may be said to pass through the treasurer to the succeeding depository, Section 1136-6, R. S., provides that the moneys, in case of removal, are to be transferred upon the written order of the county commissioners and check of the county treasurer.

It is no doubt the duty of the treasurer to see that such moneys are on hand, subject to his check, at the time of the transfer, and also to see that proper receipts are taken from the new depository; but I am not of the opinion that, in the cases supposed it is necessary to take the money in specie from the old depository to the county treasury, and from thence in specie to the new depository.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

CHARACTER OF BUSINESS DONE BY THE U. S. MEDICAL ASSOCIATION NOT WITHIN THE PROVISIONS OF THE BOND AND INVESTMENT LAWS.

COLUMBUS, OHIO, October 22, 1903.

Hon. O. P. Sperra, Deputy Inspector Building and Loan Associations, Columbus, O

DEAR SIR:—Your letter of October 21st together with memorandum of incorporation of the United States Medical Association Company, certain letters and exhibits, have been received.

You inquire whether the character of the business conducted by such corporation is such as to bring it within the laws of Ohio regulating bond and investment companies, as described in Section 3821r, et seq., Revised Statutes.

In reply, I would say that if the United States Medical Association is doing a business solely in the manner as indicated by the new circular "Exhibit E", and the certificate, "Exhibit H", then in my opinion such company is not doing a bond and investment business.

Upon an examination of the papers you have submitted, however, I am of the opinion that such association is not authorized to do the business it is doing as indicated by the new circular and such certificate, and that such association is violating the provisions of Section 3235, Revised Statutes, inasmuch as they are carrying on a professional business; and further that such association is violating Section 289, Revised Statutes, in this, that they are attempting to do an insurance business, and to make and enter into contracts substantially amounting to insurance.

I return the papers enclosed to us.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

AS TO SECTIONS 1231 R. S., AND 4367 R. S.

COLUMBUS, OHIO, October 29, 1903.

Robert Thompson, Esq., Prosecuting Attorney, Carrollton, Ohio.

DEAR SIR:—I beg to acknowledge receipt of your communication in which you state that information has come to you to the effect that I have held that under the provisions of Section 1231, R. S., the sheriff of any county is entitled to a $300.00 annual allowance by the court of common pleas, regardless of whether he performs any services therein mentioned or not; also requesting that I give you an opinion upon the subject.

I beg to state that no request has ever been made of me for an opinion concerning the sheriff's allowance provided for in the section referred to, hence have never given an opinion upon the subject.

I also beg to state that I am clearly of the opinion that the sheriff is not entitled to receive any part of the $300.00 mentioned in this section, except upon the performance of services therein mentioned. The common pleas judge being familiar with the services rendered by the sheriff for which this allowance is provided, may, if he sees fit, make such allowance as he deems the sheriff is entitled to receive without an itemized statement on the part of the sheriff as to what services he has rendered. The judge may, however, if he deems it advisable to do so, require an itemized statement from the sheriff of all services rendered and all costs in criminal cases uncollected for which he claims compensation, before he makes any allowance provided for in Section 1231, R. S.

You also inquire as to what length of time an election proclamation is required to be published, and in what papers, in order to comply with the provisions of Section 4367, R. S.

Having heretofore had occasion to examine into this question (see opinions of attorney general 1900, page 172) I will state merely my conclusions therein arrived at.

In view of the fact that the statute does not require any particular number of weeks publication, it follows that one publication will satisfy the law, hence one week's publication is sufficient.

Section 4367, R. S., also provides that the publication shall be made in two newspapers of opposite politics published at the county seat and having a general circulation within the county. All these conditions must be met before a paper is entitled to receive the proclamation for publication or is entitled to receive compensation after publication is made. It must be first, a political newspaper. Second, it must be published at the county seat. Third, it must have a general circulation throughout the county, and of course this publication must be limited to two newspapers as already suggested, unless there be a German paper published within the county, which condition, however, I understand does not exist in your county.

Very truly yours,

J. M. SHEETS,

Attorney General.

AS TO WHETHER TONTINE MERCANTILE COMPANY, PERMITTED TO DO BUSINESS IN STATE OF OHIO UNDER SECTION 3831-r, R. S.

COLUMBUS, OHIO, October 30, 1903.

Hon. O. P. Sperra, Supervisor of Bonding Investment Companies, Columbus, Ohio.

DEAR SIR:—I beg to acknowledge receipt of yours of October 30th making inquiry as to whether the business which the Preferred Tontine Mercantile Company proposes to engage in within the state of Ohio comes within the provisions of Section 3831r et seq., of the Revised Statutes of Ohio, and commonly termed the bond and investment statute.

In my opinion it does. The contracts which this company propose to write are to the effect, that the contract holder, upon paying a specified sum of money at the date of the contract and $1.00 per week thereafter, for the length of time specified, shall be netitled to receive from the company a diamond of a certain value and description.

It will readily be seen from this contract that upon failure to deliver the diamond, the remedy to the contract holder is one of damages only. Specific performance cannot be enforced. Hence, the effect of this contract may be nothing more or less than an investment security, and surely it is upon the partial payment plan. The contract proposed to be written by this company is essentially the same as that proposed to be writen by the Diamond Contract Co., and the Tontine Surety Co., which was passed on by the Supreme Court of Ohio in the case of State ex rel. v. Diamond Contract Co., 62 O. S., page 428.

The court there held that, such contracts came within the provisions of the act in question. Since that decision was rendered numerous companies of the character referred to in your letter, have undertaken to do business in Ohio, and in every instance they have been compelled to withdraw from the state. In some instances they have done so voluntarily and in others they have been proceeded against in the lower courts.

The busines of these companies is so clearly fraudulent, in my opinion, that I would be glad to see an example made of some of their representatives.

Very truly yours,

J. M. SHEETS,
Attorney General.

AS TO SECTION 2977 R. S.

COLUMBUS, OHIO, November 4, 1903.

E. L. Bush, Prosecuting Attorney, Washington, C. H., Ohio.

DEAR SIR:—I beg to acknowledge receipt of your inquiry of October 31st seeking an answer to the following questions:

First. Uuder the provisions of Section 2977, R. S., is one insertion of the sheriff's proclamation of an election in a newspaper all that is required; if not, how many insertions are required?

Second. Are the constitutional amendments to be voted on required to be included in the sheriff's proclamation; if so, must the text of the amendments be included in the proclamation, or is a mere statement of the purport of the amendments sufficient?

Third. When a sheriff procures his proclamation of an election to be inserted in a newspaper a greater number of times than is required by law, and

also includes matter not required by law, are the commissioners compelled to allow and pay for the extra insertions, and for the unnecessary matter included in the proclamation?

1. Section 2977, R. S., provides that:

> "The sheriff of each county shall, at least fifteen days before the holding of any general election, and at least ten days before the holding of any special election, for any office named in the next section, give notice by proclamation throughout his county of the time and place of holding such election, and the officers at the time to be chosen, one copy of which shall be posted up at each of the places where elections are appointed to be held; and such proclamation shall also be inserted in some newspaper published in the county, if any is published therein."

It is quite clear from reading this section that the law will be fully satisfied by the insertion of the proclamation of the sheriff but once. The statute merely requires that the proclamation shall "be inserted in some newspaper published in the county." Hence, as already suggested, one insertion completely satisfies the law. Had the legislature required more than one insertion it would have said so. This construction of the statute is strengthened by the fact that where more than one insertion of a notice is required to be published in a newspaper, the statute expresly states the number of insertions that shall be required.

2. Section 2977, R. S., above quoted, expressly states what shall be included in the sheriff's proclamation of an election. It does not include constitutional amendments, hence the sheriff is not warranted in including them in his proclamation.

For six months these proposed constitutional amendments have been published in at least two newspapers published in each county of the state announcing to the voters of the state that these amendments would be voted on at the November election for the year 1903. It would seem that this publication was enough without the sheriff including them in his proclamation—especially so when the law does not authorize any such action on his part.

No county official can create an obligation against the county except when he follows the plain provisions of the law. Hence, the action of the sheriff in inserting his proclamation of the election in the newspapers three times in the place of once, and including therein matter not authorized by law, can in no manner create an obligation against the county. It therefore follows that the commissioners are not authorized to allow and pay any bills for the extra insertions of the sheriff's proclamation or for a matter included in the proclamation not authorized by law.

Very truly yours,
J. M. SHEETS,
Attorney General.

ARTICLES OF INCORPORATION OF OHIO BOAT COMPANY.

COLUMBUS, OHIO, November 11, 1903.

Hon. Lewis C. Laylin, Secretary of State, Columbus, Ohio.

DEAR SIR:—The proposed articles of incorporation of the Ohio Boat Company have been referred to this office for consideration of the purpose expressed in such proposed articles. The articles are substantially in compliance with law, but they should be corrected in this particular: The following clause: "And also transporting for hire, by water-craft passenger and freight cars"; is objectionable

in its present form because it may be construed as written, as empowering such Boat Company to transport for hire by pasenger and freight cars. This objection is based upon the supposition that it may be the purpose of the Boat Company to use the canals of the State for transporting pasengers and merchandise by the use of motive power operated upon the land. If such purpose is intended and it is desired that boats used upon the canal may receive and carry thereon passenger and freight cars, then the clause quoted above should be substantially this way: And also transporting for hire passenger and freight cars by water-craft." If it is not the intention of this company to use the canals of the state in their business but to operate railroads, then the articles are objectioneble in this respect: That a steam railroad and railways operated by other motive power are governed by distinct statutes of the state of Ohio and are so dissimilar in their nature and operation that they may not be authorized in the same articles of incorporation. But as above stated, if it is the purpose or this company simply to propel water-craft, then by a change in the wording of the purpose as indicated above, any objection is removed to the acceptance and filing of these proposed articles of incorporation.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

AS TO SUNBURY CO-OPERATIVE CREAMERY CO'S. LIABILITY TO PAY TAXES ON CERTAIN MONEYS DEPOSITED BY IT.

COLUMBUS, OHIO, November 12, 1903.

E. T. Humes, Prosecuting Attorney, Delaware, Ohio.

MY DEAR SIR:—In accordance with your request I beg to state to you my opinion as to whether the Sunbury Co-Operative Creamery Company should pay taxes upon the money deposited to its credit in the Farmers Bank at Sunbury the day preceeding the second Monday of April, 1903. The circumstances of this deposit, as I understand them, are as follows:

The company in question manufacturers the milk of all customers into butter, charging therefor the sum of five cents per hundred pounds of milk so manufactured into butter. The customer sometimes receives from the company his butter when so manufactured, and sometimes he constitutes the company his agent to sell the butter and turn over to him the proceeds. The money deposited in the bank, which has been assessed against the company for taxation, was money received for butter belonging to customers that was sold by the company, but which has not yet been distributed to the several customers entitled thereto. Under these circumstances I am quite clear that the money in question did not belong to the creamery company, but belonged to the customers of the company. The company, in selling this butter, acted merely as an agent of its customers, and it had no right to use this money in its own business. The relation of debtor and creditor did not exist between the company and its customers, but the relation of principal and agent existed. That being the case, the money belonged to the customers and not to the company and the company should not be charged upon the tax duplicate with the amount.

Very truly yours,
J. M. SHEETS,
Attorney General.

AS TO EXPENSES OF BOARDS OF COUNTY VISITORS IN ATTENDING CONFERENCE OF CHARITIES AND CORRECTIONS.

COLUMBUS, OHIO, November 13, 1903.

Hon. R. Brinkerhoff, Member Board of State Charities, Mansfield, Ohio.

DEAR SIR:—In accordance with your request the question has been submitted to me as to whether members of county boards of visitors are entitled to be paid their expenses incurred while attending the state conference of charities and corrections, the object and purpose of attending such conference being to gather information in order that they may be better prepared to perform the duties enjoined upon them by law. In answer thereto, I would say that I am clearly of the opinion that they are not. In order to warrant the payment to a public servant of compensation or expenses incurred out of the public treasury, two things must concur.

First: The services rendered, for which compensation is asked, or in the performance of which expenses have been incurred, must be enjoined upon him by law.

Second: The law must expressly warrant their payment out of the public treasury.

A board of county visitors is appointed for each county of the state, and the duties enjoined upon these boards are confined to the county of their appointment. Their jurisdiction extends no further. And this duty consists in being required to visit charitable and corrective institutions of their respective counties supported in whole or in part from the county or municipal funds, and to keep themselves fully advised of the condition and management of said institutions. R. S., Sections 633-15 and 633-16.

The state conference of charities and corrections is a mere voluntary association, unknown to the law; and members of boards of county visitors are neither required nor authorized to attend the meetings of this association. No doubt the purpose of the organization was entirely laudable, but as the law does not recognize it and makes no provision for the county visitors attending its meetings, it follows, as a matter of course, such a duty is not enjoined upon the county visitors, hence there is no warrant for paying their expenses out of the county treasury.

Very truly yours,
J. M. SHEETS,
Attorney General.